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THE CALCUTTA HIGH COURT

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253	"	"	190	288	"	"	210	337	"	"	205	399	"	"	258	474	"	"	251
259	1934	"	815	295	"	"	209	344	"	"	230	404	"	"	20	518	1934	*PC*	238
261	"	*PC*	217	298	1934	"	741	353	"	*C*	571	412	"	"	282	528	"	"	246
267	"	"	213	305	"	*PC*	202	370	"	*PC*	235	415	"	"	263	544	1935	"	9
276	"	"	227	312	"	*C*	862	377	1935	*C*	273	458	"	"	278	551	"	"	1
				321	1935	"	253	384	"	"	261	461	"	"	99	594	"	"	12
												464	"	"	275	598	"	"	35

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CWN	AIR			CWN	AIR			CWN	AIR			CWN	AIR			CWN	AIR		
1	1933	*PC*	202	229	1934	*PC*	14	474	1934	*C*	425	697	1934	*PC*	105	1001	1934	*C*	861
11	"	"	208	235	"	"	43	476	"	"	553	702	"	*C*	543	1002	"	"	830
15	1934	*C*	244	239	"	*C*	525	477	"	*PC*	72	707	"	"	571	1004	"	"	821
25	1933	"	870	244	"	"	437	481	"	"	119	720	"	"	812	1005	"	"	616
33	1934	"	414	245	"	"	673	488	"	*C*	554	724	"	"	787	1008	"	"	730
43	"	"	277	248	"	"	377	492	"	"	552	726	"	*PC*	123	1015	1935	"	26
46	"	"	202	253	"	"	178	494	"	"	567	729	"	*C*	725	1018	1934	*PC*	138
50	"	"	396	254	"	"	173	497	"	"	541	737	"	"	796	1031	1935	*C*	168
52	1933	"	833	258	"	*PC*	87	499	"	"	566	743	"	"	703	1045	"	"	131
56	"	"	754	262	"	"	29	500	"	"	536	747	"	"	693	1051	1934	"	751
61	"	"	898	265	"	*C*	600	501	"	"	428	751	"	"	809	1053	1935	"	118
65	1934	"	288	268	"	"	488	505	"	*PC*	9	753	"	"	772	1054	"	"	33
67	"	"	140	276	"	"	242	511	"	"	74	758	"	"	709	1056	1934	"	741
71	1933	"	718	278	1933	"	741	517	"	"	96	763	"	"	707	1061	1935	"	121
77	1934	"	273	280	1934	"	389	520	"	*C*	655	771	"	"	694	1063	"	"	157
82	"	"	271	283	"	"	529	527	"	"	674	777	"	"	678	1065	"	"	108
84	"	"	368	285	"	*PC*	23	532	"	"	626	782	"	"	837	1066	1934	"	745
87	"	"	272	294	"	"	21	533	"	*PC*	112	795	"	"	823	1069	"	"	740
90	"	"	469	299	"	*C*	259	539	"	*C*	617	796	"	"	755	1070	1935	*C*	108
93	"	"	280	314	"	*PC*	34	542	"	"	770	797	"	"	747	1072	"	"	116
96	1933	"	908	319	"	"	30	545	"	"	177	799	"	"	818	1073	1934	*PC*	62
98	1934	"	399	325	"	"	58	548	"	"	640	801	"	"	546	1081	1935	*C*	224
101	"	"	402	330	"	*C*	606	551	"	"	632	804	"	"	763	1083	"	"	223
105	"	"	307	334	"	"	491	553	"	"	712	806	"	*PC*	130	1085	"	"	127
106	"	"	306	337	"	*PC*	17	554	"	"	667	813	"	"	144	1089	1934	"	820
107	1933	"	776	344	"	"	83	556	"	"	393	818	1935	*C*	1	1093	1935	"	149
108	1934	"	7	347	"	*C*	570	560	"	"	405	832	1934	"	793	1095	"	"	144
113	1933	"	880	348	"	"	282	562	1933	*PC*	218	833	"	"	775	1097	1934	"	739
115	"	"	724	352	"	"	508	568	1934	"	108	838	1935	"	10	1098	1935	"	153
117	1934	*PC*	3	357	"	"	506	575	"	"	98	841	1934	"	768	1099	"	"	116
120	1933	*C*	706	360	"	"	498	578	"	*C*	457	844	"	"	758	1101	1934	*PC*	157
124	1934	"	421	363	"	"	487	581	"	"	391	849	"	"	749	1118	1935	*C*	125
130	"	"	411	365	"	*PC*	5	582	"	"	407	850	"	"	764	1122	"	"	150
133	"	"	433	375	"	"	45	596	"	"	651	852	"	"	785	1124	"	"	130
139	"	"	452	384	"	*C*	503	589	"	"	448	854	"	"	610	1126	"	"	151
141	"	"	472	388	"	"	513	604	"	"	668	900	"	"	833	1128	"	"	120
145	1933	*PC*	239	391	"	"	545	611	"	"	671	901	"	*PC*	134	1129	1934	*PC*	180
151	"	"	198	393	"	*PC*	68	613	"	"	460	908	"	*C*	778	1132	1935	*C*	212
153	1934	*C*	325	400	"	"	77	616	"	"	661	914	"	"	810	1144	"	"	230
156	"	"	379	409	"	*C*	187	618	"	*PC*	116	917	"	"	862	1146	"	"	102
163	"	"	465	418	"	"	387	624	"	*C*	737	920	"	"	816	1154	1934	"	744
167	"	"	367	421	"	*PC*	55	627	"	"	803	924	"	"	822	1157	"	*FC*	208
168	"	"	467	427	"	"	49	634	"	"	662	926	"	"	836	1159	"	"	200
172	"	"	477	433	"	*C*	603	642	"	"	409	930	"	"	580	1165	"	"	202
173	"	*PC*	40	435	"	"	561	645	"	"	642	961	"	*PC*	147	1171	1935	*C*	117
179	"	*C*	501	438	"	"	520	648	"	"	643	971	"	*C*	842	1174	"	"	146
182	"	"	511	445	"	"	535	650	"	"	659	974	"	"	831	1178	"	"	139
184	"	"	489	446	"	"	557	654	"	"	691	976	"	"	852	1183	"	"	92
185	"	"	615	449	"	*PC*	81	655	"	"	705	977	"	"	824	1185	1934	*PC*	192
187	1933	"	800	452	"	"	53	659	"	"	636	983	"	"	827	1190	1935	*C*	218
200	1934	"	490	457	"	*C*	601	665	"	"	480	986	"	"	666	1197	"	"	206
201	"	*PC*	4					669	"	*PC*	84					1202	"	"	134
204	"	*C*	515	459	"	"	537	673	"	*C*	693	988	"	"	832	1209	"	"	179
211	"	"	238	465	"	"	549	674	1935	"	74	989	"	*PC*	153	1211	1934	"	756
214	"	"	328	467	"	"	532	682	1934	"	682	996	1935	*C*	15				

TABLE No. II

Showing Seriatim the pages of the ALL INDIA REPORTER, 1934 CALCUTTA with corresponding references of the OTHER REPORTS, JOURNALS AND PERIODICALS.

N. B.—Column No. 1 denotes pages of the ALL INDIA REPORTER 1934 CALCUTTA

Column No. 2 denotes corresponding references of OTHER JOURNALS.

A I R 1934 Calcutta=Other Journals

A I R	Other Journals	A I R	Other Journals	A I R	Other Journals	A I R	Other Journals
1	37 *C W N* 838	40	149 *I C* 262	80 (2)	37 *C W N* 1033	121	150 *I C* 90
	149 *I C* 1062	43	37 *C W N* 1020		58 *C L J* 76	122 (1)	37 *C W N* 981
3	37 *C W N* 848		58 *C L J* 281		60 *Cal* 1438		58 *C L J* 282
	58 *C L J* 143		60 *Cal* 1313		149 *I C* 27		149 *I C* 542
	147 *I C* 1040		147 *I C* 1076	82	37 *C W N* 1144	122 (2)	58 *C L J* 118
4	37 *C W N* 846	44	37 *C W N* 866		58 *C L J* 145		149 *I C* 677
	57 *C L J* 444		57 *C L J* 553		149 *I C* 1099	124	37 *C W N* 1066
	60 *Cal* 1119		60 *Cal* 1223	85	37 *C W N* 1071		58 *C L J* 66
	148 *I C* 165		149 *I C* 404		1934 *Cr C* 50		60 *Cal* 1339
5	57 *C L J* 290	49	57 *C L J* 473		147 *I C* 828		1934 *Cr C* 169
	149 *I C* 1136		150 *I C* 68		35 *Cr L J* 487		147 *I C* 1203
7	1934 *Cr C* 23	51	57 *C L J* 509	87	58 *C L J* 502		35 *Cr L J* 567
	38 *C W N* 108		1934 *Cr C* 137		61 *Cal* 119	127	58 *C L J* 133
10	1934 *Cr C* 26		150 *I C* 30		150 *I C* 398		149 *I C* 559
	61 *Cal* 190	54	60 *Cal* 1278	92	37 *C W N* 1081	128	37 *C W N* 957
13	57 *C L J* 470		149 *I C* 861		148 *I C* 70		150 *I C* 440
	147 *I C* 1061	58	37 *C W N* 998	95	57 *C W N* 849	131	37 *C W N* 818
14	37 *C W N* 892		60 *Cal* 1273		1934 *Cr C* 81		149 *I C* 854
	150 *I C* 386		147 *I C* 1064		147 *I C* 817	133	37 *C W N* 1186
17	57 *C L J* 447	59	57 *C L J* 498		35 *Cr L J* 489		1934 *Cr C* 176
	150 *I C* 209		148 *I C* 111	97	58 *C L J* 38		147 *I C* 1095
21	37 *C W N* 878	60	37 *C W N* 924		150 *I C* 368		35 *Cr L J* 538
	147 *I C* 1025		60 *Cal* 1317	101	37 *C W N* 880	134	58 *C L J* 279
23	37 *C W N* 843		147 *I C* 1031		1934 *Cr C* 145		149 *I C* 678
	60 *Cal* 1207	63	37 *C W N* 1159		147 *I C* 1041	135	37 *C W N* 971
	149 *I C* 220		1934 *Cr C* 42		35 *Cr L J* 532		149 *I C* 722
25	57 *C L J* 441		147 *I C* 848	102	37 *C W N* 1093	136	58 *C L J* 240
	60 *Cal* 827		35 *Cr L J* 492		149 *I C* 923		149 *I C* 616
	147 *I C* 1189	64	37 *C W N* 973	104	37 *C W N* 1043	137	58 *C L J* 214
26	147 *I C* 194		60 *Cal* 1298		58 *C L J* 73		1934 *Cr C* 177
	59 *C L J* 293		149 *I C* 399		149 *I C* 1028		35 *Cr L J* 597
27	37 *C W N* 841	68	58 *C L J* 85	105	37 *C W N* 1122		148 *I C* 121
	148 *I C* 131		37 *C W N* 1174		1934 *Cr C* 156	139	37 *C W N* 962
28	37 *C W N* 889		60 *Cal* 1253		61 *Cal* 6		1934 *Cr C* 179
	149 *I C* 843		149 *I C* 177		147 *I C* 1124		147 *I C* 1090
30	37 *C W N* 801	71	37 *C W N* 835		35 *Cr L J* 554		35 *Cr L J* 541
	147 *I C* 1247		60 *Cal* 1212	114	37 *C W N* 934	140	58 *C L J* 150
33	37 *C W N* 1078		149 *I C* 111		1934 *Cr C* 165		38 *C W N* 67
	149 *I C* 671	73	37 *C W N* 1087		147 *I C* 1172		149 *I C* 1130
36	37 *C W N* 948		58 *C L J* 135		35 *Cr L J* 551	142	57 *C L J* 583
	149 *I C* 653		60 *Cal* 1197	116	37 *C W N* 1045		1934 *Cr C* 180
37	57 *C L J* 500		149 *I C* 878		60 *Cal* 1331		147 *I C* 1043
	148 *I C* 163	77	37 *C W N* 1102		148 *I C* 1203		35 *Cr L J* 536
38	37 *C W N* 930		1934 *Cr C* 33		59 *C L J* 413	144	37 *C W N* 348
	60 *Cal* 1262		147 *I C* 832	118	57 *C L J* 580		1934 *Cr C* 200
	147 *I C* 1016		35 *Cr L J* 483		149 *I C* 650		147 *I C* 1028
39	57 *C L J* 498	80 (1)	37 *C W N* 852	119	37 *C W N* 1038		35 *Cr L J* 535
	37 *C W N* 914		1934 *Cr C* 35		58 *C L J* 18	145	37 *C W N* 1015
	148 *I C* 108		147 *I C* 800		148 *I C* 160		58 *C L J* 229
40	60 *Cal* 1265		35 *Cr L J* 478	121	58 *C L J* 83		

A I R 1934 Calcutta=Other Journals—(*Contd*)

A I R	Other Journals		A I R	Other Journals		A I R	Other Journals		A I R	Other Journals	
145	149 *I C*	647	238	60 *Cal*	1347	292	58 *C L J*	539	392	148 *I C*	736
146	57 *C L J*	515		149 *I C*	996		149 *I C*	887		1934 *Cr C*	593
	149 *I C*	1117		38 *C W N*	211	294	58 *C L J*	478		35 *Cr L J*	734
148	58 *C L J*	285	240	1934 *Cr C*	352		149 *I C*	1109	393	38 *C W N*	556
	150 *I C*	89		151 *I C*	259	296	58 *C L J*	271		148 *I C*	773
149	58 *C L J*	80		35 *Cr L J*	1270		150 *I C*	36		1934 *Cr C*	534
	37 *C W N*	1162	242 (1)	60 *Cal*	1336	300	60 *Cal*	512		35 *Cr L J*	881
	149 *I C*	667		1934 *Cr C*	364		149 *I C*	1162		21 *A I R Cr R*	203
151	37 *C W N*	1109		148 *I C*	808	306	38 *C W N*	106	396	38 *C W N*	50
	58 *C L J*	98		35 *Cr L J*	778		58 *C L J*	483		149 *I C*	1134
	150 *I C*	189	242 (2)	1934 *Cr C*	354		149 *I C*	804	398	148 *I C*	729
155	57 *C L J*	569		148 *I C*	57	307	38 *C W N*	105	399	38 *C W N*	98
	149 *I C*	712		38 *C W N*	276		58 *C L J*	466		149 *I C*	1034
161	37 *C W N*	964		35 *Cr L J*	592		149 *I C*	759	402	38 *C W N*	101
	1934 *Cr C*	287	244	38 *C W N*	15	308	58 *C L J*	372		61 *Cal*	148
	148 *I C*	155		151 *I C*	954		150 *I C*	292		151 *I C*	723
	35 *Cr L J*	605	250	58 *C L J*	171	322	61 *Cal*	371	405 (1)	151 *I C*	257
162	60 *Cal*	1236		149 *I C*	1044		150 *I C*	77		60 *C L J*	199
	149 *I C*	1053	251	37 *C W N*	1164	325	38 *C W N*	153	405 (2)	59 *C L J*	204
169	37 *C W N*	1061		149 *I C*	1142		60 *Cal*	1470		38 *C W N*	560
SB	1934 *Cr C*	21	253	60 *Cal*	1217		149 *I C*	24		148 *I C*	691
	148 *I C*	172		37 *C W N*	1105	327	60 *Cal*	1467		1934 *Cr C*	549
	35 *Cr L J*	601		149 *I C*	22		149 *I C*	224		35 *Cr L J*	729
173	147 *I C*	860	255	58 *C L J*	234	328	58 *C L J*	333		61 *Cal*	467
SB	1934 *Cr C*	295		149 *I C*	865		61 *Cal*	80	407	38 *C W N*	582
	35 *Cr L J*	496	256	37 *C W N*	1048		149 *I C*	1215		1934 *Cr C*	551
	61 *Cal*	256		148 *I C*	800		38 *C W N*	214		148 *I C*	543
	38 *C W N*	254		35 *Cr L J*	779	341	60 *Cal*	1442		35 *Cr L J*	712
175	37 *C W N*	1139	257	58 *C L J*	489		149 *I C*	331	409	38 *C W N*	642
	148 *I C*	442		150 *I C*	123	345	58 *C L J*	534		1934 *Cr C*	553
177	58 *C L J*	48	258	58 *C L J*	487		150 *I C*	364		149 *I C*	352
	38 *C W N*	545		149 *I C*	926	348	58 *C L J*	356		35 *Cr L J*	937
	150 *I C*	69	259	38 *C W N*	299		150 *I C*	124		61 *Cal*	537
178	148 *I C*	1025		1934 *Cr C*	387	356	60 *Cal*	1406	411	38 *C W N*	130
	38 *C W N*	253		59 *C L J*	185		149 *I C*	410		150 *I C*	374
179	58 *C L J*	190		61 *Cal*	197	367	38 *C W N*	167	413	61 *Cal*	72
	150 *I C*	214		151 *I C*	1028		58 *C L J*	468		151 *I C*	729
187	38 *C W N*	409		35 *Cr L J*	1466		149 *I C*	757	414	38 *C W N*	33
	59 *C L J*	295	269	58 *C L J*	430	368	38 *C W N*	84		151 *I C*	268
	151 *I C*	1076		149 *I C*	679		60 *Cal*	1477	421	38 *C W N*	124
192	58 *C L J*	120	271	38 *C W N*	82		1934 *Cr C*	470		151 *I C*	454
	150 *I C*	617		1934 *Cr C*	407		148 *I C*	925	425	38 *C W N*	474
198	58 *C L J*	1		149 *I C*	827		35 *Cr L J*	766		1934 *Cr C*	537
	1934 *Cr C*	297		35 *Cr L J*	1021	370	58 *C L J*	499		148 *I C*	559
	148 *I C*	597	272	38 *C W N*	87		149 *I C*	824		35 *Cr L J*	715
	35 *Cr L J*	722		149 *I C*	874	372	58 *C L J*	513	426	59 *C L J*	18
202	58 *C L J*	174	273	38 *C W N*	77		150 *I C*	389		151 *I C*	317
	38 *C W N*	46		1934 *Cr C*	297	377	58 *C L J*	542	428	38 *C W N*	501
	149 *I C*	1088		151 *I C*	409		148 *I C*	1084		1934 *Cr C*	538
205	37 *C W N*	1054		35 *Cr L J*	1313		61 *Cal*	320		149 *I C*	345
	150 *I C*	504	277	38 *C W N*	43		38 *C W N*	248		35 *Cr L J*	941
210	58 *C L J*	251		60 *Cal*	1401	379	38 *C W N*	156		61 *Cal*	498
	149 *I C*	1150		59 *C L J*	31		58 *C L J*	445		59 *C L J*	516
213	58 *C L J*	93		149 *I C*	13		61 *Cal*	106		21 *A I C r R*	255
	37 *C W N*	1170	278	58 *C L J*	474		150 *I C*	179	430	61 *Cal*	1
	149 *I C*	1140		149 *I C*	1086	384	58 *C L J*	294		151 *I C*	743
215	58 *C L J*	157	280	38 *C W N*	93		150 *I C*	529	432	59 *C L J*	15
	149 *I C*	1156		61 *Cal*	75	387	38 *C W N*	418		1934 *Cr C*	669
217	58 *C L J*	283		149 *I C*	1072		59 *C L J*	122		151 *I C*	365
	1934 *Cr C*	311	282	59 *C L J*	35		1934 *Cr C*	528		35 *Cr L J*	1311
	148 *I C*	587		38 *C W N*	348		148 *I C*	739	433	38 *C W N*	133
	35 *Cr L J*	716		61 *Cal*	234		35 *Cr L J*	742		151 *I C*	458
221	147 *I C*	32		151 *I C*	253		61 *Cal*	445	437	59 *C L J*	21
SB	1934 *Cr C*	315	284	151 *I C*	290	389	38 *C W N*	280		149 *I C*	1027
	35 *Cr L J*	334	285	60 *Cal*	1379		1934 *Cr C*	530		38 *C W N*	244
232	60 *Cal*	1367		149 *I C*	868		61 *Cal*	356	438	61 *Cal*	22
	149 *I C*	895	288	61 *Cal*	82		149 *I C*	1193		151 *I C*	432
234	60 *Cal*	1357		38 *C W N*	65	391	38 *C W N*	581	441	61 *Cal*	64
	149 *I C*	999		150 *I C*	238		1934 *Cr C*	532		151 *I C*	334
235	60 *Cal*	1372	290	60 *Cal*	1388		35 *Cr L J*	714			
	149 *I C*	1000		150 *I C*	42		148 *I C*	58	444	148 *I C*	459

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448	59	*C L J*	233
FB	38	*C W N*	589
	149	*I C*	3
	61	*Cal*	796
452	38	*C W N*	139
	149	*I C*	1093
454	1934	*Cr C*	620
	149	*I C*	96
	35	*Cr L J*	896
457	38	*C W N*	578
	1934	*Cr C*	623
	149	*I C*	363
	21	*A I Cr R*	275
	61	*Cal*	792
	35	*Cr L J*	946
458	149	*I C*	139
	1934	*Cr C*	663
	35	*Cr L J*	904
	21	*A I Cr R*	201
460	1934	*Cr C*	613
SB	38	*C W N*	613
	149	*I C*	169
	61	*Cal*	508
461	61	*Cal*	45
	151	*I C*	813
465	38	*C W N*	163
	151	*I C*	1015
647	38	*C W N*	168
	152	*I C*	172
469	38	*C W N*	90
	59	*C L J*	86
	151	*I C*	992
472	38	*C W N*	141
	151	*I C*	913
474	59	*C L J*	9
	61	*Cal*	227
	151	*I C*	399
477	38	*C W N*	172
	152	*I C*	219
479	149	*I C*	126
480	38	*C W N*	665
	1934	*Cr C*	688
	149	*I C*	431
	35	*Cr L J*	949
482	149	*I C*	460
	1934	*Cr C*	690
	35	*Cr L J*	952
	61	*Cal*	588
487	38	*C W N*	363
	1934	*Cr C*	695
	152	*I C*	210
	36	*Cr L J*	68
488	38	*C W N*	268
	61	*Cal*	302
	151	*I C*	749
489	38	*C W N*	184
	152	*I C*	195
490	38	*C W N*	200
	61	*Cal*	2 3
	1934	*Cr C*	696
	151	*I C*	660
	35	*Cr L J*	1373
491	38	*C W N*	334
	59	*C L J*	69
	61	*Cal*	338
	151	*I C*	94
494	59	*C L J*	39
	151	*I C*	916
498	38	*C W N*	360
	59	*C L J*	379

A. I. R.	Other Journals		
498	61	*Cal*	261
	151	*I C*	718
	35	*Cr L J*	1399
499	59	*C L J*	66
	152	*I C*	212
500	59	*C L J*	83
	1934	*Cr C*	712
	152	*I C*	226
	36	*Cr L J*	74
501	38	*C W N*	179
	151	*I C*	246
503	38	*C W N*	384
	151	*I C*	922
506	38	*C W N*	357
	59	*C L J*	79
	61	*Cal*	326
	151	*I C*	733
508	38	*C W N*	352
	61	*Cal*	293
	149	*I C*	1229
511	38	*C W N*	182
	151	*I C*	155
513	38	*C W N*	388
	1934	*Cr C*	754
	151	*I C*	183
	35	*Cr L J*	1252
515	61	*Cal*	132
SB	150	*I C*	404
	38	*C W N*	204
520	38	*C W N*	438
	152	*I C*	1073
524	59	*C L J*	47
	151	*I C*	128
525	61	*Cal*	245
	38	*C W N*	239
	151	*I C*	160
529	38	*C W N*	283
	61	*Cal*	281
	1934	*Cr C*	791
	151	*I C*	137
	35	*Cr L J*	1238
530	61	*Cal*	143
	151	*I C*	10
532	38	*C W N*	467
	59	*C L J*	306
	1934	*Cr C*	793
	151	*I C*	22
535	35	*Cr L J*	1279
	38	*C W N*	445
	150	*I C*	596
536	38	*C W N*	500
	59	*C L J*	315
	150	*I C*	335
537	61	*Cal*	477
	38	*C W N*	459
	151	*I C*	165
541	38	*C W N*	497
	150	*I C*	313
543	61	*Cal*	306
	38	*C W N*	702
	151	*I C*	803
545	38	*C W N*	391
	59	*C L J*	290
	61	*Cal*	390
	1934	*Cr C*	785
	151	*I C*	691
546	35	*Cr L J*	1374
	61	*Cal*	382
	38	*C W N*	801
	1934	*Cr C*	786

A. I. R.	Other Journals		
546	151	*I C*	763
	35	*Cr L J*	1401
549	38	*C W N*	415
	61	*Cal*	425
	150	*I C*	925
550	61	*Cal*	351
	150	*I C*	658
552	38	*C W N*	492
	150	*I C*	321
	61	*Cal*	494
554	38	*C W N*	488
	61	*Cal*	433
	150	*I C*	982
556	38	*C W N*	476
	1934	*Cr C*	789
	150	*I C*	600
	35	*Cr L J*	1093
	21	*A I Cr R*	282
557	38	*C W N*	446
	1934	*Cr C*	789
559	61	*Cal*	240
	152	*I C*	69
561	38	*C W N*	435
	61	*Cal*	419
	150	*I C*	723
563	61	*Cal*	324
	151	*I C*	753
564	61	*Cal*	344
	151	*I C*	511
566	38	*C W N*	499
	151	*I C*	721
567	38	*C W N*	494
	61	*Cal*	440
	150	*I C*	1051
569	150	*I C*	985
	61	*Cal*	890
570	38	*C W N*	347
	152	*I C*	32
571	38	*C W N*	707
	150	*I C*	1019
	60	*C L J*	353
580	38	*C W N*	930
FB	150	*I C*	561
	1934	*Cr C*	841
	35	*Cr L J*	1071
	61	*Cal*	607
	59	*C L J*	555
600	38	*C W N*	265
	151	*I C*	5
603	38	*C W N*	433
	61	*Cal*	429
	151	*I C*	126
604	149	*I C*	450
	35	*Cr L J*	996
	1934	*Cr C*	861
606	38	*C W N*	330
	152	*I C*	900
609	38	*C W N*	457
	152	*I C*	198
610	38	*C W N*	854
	59	*C L J*	482
	1934	*Cr C*	908
	151	*I C*	662
	61	*Cal*	991
	35	*Cr L J*	1267
615	38	*C W N*	185
	152	*I C*	215
616	38	*C W N*	1005
	1934	*Cr C*	905
	150	*I C*	980

A. I. R.	Other Journals		
616	35	*Cr L J*	1178
	61	*Cal*	967
617	38	*C W N*	589
	151	*I C*	630
619	*New Case*		
621	151	*I C*	675
622	1934	*Cr C*	907
	150	*I C*	1122
	35	*Cr L J*	1216
623	59	*C L J*	250
	151	*I C*	656
624	61	*Cal*	408
	151	*I C*	693
626	38	*C W N*	532
	151	*I C*	626
627	61	*Cal*	412
	152	*I C*	130
629	61	*Cal*	393
	152	*I C*	710
632	38	*C W N*	551
	59	*C L J*	391
633	61	*Cal*	365
	152	*I C*	597
636	38	*C W N*	659
	61	*Cal*	399
	1934	*Cr C*	929
	152	*I C*	44
	35	*Cr L J*	1429
640	38	*C W N*	548
	151	*I C*	635
642	38	*C W N*	645
	151	*I C*	611
	61	*Cal*	821
643	38	*C W N*	643
	151	*I C*	761
644	61	*Cal*	377
	151	*I C*	464
650	59	*C L J*	514
	152	*I C*	518
651	38	*C W N*	586
	1934	*Cr C*	933
	152	*I C*	234
	36	*Cr L J*	70
653	59	*C L J*	218
	152	*I C*	24
655	59	*C L J*	221
	38	*C W N*	520
	61	*Cal*	480
	151	*I C*	680
659	38	*C W N*	650
	61	*Cal*	663
	153	*I C*	201
661	38	*C W N*	616
	153	*I C*	509
662	38	*C W N*	634
	61	*Cal*	870
	152	*I C*	279
666	38	*C W N*	985
	151	*I C*	880
667	38	*C W N*	554
	152	*I C*	167
668	38	*C W N*	604
	152	*I C*	835
671	38	*C W N*	611
673	61	*Cal*	276
	38	*C W N*	245
	152	*I C*	691
674	38	*C W N*	527

A. I. R. 1934 Calcutta=Other Journals.—(*Concld.*)

AIR	Other Journals		AIR	Other Journals		AIR	Other Journals		AIR	Other Journals	
674	61 *Cal*	513	737	152 *I C*	73	770	38 *C W N*	542	816	38 *C W N*	920
	152 *I C*	753	739	38 *C W N*	1097		61 *Cal*	532		153 *I C*	511
678	38 *C W N*	777		60 *C L J*	86		152 *I C*	112	818	38 *C W N*	799
SB	1934 *Cr C*	1045		153 *I C*	158	772	61 *Cal*	525		59 *C L J*	463
	151 *I C*	486		62 *Cal*	73		38 *C W N*	753		61 *Cal*	971
	35 *Cr L J*	1357	740	38 *C W N*	1069		151 *I C*	1033		153 *I C*	126
682	38 *C W N*	682		152 *I C*	514	775	38 *C W N*	833	820	59 *C L J*	500
	61 *Cal*	841	741	38 *C W N*	1056		59 *C L J*	473		38 *C W N*	1089
	152 *I C*	351		60 *C L J*	298		61 *Cal*	894		152 *I C*	889
691	38 *C W N*	654		153 *I C*	291		152 *I C*	429	821	38 *C W N*	1004
	152 *I C*	480	744	38 *C W N*	1154	778	38 *C W N*	908		152 *I C*	933
693	38 *C W N*	747		1934 *Cr C*	1153		61 *Cal*	548	822	38 *C W N*	924
	152 *I C*	422		60 *C L J*	194		152 *I C*	117		152 *I C*	1059
694	38 *C W N*	771		152 *I C*	661	780	59 *C L J*	389	823	38 *C W N*	795
	61 *Cal*	814		36 *Cr L J*	129		153 *I C*	160		59 *C L J*	440
698	38 *C W N*	673	745	38 *C W N*	1066	781	61 *Cal*	568		153 *I C*	272
	59 *C L J*	377		60 *C L J*	106		152 *I C*	35	824	38 *C W N*	977
	1934 *Cr C*	1044		152 *I C*	830	782	59 *C L J*	381		153 *I C*	1055
	61 *Cal*	824	747	38 *C W N*	797		152 *I C*	540	827	38 *C W N*	983
	152 *I C*	1005		152 *I C*	484	783	61 *Cal*	599		60 *C L J*	7
699	59 *C L J*	503	749	38 *C W N*	849		152 *I C*	37		61 *Cal*	1068
	152 *I C*	571		59 *C L J*	471	785	1934 *Cr C*	1207		153 *I C*	777
703	38 *C W N*	743		152 *I C*	557		38 *C W N*	852	830	38 *C W N*	1002
	59 *C L J*	362	750	59 *C L J*	360		152 *I C*	646	831	59 *C L J*	491
	61 *Cal*	879		151 *I C*	1090		36 *Cr L J*	133		38 *C W N*	974
	154 *I C*	147	751	38 *C W N*	1051	786	59 *C L J*	447		151 *I C*	78
705	38 *C W N*	656		152 *I C*	433		152 *I C*	97	832	38 *C W N*	938
	1934 *Cr C*	1100		62 *Cal*	52	787	1934 *Cr C*	1209		152 *I C*	945
	60 *C L J*	190	752	59 *C L J*	383		38 *C W N*	724	833	38 *C W N*	900
	153 *I C*	529		61 *Cal*	543		153 *I C*	174		153 *I C*	621
707	38 *C W N*	763		152 *I C*	66	788	59 *C L J*	320	834	59 *C L J*	467
	153 *I C*	170	754	39 *C W N*	67		153 *I C*	134		153 *I C*	807
709	38 *C W N*	758		153 *I C*	671	793	38 *C W N*	832	836	1934 *Cr C*	1357
	59 *C L J*	423	755	38 *C W N*	796		152 *I C*	764		38 *C W N*	926
	61 *Cal*	864		153 *I C*	141	794	1934 *Cr C*	1210		153 *I C*	771
	152 *I C*	510	756	1934 *Cr C*	1164		59 *C L J*	419	837	38 *C W N*	782
711	59 *C L J*	511		38 *C W N*	1211		152 *I C*	43		153 *I C*	673
	152 *I C*	560		152 *I C*	973	795	59 *C L J*	417	838	1934 *Cr C*	1359
712	38 *C W N*	553	757	59 *C L J*	396		151 *I C*	1083		39 *C W N*	20
	59 *C L J*	394		1934 *Cr C*	1165	796	61 *Cal*	702		153 *I C*	657
713	60 *C L J*	1		152 *I C*	40		38 *C W N*	737	842	38 *C W N*	971
	152 *I C*	563		35 *Cr L J*	1487		153 *I C*	61		61 *Cal*	956
715	...		758	38 *C W N*	844	799	59 *C L J*	328		153 *I C*	247
716	153 *I C*	1047		60 *C L J*	184		153 *I C*	313	845	59 *C L J*	521
717	1934 *Cr C*	1102		61 *Cal*	1041	803	38 *C W N*	627		153 *I C*	289
	152 *I C*	681		153 *I C*	938	**SB**	61 *Cal*	556	846	59 *C L J*	421
	36 *Cr L J*	135	761	153 *I C*	992		152 *I C*	601		61 *Cal*	910
719	151 *I C*	473	762	59 *C L J*	387	808	1934 *Cr C*	1278		153 *I C*	807
SB	35 *Cr L J*	1385		152 *I C*	561		59 *C L J*	410	847	1934 *Cr C*	1364
721	61 *Cal*	504	763	38 *C W N*	804		152 *I C*	943		153 *I C*	454
	152 *I C*	33		1934 *Cr C*	1188	809	38 *C W N*	751	851	59 *C L J*	532
723	61 *Cal*	522		152 *I C*	241		59 *C L J*	448		153 *I C*	532
	1934 *Cr C*	1109		36 *Cr L J*	76		153 *I C*	366	852	38 *C W N*	976
	152 *I C*	58	764 (1)	59 *C L J*	399	810	61 *Cal*	975		153 *I C*	452
724	1934 *Cr C*	1110		61 *Cal*	605		38 *C W N*	914	853	1934 *Cr C*	1868
	152 *I C*	924		151 *I C*	1026		152 *I C*	991		39 *C W N*	27
725	61 *Cal*	450	764 (2)	38 *C W N*	850	812	61 *Cal*	903	858	1934 *Cr C*	1372
	38 *C W N*	729		60 *C L J*	22		38 *C W N*	720		153 *I C*	632
	152 *I C*	914		152 *I C*	770		59 *C L J*	441	861	38 *C W N*	1001
730	38 *C W N*	1008	766	153 *I C*	493		153 *I C*	304		153 *I C*	623
	1934 *Cr C*	1104	768	38 *C W N*	841	815	60 *C L J*	259	862	60 *C L J*	312
	152 *I C*	566		61 *Cal*	962		39 *C W N*	54		38 *C W N*	917
735	152 *I C*	854		152 *I C*	930		153 *I C*	778		61 *Cal*	1047
737	38 *C W N*	624		59 *C L J*	528	816	61 *Cal*	913		153 *I C*	972
	61 *Cal*	483									

Cases nat bearing Parelle references against them are not reported elsewhere.

LIST OF CASES OVERRULED AND REVERSED IN A. I. R. 1934 CALCUTTA

Anarjan Bibi v. Chandramani Saha (1932), 56 C. L. J. 574=1932 Cal. 75=134 I. C. 1188.	Reversed in 1934 P. C. 134.
Jatindra Mohan v. Rebati Mohan (1932), 59 Cal. 961=55 C. L. J. 8=1932 Cal. 275=138 I. C. 4.	„ 1934 P. C. 96.
Neckbar Sahai v. Prakash Chandra Nag (1930), 56 Cal. 608=1930 Cal. 86=120 I. C. 107.	Overruled in 1934 P. C. 134.

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CALCUTTA HIGH COURT

A. I. R. 1934 Calcutta 1

MITTER AND M. C. GHOSE, JJ.

Satish Chandra Sen—Appellant.

v.

Jewan Lal Daga and *another*—Respondents.

Appeals Nos. 251 and 252 of 1931, Decided on 3rd March 1933, from original orders of Sub-Judge, Asansol, D/- 3rd February 1931.

Limitation Act (1908), S. 7—One co-mortgagee cannot ordinarily give valid discharge—Special circumstance taking case out of general rule must be proved by such person—One mortgagee decree-holder minor—Time does not begin to run even against adults.

One of the two co-mortgagees cannot ordinarily give a valid discharge in respect of the mortgage debts, but the circumstances which would take the case out of the general rule (e. g., where the co-mortgagees are partners) must be alleged and proved by the person who desires to take his case out of the general rule. Where therefore one of the mortgagee decree-holders is a person under disability, limitation does not begin to run even against the major mortgagees : *A I R* 1927 *Cal* 425 and 952, *Rel on.* [P 3 C 1]

Sarat Chandra Basu and *Santimoy Majumdar*—for Appellant.

S. N. Banerjee, Jatindra Nath Sen and *Manilal Bhattacharjee*—for Respondents.

Mitter, J.—These two appeals are directed against one order made in the course of execution. The only question raised by these two appeals is one of limitation. In order to appreciate the point it is necessary to state a few salient facts. It appears that Mugneeram Bangar and Kedar Nath Daga instituted a suit in the Court of the Subordinate Judge at Asansol against S. H. Seddon and Rasaraj Biswas for declaration of their title to two annas share of a large number of valuable coal properties and for recovery of about ten lacs and odd under a mortgage bond said to have been executed by the said two persons in favour of the plaintiffs on 31st March 1921. This suit was compromised and on 3rd July 1923 the decree which appears to be a preliminary decree for sale was passed by the Subordinate Judge against the said defendant 1, Seddon, in favour of the plaintiffs according to the terms of a settlement which is to be found annexed to the decree at pages 3, 4 and 5 of the paper book. Kedar Nath Daga, one of the plaintiffs, died on 1st January 1924 and on an application on behalf of his two minor sons Jiwan Lal Daga and Satya Narayan Daga through their mother and guardian, one Lachmi Bai, they were substituted in place of the said Kedar Nath Daga on 19th November 1924. On 18th April 1925 a final decree for sale was passed in favour of the said Mugneeram and the two minor sons of Kedar Nath Daga against S. H. Seddon. The order making the decree absolute is to be found on pages 10, 11 and 12 of Part 2 of the paper book. After this final decree had been made the appellant in Appeal from Original Order No. 251 of 1931 was appointed a Receiver in Suit No. 908 of 1923 which was brought by one Sashi Kanta Banerjee against the said S. H. Seddon.

On 10th February 1930, nearly 5 years after the order absolute was made the two minor sons of Kedar Nath Daga applied for execution of the decree against Seddon, the present Receiver, as well as against one Rasaraj Biswas, and the other decree-holder Mugneeram Bangar was made opposite party to the said application being described as the decree-holder proforma in the petition for execution which is to be found at pages 13 to 15 of the paper-book. This application for execution resulted in the starting of the Miscellaneous Title Execution Case

which was numbered as 38 of 1930. On this both Mr. Seddon and the present Receiver who is the appellant in M. A. No. 251 of 1931 preferred objections to the execution of the decree and their main contention was that the decree was barred by limitation as no application was made within three years from 18th April 1925 when the final decree in the case was made. The objection was finally decided by an order of the Subordinate Judge dated 3rd February 1931. It is material to observe that although the petition of objection was filed on 19th May 1930 and the petition was not disposed of till 3rd February 1931 the present appellant did not set out the facts on which they contend that the application for execution was barred by limitation which facts are now urged before us by Mr. Basu who appears for the appellant. This was a circumstance which we shall show later goes very much against the contention of the present appellant that no opportunity was given to them of establishing the facts which are now alleged. The Subordinate Judge however came to the conclusion that as the decree was a mortgage decree and as it was not possible for Mugneeram, the adult decree-holder, to give a valid discharge with reference to mortgage debt, having regard to the provisions of S. 7, Lim. Act, the application of the minor decree-holders is not barred by the statute of limitation. He accordingly dismissed the objections. Against this order the two appeals have been preferred, as has already been stated, one by Seddon and the other by the Receiver, Satish Chandra Sen, and it is argued before us that in arriving at a decision adverse to the appellant the Subordinate Judge has merely relied on the abstract doctrine of law that one of the two co-mortgages cannot ordinarily give a valid discharge in respect of the mortgage debts.

It is strenuously contended that it may be that on the deed or indenture on which the suit was instituted the two decree-holders were really partners and therefore under Illus. (a), S. 7, Lim. Act, time would run against all including the infant decree-holders. But unfortunately for Mr. Basu's client no foundation was laid for this case in the Court below. Although the execution case remained pending for a good length of time no such case was made out either by putting in an application to the Court below to produce evidence in this behalf or to produce even the indenture which is now sought to be referred to by Mr. Basu in the course of his argument before us and to the reception of which objection has been rightly taken by Mr. Banerjee who appears for the respondents. It has not also been stated in the petition that there are circumstances which would take the case out of the general rule, namely, that a co-mortgagee cannot give a valid discharge in respect of mortgage debt so as to bind his co-mortgagee. This question was discussed very elaborately by N. R. Chatterjea, J. in a recent case of this Court in the case of *Satindra Nath Chaudhury* v. *Jatindra Nath* (1) and the learned Judge after a review of the authorities came to the conclusion that mortgage debt being one and indivisible ordinarily one mortgagee alone cannot enforce the mortgage for his share of the debt only except in cases where there has been severance of the mortgagee's interests effected with the mortgagor's consent and further that the discharge by one mortgagee alone is valid only as regards his share of the debt and the payment of the mortgage money by the mortgagors to one only of several joint mortgagees is not a good and valid payment as against the other mortgagee or mortgagees and does not operate as a discharge as to all. It is true that there is perhaps some conflict of authorities between the different High Courts of India as has been noticed in that judgment. But the consensus of authorities is in favour of the view which has been taken by Chatterjea, J. The same view has been taken by Page, J., in another case which is referred to in the judgment of the Sub-ordinate Judge. That is the case of *Sm. Jugal Kishori Debi* v. *Baidya Nath* (2). Page, J., points out in that case that some of the decisions are difficult to reconcile. The learned Judge says this :

"I have examined a number of cases upon this subject. It is not easy to disentangle them, and to reconcile them is impossible."

He points out that in the case before him (Page, J.) it was not proved that the decree-holders were members of a joint undivided Hindu family, nor was it

1. AIR 1927 Cal 425=101 I C 530.
2. AIR 1927 Cal 952=104 I C 668.

proved that they were living under the Mitakshara or Dayabhaga school of Hindu law, nor was it proved that one of the mortgagees acted as the Karta of a joint Hindu family of which the decree-holders were members. In this view he was of opinion that one of the decree-holders could not give a valid discharge as the decree was a joint decree. The decree-holders were jointly entitled to execute the decree. The adult decree-holders could not give a valid discharge to the judgment-debtor without the concurrence of the minor decree-holders and the application for execution of sale was not barred by limitation under Ss. 6 and 7, Lim. Act. So far as this Court is concerned this is the position and we are not prepared at this moment to disagree with these decisions which are the considered opinions, of at least four learned Judges of this Court. No foundation has been laid in the Court below by offering any evidence to show that this case can be taken out of the general rule about discharge of the debt as between co-mortgagees and in such circumstances we are compelled to come to the conclusion that these appeals must be dismissed with costs; we assess the hearing-fee at three gold mohurs.

M. C. Ghose, J.—I agree.

R.K. *Appeals dismissed.*

A. I. R. 1934 Calcutta 3

MALLIK AND JACK, JJ.

Abdul Jalil and *others*—Petitioners.

v.

Sm. Mahamuda Khatun and *another*—Opposite Parties.

Civil Rule No. 1391 of 1932, Decided on 2nd May 1933, from order of Munsif Fatickchery, D/- 17th September 1932.

(a) Bengal Tenancy Act (8 of 1885), S. 26-F (1) (a)—Interest as cosharer obtained by purchase—Sale of holding by tenant to such person—S. 26-F (i) (a) does not afford protection.

Where a tenant sells his share in respect of a holding to another who is already a cosharer in the tenancy but who has obtained such interest by purchase, S. 26-F (i) (a) does not afford protection to the sale and the landlord is entitled to have the share of the holding transferred to him. [P 3 C 2]

(b) Pre-emption—Right of pre-emption.

A right of pre-emption accrues only after the property has been sold to another and not before. [P 3 C 2]

Narendra Kumar Das—for Petitioner.

Chandra Sekhar Sen and *Imam Hossein Choudhury*—for Opposite Parties.

Mallik, J.—This rule is directed against an order by which an application made by the petitioners under S. 26-F, Ben. Ten. Act, to have the share of a holding transferred to them, was refused. The petitioners are the landlords and the opposite party No. 2 is one of the tenants in respect of the holding under them. In 1931 the opposite party 2 sold his share to his wife, the opposite party 1, for Rs. 40 and it was for the transfer of this share to them that the petitioners applied under S. 26-F. The petitioner's application was refused on the ground that the opposite party 1 had been a cosharer in the tenancy from 1927 and according to the learned Munsif the transfer to the opposite party 1 was protected by the provisions of Cl. 1 (a), S. 26-F. Cl. 1 (a) could protect the transfer if the interest of opposite party 1 which was existing at the time had not been acquired by purchase. But Ex. 1 (a kobala) shows that it was by purchase that that interest had been acquired. That being so Cl. 1 (a) afforded no protection to the transfer of 1931.

Mr. Sen for the opposite party contended that the wife was not a co-owner of the tenancy as the transfer in her favour in 1927 had been made without the consent of the landlords. But it appears that the petitioners recognized the wife as a cosharer tenant by realizing rent from her subsequent to the transfer in her favour in 1927 and before 1929 when the new Bengal Tenancy Act came into force. Mr. Sen as a last resort drew our attention to sub-S. (8), S. 26-F and contended that under the general law of pre-emption the opposite party 1 had the right to purchase the share which was transferred to her in 1931, the parties being all Mahomedans. But such a right would accrue only after the property had been sold to another person and not before. The general law about the right of pre-emption would not therefore be of any help to the opposite parties at present. The rule is therefore made absolute with costs, one gold mohur. Let the transfer be allowed as provided for in S. 26-F, Ben. Ten. Act.

Jack, J.—I agree.

K.S. *Rule made absolute.*

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JACK AND NAG, JJ.

Saradakripa Lala—Petitioner.

v.

Comilla Union Bank, Ltd. — Opposite Party.

Civil Revn. Petn. No. 365 of 1933, Decided on 10th April 1933.

Civil P. C. (1908), Ss. 37, 42 and O. 21, R. 29—Court to which decree is transferred has power to stay execution.

Under the provisions of Ss. 37 and 42, the Court to which the decree has been transferred, has power to stay the execution of the decree under O. 21, R. 29: *A I R* 1930 *All* 121, *Expl.*; *A I R* 1916 *P C* 16 and 10 *All* 389, *Ref*; 8 *W R* 392, *held no longer grod law.* [P 4 C 2; P 5 C 1]

N. N. Sircar and *Chandrashekar Sen*—for Petitioner.

J. C. Hazra, S. B. Datta and *Premranjan Ray Chaudhuri*—for Opposite Party.

Jack, J.—This rule has been directed against an order of the Subordinate Judge, Second Court, Chittagong, rejecting an application of the petitioners, made under O. 21, R. 29, Civil P. C., on the ground that he had no jurisdiction to stay the execution of the decree under O. 21, R. 29.

In this case a money decree was passed against the plaintiffs petitioners before us and that decree was transferred from the Comilla Court to the Court at Chittagong. In that Court, the plaintiffs filed a suit for setting aside the decree and for recording an adjustment and therefore applied to the Court for stay of execution of the decree, which had been transferred from the Comilla Court. The learned Subordinate Judge held that, under the terms of O. 21, R. 29, he was not entitled to stay the execution, inasmuch as his Court was not the Court, which passed the decree. Under R. 29, O. 21:

"Where a suit is pending in any Court against the holder of a decree of such Court, on the part of the person against whom the decree was passed, the Court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided."

The learned Subordinate Judge relied upon a recent decision of the Allahabad High Court in the case of *Inayat Beg* v. *Umrao Beg* (1). The learned Advocate-General, on behalf of the petitioners, has referred us to Ss. 37 and 42, Civil P. C. S. 37 lays down that the expression "Court which passed a decree" or words to that effect, shall be deemed to include, where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit. It is urged that, inasmuch as the Comilla Court had transferred the decree for execution to the Court at Chittagong, it ceased to have jurisdiction to execute the decree. In support of this view the case of *Maharaja of Bobbili* v. *Narasaraju Peda Simhulu* (2), has been cited, where it was held that, when a decree of a District Court was sent to the Court of a Munsif for execution, the proper Court, in which to apply "for execution or to take some step-in-aid of execution" of the decree is the Court of the Munsif, the original Court having ceased to have jurisdiction. In this view of the case the holder of a decree of such Court under S. 37, Civil P. C., will include the Court, to which the decree was transferred. Under S. 42, Civil P. C., also:

"The Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself."

The Chittagong Court therefore had powers to stay the execution of the decree, which was transferred to it under O. 21, R. 29. In the Allahabad case, on which reliance has been placed by the learned Subordinate Judge, no reference was made to S. 37 and S. 42, Civil P. C. In another decision of the Allahabad High Court in the case of *Kassa Mal* v. *Gopi* (3), Mahmood, J., held that the words "such Court," in S. 243, Civil P. C., which corresponds to O. 21, R. 29, of the present Code, did not limit the exercise of the powers given by that section only to decrees passed by the Court in which the suit was pending. It is true that there is a ruling of this Court in the case of *Mittun Bibee* v. *Buzloor Khan* (4), in which it was held that, in order to make the Court in such cases competent to stay execution of a decree, it must be a decree of the Court in which the suit was pending. That case would not be good law at present, inasmuch as the decree was by the appellate Court and it was held that the original Court could not have powers to stay execution of the decree, because "such

1. A I R 1930 All 121=122 I C 182.

2. A I R 1916 P C 16=36 I C 682 (PC).

3. (1888) 10 All 389=(1888) A W N 51.

4. (1867) 8 W R 392.

Court" could not be held to include the appellate Court. But, under S. 37 of the Code, Cl. (1), it is laid down that the expression "Court which passed a decree" or words to that effect, where the decree to be executed has been passed in the exercise of appellate jurisdiction, includes the Court of first instance. Moreover, in that case, no reference was made to S. 649 of the old Code corresponding to S. 37 of the present Code of Civil Procedure.

It seems clear that, under the provisions of Ss. 37 and 42, Civil P. C., the Court, to which the decree has been transferred, has powers to stay the execution of the decree under O. 21, R. 29. This rule is, accordingly, made absolute, the order of the Court below is set aside and the case is sent back to the Court to be dealt with according to law under O. 21, R. 29. The petitioners are entitled to the costs of this rule, hearing fee one gold mohur.

Nag, J.—I agree.

K.S. *Rule made absolute.*

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MALLIK AND JACK, JJ.

Tarakeswar Ray and *others*—Applts.

v.

Sreejukta Saraju Bala Debi—Respdt.

Appeals Nos. 1140 and 2551 to 2996 of 1931, Decided on 24th February 1933.

(a) Bengal Tenancy Act (8 of 1885), S. 158-A—Application under S. 158-A must come from entire body of landlords.

Where there are more than one landlord with joint collection an application under S. 158-A, before it can be legitimately granted, must come from the entire body of landlords, the reason being that a certificate cannot be issued in respect of the share of rent of one cosharer landlord only, when the collection is joint. [P 6 C 1]

(b) Bengal Tenancy Act (8 of 1885), S. 158-A—Whether or not there had been a proper discretion in issuing certificate is question of fact—Civil P. C. (1908), S. 100.

Whether there had been a proper discretion or not before issuing certificate is a question of fact and cannot be allowed to be raised in second appeal for the first time. [P 6 C 2, P 7 C 1]

(c) Bengal Tenancy Act (8 of 1885), S. 158-A—Release of part of estate under possession of Court of Wards — Application by owner of share released to realise share of rent under certificate procedure granted on condition that part released should remain under management of manager of the remaining portion under Court of Wards — Requisition by manager against tenants for certificate for entire state— Certificate filed by certificate officer— Held order granting application of owner of share released and certificates were not ultra viress and that claims made by manager in respect of share released and remaining portioncould be joined together.

The Court of Wards was in possession of the entire sixteen annas of an estate. The four annas share of one of the owners was released; and an application by the latter to recover his share of rent by certificate procedure under S. 158-A was granted on condition that the certificate procedure would apply to that share so long as the remaining twelve annas share remained under the Court of Wards and so long as the four annas share would be managed by the manager of the remaining twelve anna share under the Court of Wards. Thereafter the manager under the Court of Wards sent requisitions for certificates against the tenants for the whole sixteen anna rent due from them and cerficates were duly filed by the certificate officer. It was contended that the application of the owner of four anna share under S. 158-A and the order granting it as also the certificates were ultra vires.

Held : that although there was only an application from one of the cosharer landlords, in effect when the application was granted there was such an application from the entire body of landlords, that there was no necessity for the twelve anna landlords to make any formal application, and that the order granting the application and the certificates were not ultra vires.

Held further : that as the same procedure was applicable to the four anna share released and the twelve anna share under the Court of Wards the claims made in respect of both by the manager under the Court of Wards could be joined together for the purpose of certificate procedure. [P C.]

Brojolal Chakrabarty, Nagendra Nath Basu and *Kshetra Mohan Chatterjee*—for Appellants.

S. M. Bose, A. K. Roy, Nasim Ali, Prafulla Chandra Charaburtty and *Kiran Mohon Sircar*—for Respondent.

Mallik, J.— All these appeals were, with the consent of the parties, heard together, the points that were involved being common to all of them. They arose out of suits brought by a number of tenants of the Bhowal Raj for a declaration that certain certificates issued against them were without jurisdiction and for an injunction to restrain the defendants from taking any steps in execution of those certificates. What happened in the cases was this: The Court of Wards was in possession of the entire sixteen annas of this estate till 15th August 1919 when the four annas share of one of the owners, defendant 4, Srimati Ananda Kumari Devi, was released with the result that the Court of Wards remained in possession of the twelve annas share only while the four annas share of defendant 4 came into her possession.

In 1920 Ananda Kumari filed an application under S. 158-A, Ben. Ten. Act, to realize her share of the rent by certificate procedure and this application was granted on certain conditions, the conditions that were imposed being that the certificate procedure would apply to Ananda Kumari's share as long as the remaining twelve annas share of the estate would remain under the Court of Wards and as long as the four anna share of defendant 4 would be managed by the Manager of the remaining twelve anna share, under the Court of Wards. Thereafter the Manager under the Court of Wards sent requisitions for certificates against the plaintiffs for the whole sixteen anna rent due from them and certificates were duly filed by the certificate officer. The suits which have given rise to the present appeals were filed for a declaration that these certificates were ultra vires and without jurisdiction. The defence was that there was nothing wrong in the certificates. This defence found favour with the Courts below and the Courts below dismissed the plaintiffs' suits. The plaintiffs have come up to this Court in Second appeal.

The chief point in controversy before us has been the competency or otherwise of the certificates. On behalf of the appellants it was said that the application by Ananda Kumari under S. 158-A and the order granting it were ultra vires, the contention being that Ananda Kumari was only a cosharer landlord without any separate collection and therefore was not entitled to apply under S. 158-A. According to the learned advocate for the appellants, where there are more than one landlord with joint collection, an application under S. 158-A, before it can be legitimately granted, must come from the entire body of landlords. This contention, so far as it goes, seems to me to be sound, having regard to the provisions of S. 158-A, sub-S. 9, Ben. Ten. Act, the reason being that a certificate cannot be issued in respect of the share of rent of one cosharer landlord only, when the collection is joint. But in the present case, so far as the twelve anna landlords were concerned there was no necessity of making any formal application under S. 158-A as the statute had already given them the right which such an application could give them. As has been said before, the application of Ananda Kumari was granted on the condition that her estate should also be managed by the Manager of the other twelve anna cosharers. Therefore although strictly speaking, there was an application under S. 158-A, coming from one of the cosharer landlords only, in effect, when the application was actually granted, there was such an application from the entire body of landlords. At any rate the objection that was raised in the present case on the ground that the application had been actually filed by a cosharer landlord only whose collection was not separate is of a very technical nature in the circumstances of the present case. On behalf of the appellants it was said that the objection was not technical but of a substantial nature in view of the fact that the action of the Manager was mala fide and that the certificate procedure was adopted only for the purpose of unnecessarily harassing the tenants. But there was no allegation of mala fide made against the Manager in the plaints of the plaintiffs and the point was not canvassed in either of the two Courts below. The main point raised on behalf of the appellants must therefore in my opinion fail.

There were one or two other small points taken before us. It was said that as the manager was acting in his capacity as a manager under the Court of Wards in respect of the twelve anna share, and as a private manager in respect of Ananda Kumari's four anna share the two claims one in respect of twelve anna share and another in respect of four anna share were distinct and therefore could not be joined together for the purpose of certificate procedure. I do not think that there is much substance in this contention. The procedure that would be applicable to the twelve anna share under the Court of Wards would be the procedure as laid down in the Public Demands Recovery Act, 1913 and under S. 158-A, sub-S. 7, Ben. Ten. Act., the same procedure would be applicable to Ananda Kumari's four annas share of the rent. Lastly it was contended that even if the certificates are held to have been competent no proper discretion had been exercised by the authorities before issuing them. Whether there had been a proper discretion or not is a question of

fact and that being so, it cannot be allowed to be raised here in second appeal for the first time, no definite issue having been raised in the Courts below as to whether the certificates were bad on the ground that no proper discretion had been exercised before issuing them. The cases appear to have been fought out in the Courts below on one ground only viz., whether the application of Ananda Kumari Devi under S. 158-A and the order granting the application were ultra vires and without jurisdiction. All the contentions raised before us on behalf of the appellants must therefore fail, and all the appeals must accordingly be dismissed with costs to the respondents represented by the manager under the Courts of Wards, hearing fee being assessed at Rs. 56 for all the appeals.

Jack, J.—I agree.

K.S. *Appeals dismissed.*

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LORT-WILLIAMS AND M. C. GHOSE, JJ.

Emperor

v.

Nur Ahmed—Accused.

Jury Ref. No. 10 of 1933, and Appeal No. 173 of 1933, Decided on 28th July 1933, from order of Addl. Sess. Judge, Alipore.

Criminal P. C. (1898), S. 297 — Charges made by woman against man in cases arising out of sexual matters — Judge should warn jury that only in exceptional cases should uncorroborated testimony of woman be accepted — Corroboration required should be independent evidence of some witness other than woman herself — Penal Code (1860), S. 376.

In cases arising out of sexual matters, when charges are made against a man by a woman, the Judge should warn the jury that it is dangerous to convict upon her evidence alone and that they ought to require corroboration of her story before they bring in a verdict of "guilty." He should make the jury understand that only in exceptional cases would they be justified in accepting the uncorroborated testimony. The kind of corroboration required in such cases must be independent evidence, that is to say, the evidence of some witness other than the girl herself : *R.* v. *Baskerville*, 12 *Cr App Rep* 81, *In re Job Whitehead*, 21 *Cr A C* 23, *Rel on.*

[P 9 C 1, 2]

Debrata Mookerjee—for Appellant.

Khondkar and *Haridev Chatterjee* — for the Crown.

Lort-Williams, J.—In this case Ohajuddin Molla and Nur Ahmed alias Nonia were tried by the Additional Sessions Judge at Alipore and a jury which consisted of three Hindus and two Mahomedans. They were convicted under Ss. 366 and 376, I.P.C., by a majority of 3 to 2. The learned Judge considers that the verdict against Nur Ahmed was against the weight of evidence and unreasonable and that he ought to be acquitted under both the sections.

The facts were that a girl named Kiron Bala Dassi of the Bairagi caste lives in a small village near to a much larger Mahomedan village. According to her story, some time before the date of the offence alleged in this case, Ohajuddin made immoral suggestions to her, asking her to go and live with him. She said that she was highly shocked and screamed out with fear. This is alleged to have taken place at midday, while she was working in her hut and Ohajuddin is alleged to have called her from outside. Further, it is suggested that before this incident, some persons approached her bari at night, but were chased away by male members of her family. There is the evidence of one witness that Ohajuddin was seen among those who were running away. This witness was Adel Molla. His evidence appears to be unsatisfactory, because it is clear that he told two entirely different stories before the Magistrate and before the Sessions Judge. On the night of the alleged offence the girl's husband was away. Her evidence was that two men whom she did not name came into her hut and gagged her with a piece of cloth. She tried to scream, but they brandished a knife, then they dragged her away to their house and raped her one after the other.

The next day, she was kept in the house and Ohajuddin forced her to eat and then raped her twice that day. The next morning, Ohajuddin came with Maniruddi and let her out. Maniruddi was not there the previous night. Ohajuddin told her to go to her father's house and on her way home she met her 'deor' and the chaukidar to whom she told what had happened. Then, "looking unwillingly" at the two men in the dock, she said "Ohajuddin and Maniruddi are in the dock." It will be noticed that in her examination-in-chief she did not mention either of the two accused when she described what happened in her hut, nor did she mention anybody else but

Maniruddi, who she said was with Ohajuddin when she was let out on the Thursday morning.

Not satisfied however with the paucity of evidence elicited in examination-in-chief, the learned pleader on behalf of the accused brought out a great deal more evidence in her cross-examination, which in my experience almost invariably seems to be the practice in this country. She said then that she had known both the accused for some four years, but neither of them had been to her hut before. She said that she could not see their faces in the dark, nor could she see any knife or whether they had a knife or not. Then she explained her former evidence by saying that she was threatened in the room twice by word of mouth. She said that the accused were outside the curtain when she awoke : she was pulled outside the curtain and then they seized and gagged her. In view of this evidence it is a little difficult to understand why the girl was not able to scream before she was gagged and threatened. Then she said that she was taken by them to their house and it is apparent from other evidence of witnesses who saw three persons going along together, that she was walking quietly between the other two. Her mouth was not gagged, but she says it was "clogged" and explains that expression as meaning that she was threatened with a knife, although she did not see one, which seems a little difficult to understand. Then the Court cross-examined her and elicited that at Ohajuddin's house that night she saw his face. Still she persisted in not mentioning the other man. Then there was further cross-examination, the pleader for the accused being still dissatisfied with the amount of evidence elicited against his client. And after further cross-examination, she said that she recognized them both on the Tuesday night and that she saw their faces clearly in the dawn.

It appears from the evidence that she was confined the whole of Wednesday in a room in which there were two open windows. She made no effort to escape though she was left alone there. She did not see Nonia the whole of that day. Finally, the jury put some questisons to which she said that on Tuesday night it was dark and she recognized the accused by their voices. Before the Magistrate she had sworn that she could not recognize either of the two men. They took her inside some one's house where both of them raped her in the course of the night ; they were with her the whole of the night, but she could not recognize them at all. She says however that the next morning, when there was light, she recognized them both. This, again, sounds a somewhat improbable story. It is a little difficult to understand why they waited until she was able to recognize them when the light came. She did not make any complaint of actual hurt, nor were any marks found upon her. There was evidence of one or more witnessess who saw her leaving Ohajuddin's house on Thursday morning weeping. During the search for the girl, Ohajuddin assisted; in fact, it was he who said "Let us all join in search of the girl." They searched Hindu houses but did not suspect any Mahomedan. When previously some men had been chased from their house at night, they did not suspect them of coming after Kiran Bala, but thought they were thieves. Ohajuddin has a young wife aged between 18 and 20 and two daughters. One witness said that he saw two men, whom he did not recognize, carrying a woman off. He knew their voices to be of Ohajuddin and Nonia, but he was not called as a witness. When the chaukidar met her, she used a curious expression "Ohajuddin took me away and dishonoured my religion." Kanai Bairagi, one of the witnesses, said that there had been a maramari between him and the accused before and there was friction between Ohajuddin and Chandra about the advances to Kiran Bala. This witness in the Court below said that when he observed two men taking a woman away, he did not recognize any one.

Elaj Molla said that he saw three folk walking together and he asked them where they were going. He vaguely recognized Ohajuddin from his voice chiefly. He did not feel suspicious of them. They were walking in the ordinary way. The accused being Mahomedans and the girl a Hindu, it is unfortunate that the jury was composed as it was. It is obvious from the references which I have made to the evidence that this case is unsatisfactory from many points of view apart from the direction given by the Judge to

the jury. His charge unfortunately, is somewhat short and sketchy. There is little attempt to deal with the story in chronological sequence or to examine or weigh the evidence with care and point out its relevancy to the jury. The Judge has quite properly warned them that in cases of this description arising out of sexual matters, when charges are made against a man by a woman, it is dangerous to convict upon her evidence alone and that they ought to require corroboration of her story before they bring in a verdict of "guilty." He said that they were entitled to accept the evidence of the girl, but that they should be slow in accepting it. They should scrutinize her evidence very carefully and unless her story convinced them so much that they felt that it did not possibly stand in need of any corroborative evidence, they should not accept her uncorroborative evidence. This direction was correct. But, in my opinion, the learned Judge has not emphasized sufficiently the danger of convicting any man upon the uncorroborated testimony of the girl in cases such as this. He ought to have dealt with this part of the charge, so as to make the jury understand that only in exceptional cases would they be justified in accepting the uncorroborated testimony. Unfortunately also, he misdirected them by stating that there was corroborative evidence and it was only this

"that the prosecution says that there were those two instances before, that she was missing all the night and the following day. But she could equally have been missing if she had gone of her own free will. The corroborative evidence consists of what the girl said to the manager and to her *deor*."

This is not the kind of corroboration required by law. The leading case on this subject, in which the whole law was exhaustively discussed by Lord Reading, who was then the Lord Chief Justice, is *R.* v. *Baskerville* (1). This being the leading case on the subject, I am surprised to find no reference to it in some of the leading text-books, except a passing reference upon another point. In that case, the learned Lord Chief Justice said:

"We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only her evidence that the crime has been committed but also that the prisoner committed it."

Then referring to the Criminal Law Amendment Act (1885), Ss. 2 and 3, he says:

"The lannguage of the statute 'implicating the accused' compendiously incorporates the test applicable at common law in the rule of practice. The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in a high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused."

Again, at p. 89, he says:

"What is required is some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it. The corroboration must be by some evidence other than that of an accomplice and therefore one accomplice's evidence is not corroboration of the testimony of another accomplice."

It is clear therefore that the kind of corroboration required by the rule must be independent evidence, that is to say, the evidence of some witnesses other than the girl herself. If there were any doubt about this, it was made clear in the case of *Job Whitehead* (2) the head-note of which is that "the witness cannot be corroborated by himself." The Lord Chief Justice Lord Hewart in that case said that "corroboration should come from another person altogether." Therefore applying the rule to the evidence in this case, it is clear that the evidence referred to by the learned Judge is not corroborative evidence within the meaning of the rule, because what the girl said to the manager and to her *deor* and what she said about Ohajuddin having made improper proposals to her were statements made by her and equally dependent upon whether her testimony was to be believed or not. The fact that she was missing all the night and the following day was not a fact which implicated either of the accused and this the Judge has realized, because he points out that she could equally have been missing, if she had gone of her own free will. The fact that some persons had been near the house at night on a previous occasion and one of them was Ohajuddin, even if the evidence of identification can be relied upon, is not evidence

1. 12 Cr App Rep 81.

2. 21 Cr App Cas 23.

which implicates Ohajuddin in the offence charged. The only piece of corroborative evidence, which I can find in the record, is the statement of one or more witnessess that they saw her coming out of Ohajuddin's house on the Thursday morning weeping. But this has not been referred to by the Judge as corroborative evidence within the meaning of the rule which the jury might take into consideration to confirm the story of the girl.

The learned Judge has pointed out a number of reasons which induced him to think that there has been a miscarriage of justice in this case and we agree with him that the trial for various reasons has been unsatisfactory. Against Nonia, there is nothing but the girl's evidence and that is not very convincing. Against Ohajuddin, there is, as I have already pointed out, some evidence which might be accepted as corroboration within the meaning of the rule. It is true that if, after a careful and sufficient warning, the jury choose to condemn either or both then upon the girl's statement alone, there is nothing in law to prevent them from doing so. That being the position, we think that the fairest and the best way of dealing with this case is to set all the convictions and sentences aside and to direct a new trial of both the accused, and we direct that they shall be tried by another Judge, because this Judge will not wish to try the same case all over again. The accused who are on bail will continue on the same bail, pending further orders by the trial Court.

M. C. Ghose, J.—I agree.

K.S. *Retrial ordered.*

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AMEER ALI AND M. C. GHOSE, JJ.

Mukunda Murari Pal—Accused.

v.

Emperor—Opposite Party.

Death Ref. No. 19 and Appeal No. 580 of 1933, Decided on 12th September 1933.

(a) Penal Code (1860), Ss. 34, 114 and 302—Two persons going armed with guns and ammunition to commit robbery—Large number of shots fired by them while retreating and trying to escape—One of pursuers killed by one of shots from one of them—Other is also guilty under S. 302 read with Ss. 34 and 114.

Where the two accused, who were armed with guns and had plenty of ammunition entered a shop for the purpose of committing robbery, they were disturbed in their act by a large number of villagers; they decided to retreat and in so retreating they fired a large number of shots and one of the pursuers was killed by one of the shots fired by one of them:

Held: that though their primary intention was to effect their escape and not to kill any of their pursuers, still it must be concluded from the circumstances that their intention was to effect their escape even though, for that purpose it was necessary to shoot any of the pursuers mortally, and that the other accused should be convicted under S. 302 read with Ss. 34 or 114; *A I R* 1925 *P C* 1, *Ref.* [P 11 C 2]

(b) Criminal P. C. (1898), Ss. 274 and 276—18 jurors summoned in murder case—Only eight present in Court and Judge holding trial by choosing seven out of them—Judge is not bound to find out whether there are persons to serve as jurors in adjacent Sessions Court.

In a murder case 18 jurors were duly summoned, but when the names were called out, only eight of them were present in Court. Thereupon the Judge chose seven out of them and held the trial.

Held: that the trial was not invalid, and that it was not the duty of the Judge to send his Court officers to adjacent Sessions Court to find out men to serve as jurors: *A I R* 1928 *Cal* 645; *A I R* 1930 *Cal* 60; 122 *I C* 557; *A I R* 1931 *Cal* 793; 122 *I C* 553 and *A I R* 1930 *Cal* 212, *Ref.* [P 13 C 1]

Ramendra Chandra Roy—for Appellant.

N. A. Khundkar—the Crown.

M. C. Ghose, J.—This is an appeal by Mukunda Murari Pal alias Jatindra Pal alias Harendra Chandra De who has been convicted under S. 393 read with S. 398 and S. 75, I. P. C., and also under S. 302 read with S. 114, I. P. C. He was sentenced under the first section to transportation for life and under the second section sentenced to death. There is a reference by the learned Sessions Judge for confirmation of the sentence of death. The facts in short are that about 2 to 3 a. m. on 1st May 1931 two men armed with guns entered into the shop of Sita Nath Sil at Bahadurabad and put the inmates into fear of instant hurt and demanded the keys. Some of the inmates managed to escape, others were put to terror. About this time many villagers came up and wanted to know what was the matter whereupon one of the intruders opened the door and threatened the villagers. The intruders fired two shots and got out of the room and proceeded to go away. The villagers pursued them at a distance. The offenders continued to fire at them. At a certain place in the pursuit one of the pursuers, Astha Lal Mali,

came very near the two men and shouted, whereupon one of the two, not the present accused, shot and killed Astha Lai Mali. The villagers, however, continued to pursue the men who continued to fire shots. One of the shots struck and caused slight injury to witness Salim. After a long pursuit the two men at last ceased firing and the villagers concluded that their ammunition was exhausted. Then the villagers beat them down, captured them together with two guns and brought them back to Bahadurabad where they were kept in the local zamindar's cutchery. A chowkidar went to the Thana and the police arrived in the morning and took charge of the two captives and the two guns.

The two men took the police to a certain boat where a dog prevented the police party from entering. The present accused caught the dog and tied it and thereafter the boat was searched and the present accused produced a bag containing gold, silver and coins from the sand near the boat. The two men were duly sent up and were committed to the Court of Sessions. While the trial was pending one of the men, Ismail, died in prison. It appears that the present accused who was allowed bail absconded from bail by reason of which the trial was not held till more than two years after the occurrence. The learned advocate for the appellant has read the whole of the evidence before us. It is urged that many of the witnesses who were said to have seen the occurrence have not been examined. It appears that there were 5 men inside the shop when the offenders entered. Of them three men were examined in the Sessions Court and two men were tendered for cross-examination. Of the pursuers, who amounted to a large number, a good many have been examined in the Sessions Court. There is, in our opinion, no prejudice caused to the accused because all the pursuers were not examined. The two guns which were found in the possession of the two offenders were proved by evidence to have been stolen shortly before the occurrence. It is urged that a certain bullet was found on the body of the deceased but the bullet was not produced in the Sessions Court and further that no expert was examined to show that the guns had been recently fired. We are of opinion that these omissions have not cast any doubt upon the prosecution story. Upon the whole of the evidence it is clear that the jury had sufficient materials in finding the present accused guilty under S. 393 read with S. 398 and S. 75, I. P. C.

It is urged that the conviction under S. 302 read with S. 114 is wrong in law inasmuch as there is no evidence that the present accused abetted his companion Ismail to shoot and kill Asthalal Mali. The charge of the learned Sessions Judge on this point has been read and commented upon before us. There is no doubt on the evidence that the accused's companion Ismail deliberately shot and killed Asthalal Mali and thereby committed an offence of murder punishable under S. 302, I. P. C. The question is whether in the circumstances it can be said that the accused abetted his companion in committing the murder. Under S. 107, I. P. C., a person abets the doing of a thing who; (1) instigates any person to do that thing; (2) engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or (3) intentionally aids, by any act or illegal omission, the doing of that thing.

As the learned Sessions Judge rightly pointed out to the jury in the present case there is nothing to show that the present accused instigated Ismail or intentionally aided him to commit the murder. The question is whether he engaged in a conspiracy with Ismail for the commission of the murder. For this purpose, the whole of the circumstances must be taken into account. The two men were armed with guns and had plenty of ammunition and they entered the shop for the purpose of committing robbery. When they were disturbed in their act by a large number of villagers they decided to retreat and in so retreating they fired a large number of shots. It is clear that their primary intention was to effect their escape from their pursuers and it was their determination to prevent the pursuers from arresting them. It may be conceded that it was not their primary intention to kill any of their pursuers. Their intention was merely to effect their escape from the pursuers

But from the circumstances, it may be concluded that their intention was to effect their escape even though for that purpose it was necessary to shoot any of the pursuers mortally. There can be no other conclusion from the fact of their constant shooting. It is true that if none of the pursuers had come within the range of their shots no one would have been killed. Asthalal Mali happended to run near the pursuers and immediately one of the offenders turned and shot him dead. That person was the accused's companion Ismail. From these circumstances the jury, in our opinion, were right to conclude that the accused conspired with Ismail to commit the robbery and to effect their escape if necessary by shooting with their guns. In the prosecution of the object of their conspiracy the accused's companion shot Asthalal Mali dead. There is thus no doubt that accused Mukunda Murari Pal has been rightly convicted under S. 302 read with S. 114, I. P. C. Indeed, in the circumstances of this case, the accused might well have been convicted under S. 302 read with S. 34, I. P. C. : see the case of *Barendra Kumar Ghose* v. *Emperor* (1).

A preliminary objection was taken that the whole trial was illegal inasmuch as the jury were not properly constituted. The facts are that 18 jurors were duly summoned for the trial of the case. But when the learned Judge took up the trial and the names of the 18 jurors were called, one by one, only eight of them were found present in Court. Thereupon the learned Sessions Judge chose seven of them and held the trial with the aid of seven jurors. It is provided by S. 274, Criminal P. C., that where an accused person is charged with an offence punishable with death the jury shall consist of not less then seven persons and, if practicable, of nine persons. In numerous cases of this Court it has been held that the meaning of this section is that in trying an offence punishable with death the jury shall consist of nine persons, but if it be not practicable to have nine persons then it may be held with the aid of seven persons. S. 326, Criminal P. C., provides that the number of jurors to be summoned shall not be less than double the number required. Upon the two sections it has been held that in a murder case at least 18 jurors must be summoned for the trial: see *Serajul Ismail* v. *Emperor* (2), *Dwarika Malo* v. *Emperor* (3), *Amir Khan* v. *Emperor* (4), *Shahebali* v. *Emperor* (5). In the case of *Emperor* v. *Tamizuddin* (6) the learned Judges went so far as to hold that where less than 18 jurors were summoned though nine jurors attended and were chosen without objection yet the jury were not properly constituted according to the above sections. This case however was overruled by the Full Bench decision in the case of *Emperor* v. *Erman Ali* (7) where the Court held that in a murder case where 14 jurors were summoned and nine of them were chosen without objection the trial was not bad merely by reason of the fact that only 14 jurors were summoned. In the present case, 18 jurors were summoned and there can be no objection on the score that a proper number of jurors were not summoned under S. 326, Criminal P. C. The question is whether the learned Judge duly complied with S. 274, Criminal P. C., according to which he should have considered whether it was practicable to have nine jurors. Upon considering the fact that only eight jurors were present, it is clear that there were not a sufficient number of persons from whom nine jurors might have been chosen. The question is whether the learned Judge complied with S. 276, Criminal P. C., which provides inter alia that in case of deficiency of persons summoned the number of jurors required may, with the leave of the Court, be chosen from such other persons as may be present. It is apparent in this case that there were no such persons present in the Court of the learned Sessions Judge. It has been urged by the learned Advocate for the appellant that there are four or five Sessions Courts in Mymen Singh and it may be presumed that there were Sessions cases going on in one or other Court on that date, and it is urged that it was the duty of the

1. A I R 1925 P C 1=85 I C 47=26 Cr L J 431=52 I A 40=52 Cal 197 (P C).
2. A I R 1928 Cal 645=111 I C 735=29 Cr L J 927=55 Cal 794.
3. A I R 1930 Cal 60=1930 Cr C 12=122 I C 219=31 Cr L J 377=56 Cal 1154.
4. (1929) 122 I C 557.
5. A I R 1931 Cal 793=1931 Cr C 1057=135 I C 435=33 Cr L J 129=58 Cal 1272.
6. (1929) 122 I C 558.
7. A I R 1930 Cal 212=1930 Cr C 212=123 I C 664=57 Cal 1228.

learned Sessions Judge to send his Court officers to those other Court-rooms and bring from there such jurymen as were available. The question is whether S. 276, Criminal P. C., casts a duty upon the trial Judge to send his Court officers to adjacent Sessions Courts to find out men to serve as jurors in his Court. Upon considering the wording of the section, we are of opinion that no such duty is cast upon the trial Judge. The section merely says that the number of jurors required may, with the leave of the Court, be chosen from such persons as may be present. The meaning of the words is plain. It cannot, in our opinion, be held to mean that it was the duty of the Judge to send his Court officers to search for jurors in adjacent Sessions Courts. We are therefore of opinion that in this case as there were not nine suitable persons present in Court it was not practicable for the trial Judge to empanel nine jurors. The constitution of a jury of seven, in the circumstances, was not, in our opinion, an illegality such as would render the trial invalid. The preliminary objection is overruled.

It remains to consider the sentence of death which has been passed upon the appellant. The learned Sessions Judge recorded his age to be about 28 to 30 years. The Committing Magistrate estimated his age to be about 25 years. He did not fire the fatal shot. He fired many shots from his guns but it does not appear that he caused hurt to anyone. His companion who fired the fatal shot died in jail while he was under trial. Having regard to all the circumstances, we are of opinion that a sentence of transportation for life will meet the ends of justice in this case. In the result, the convictions are upheld and the sentence of death is reduced to transportation for life.

Ameer Ali, J.—I agree. I desire only to emphasise that we have no intention of laying down any general rule as to what is or is not to be considered "practicable" under any particular set of circumstances.

K.S. *Sentence reduced.*

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MALLIK AND JACK, JJ.

Ajad Bakt Mandal—Defendant—Appellant.

v.

Rebati Mohan Chowdhury—Plainti—ff Respondent.

Appeals Nos. 73 to 75 of 1931, Decided on 28th February 1933, from appellate decree of Sub-Judge, Rangpur, D/- 10th June 1930.

Bengal Tenancy Act (8 of 1885), S. 29—Enhancement of rent on ground of increase in area—Unless landlord proves actual increase in area he is not entitled to enhance rent beyond amount allowed by S. 29 even by agreement with tenant.

The landlord is not entitled to enhance the rent by agreement with the tenant beyond the amount allowed by S. 29, except in circumstances which are not really in violation of the terms of S. 29 of the Act. No doubt where fresh lands have been added to a holding by encroachment or otherwise, and the tenants have agreed to pay additional rent for the actual area, the landlord is not bound by the terms of S. 29 as the new holdings are not identical with the old, but in such cases he must prove that there has actually been an increase in the area of the holdings : 18 *Cal* 333, 25 *I C* 829; 5 *I C* 309 and *A I R* 1924 *Cal* 374, *Ref.* [P 14 C 1]

Abinash Ch. Ghose—for Appellant.

Atul Chandra Gupta and *Biraj Mohun Roy*—for Respondent.

Jack, J.—These three appeals have arisen out of three analogous rent suits. Rent is claimed for the years 1331-1334 B. S., at the rate of :

Rs. a. p.
29-11-9
4-12-3 } respectively in Suit Nos. 2048,
2-13-0 } 1075 and 1125.

The defendants maintain that the rent is :

Rs. a.-p.
23- 3-3 }
2-10-11¼ } in Suits Nos. 2048, 1075 respetively
2- 3-0 } 1125

The suits were decreed at the rates claimed, by both the Courts, the appellate Court merely repeating in an abbreviated form the judgment of the first Court. The learned Munsif refers to the fact that the plaintiff does not claim rents at enhanced rates on the ground of increase in area of the lands in suit, he claims rents on the basis of a fresh assessment which was accepted by the tenant who paid enhanced rents amicably for three years according to the new assessment. He adds that evidence is wanting for the establishment of a case under S. 52, Ben. Ten. Act, and

in this he is correct for there is no satisfactory evidence as to the area for which rent was originally paid at the rates at which the tenants at will claim to hold the land. There is no proof, for instance, that the area was measured when originally let out, nor what the standard of measurement was. So far the Courts below are entirely correct, but I think the learned Munsif is wrong in holding that S. 29, Ben. Ten. Act, has no application in these cases.

The landlord is not entitled to enhance the rent by agreement with the tenant beyond the amount allowed by S. 29, Ben. Ten. Act, except in circumstances which are not really in violation of the terms of S. 29 of the Act, e. g., the settlement of a bona fide dispute as to the rate of rent to avoid further litigation : *Sheo Sahoy Panday* v. *Ram Rachia Roy* (1) and *Bata Mandal* v. *Manindra Chandra Nandi* (2) or in settlement of a bona fide dispute as to the area of the holding : *Kedar Nandi* v. *Manindra Chandra Nandi* (3) and *Manindra Chandra Nandi* v. *Kaulat Sheikh* (4). No doubt where fresh lands have been added to a holding by encroachment or otherwise, and the tenants, have agreed to pay additional rent for the actual area the landlord is not bound by the terms of S. 29, Ben. Ten. Act, as the new holdings are not identical with the old, but in such cases he must prove that there has actually been an increase in the area of the holdings. This the landlord has failed to do in these cases and the tenants maintain that the areas are unchanged. In so far therefore as the enhancements of rent in these cases are in excess of the amounts allowable according to the terms of S. 29, Ben. Ten. Act, they are illegal and the rents must be reduced accordingly.

The plaintiff will therefore get a decree for rents at the rates of Rupees 25-13a-3g, Rs. 3-0a-3½g, Rs. 2-8a-4½g respectively with cesses in proportion. The claim for damages is dismissed. The parties will bear their own costs throughout.

Mallik, J.—I agree.

K.S. *Order accordingly.*

1. (1891) 18 Cal 333.
2. (1917) 25 I C 829.
3. (1910) 5 I C 309.
4. A I R 1924 Cal 374=79 I C 852=50 Cal 957.

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MUKERJI AND MALLIK, JJ.

Ebratannessa Bibi—Appellant.

v.

Sarat Chandra Sen and *others*—Respondents.

Appeal No. 194 of 1929, Decided on 11th May 1933.

(a) Mahomedan Law—Wakf—Intention of settlor has to be inquired into to see whether wakf is real or sham transaction—Conduct of settlor at time of transaction and subsequent to it is relevant.

The intention of the settlor has to be inquired into in order to make out whether a wakf is real or not, and for the purposes of such inquiry, facts and circumstances showing or suggesting that it was never intended to be acted upon are relevant. The conduct of the settlor himself at the time of the transaction, as also his subsequent conduct, if it is merely in continuation of his conduct at the time and of a piece with it are relevant in such an inquiry. The question whether in fact the wakf was acted upon or not is not relevant except as a means of or by way of a step for determining that intention: in other words, if the intention that it should be operative is established the fact that it was not acted upon by the settlor himself would not detract from its validity in the least, but would be only evidence of a breach of trust on the part of the settlor.

A deed of wakf was executed by a young widow of about 20 to keep away the properties from her brother's creditors and her co-widow's claim. Within a year after this she remarried and was enjoying and dealing with it as her own by alienating the property and taking the rent for herself. No part of the income used for any charitable purpose was mentioned in the deed.

Held: that the wakf was not a real but sham transaction, never intended to be acted upon. [P 16 C 1, 2]

*** (b) Civil P. C. (1908), S. 11—Res judicata—Decision by trial Court on two issues—Appellate Court disposing appeal on one of such issues leaving open and undecided other issues - Decision of trial Court on the other issue left undecided by appellate Court will not operate as res judicata in subsequent suit.**

A decision of the trial Court was based on finding of two issues. The appellate Court disposed of the appeal on one of the issues and left open and undecided the other issue.

Held: that the finding of the lower Court on the issue left untouched and undecided by the appellate Court did not operate as res judicata in a subsequent suit as the question of res judicata has to be determined by the appellate Court's decision: 44 *Cal* 367, *Dist.*; 21 *All* 505 (*P C*), *Rel. on.* [P 17 C 1]

Fazlul Huq, Jahnavi Charan Das Gupta, Surendra Fath Basu II and *Jogesh Chandra Sinha*—for Appellant.

Gunada Charan Sen, Bijan Kumar Mukerjee, Sarat Kumar Chatterjee and *Nilmoni Goswami*—for Respondents.

Judgment.—The plaintiff's title which has been found in his favour in the Court below rests for its validity upon the invalid character of a wakf which was executed by one Moriunnessa Bibi. The Subordinate Judge has found in favour of the plaintiff. Some of the defendants have preferred this appeal.

The wakfnama was executed by the lady on 24th January 1902, and was registered on her own admission on 28th January 1902. Upon the evidence which is on the record, the circumstances under which she executed it were the following. She was at first married to one Syed Mehdi, who was a Police Sub-Inspector. He died in July 1901, when she was about or a little over 20 years of age. In 1899 under a partition amongst the members of her father's family, her father having died before, she had got some properties of her father amongst which were two houses in the town of Hooghly. In respect of these two houses the wakf was created by her. By the terms of the deed she was to remain mutawalli so long as she would remain alive, and on her death one Sujat Ali and one Kalimulla would be mutawallis. The provision was that 4-annas of the rents and profits of the said two houses would belong to the mutawallis, another 4-annas would go towards repairs, and the remaining 8-annas would be spent in charities, it being laid down as a rule that the poor will be fed once every month and will be given clothes once every year. Certain other provisions were made for superintendence of the wakf after failure amongst the two mutawallis named.

In 1920 the plaintiff purchased from the lady the property in suit, which is admittedly included in this wakf but which she purported to sell as belonging to her personally and as having been obtained by her as an heir of her father and upon a partition with her coheirs in 1899. This is the title on which the plaintiff's suit rests and he has sought to establish it upon evidence, the most important of which is that of the lady herself. The case which she has sought to make out is very well described by the Subordinate Judge in these words taken from her deposition:

"People flocked round her to marry her for the sake of her properties. Her brother was a bad character; and he ran into debts and squandered his properties; and creditors sued him and got decrees. It was under the advice of Sujat Ali who used to look after her affairs and who once wished for her hand that a nominal document was created to protect the properties if (they were) attached by the creditors of her brother. She did not know that it was a wakf. She did not know the meaning of 'wakf,' and she was not explained the true import of it and nobody explained the true import of it and nobody explained the terms to her. Young as she was she wished to marry again and she never wished to renounce the world and worldly affairs and never wanted to divest herself of her rights over the properties. In fact she never transferred her rights and she remained malik as before and enjoyed the properties for herself and realized the rents and spent the same for her own maintenance and she did not spend the income in distributing alms to the poor and in feeding them."

A few more facts require to be stated. Within a year and half after the execution of the document the lady married one Moulvi Abdul Aziz, then a young pleader, and removed herself to Purnea to live with him there, where he began to practise as a pleader. On the wakfnama appears an endorsement signed by the lady in Persian—the lady does not know Bengali in which language the deed is—purporting to have been written in the presence of her husband, who put down his signature under the endorsement as a witness. The endorsement translated runs in these words; "This wakfnama deed not having been acted upon is declared as invalid and void." The exact time when this endorsement was actually made is a matter of controversy; one version is that it was made very soon after the marriage with Moulvi Abdul Aziz, and another version is that it was made just after the plaintiff's purchase. On this conflict of evidence the endorsement must go out and the plaintiff can hardly rely on it as a declaration or as indicative of an intention to declare that the deed was invalid or void. In 1907 there was a mortgage effected by the lady in respect of the property in suit as a property belonging to her personally, and on this mortgage a loan of Rs. 2,000 was contracted. This loan was eventually paid off. As a piece of evidence bearing on the question of the character of the wakf not much importance need be attached to that transaction. The Subordinate Judge has observed that the mortgagee would not have lent the money unless he thought that the wakf was a sham transaction. But the mortgagee has not been exami-

ned, even if he were, his view of the transaction would not be the deciding factor.

The declaration contained in the deed is perfect, and the transaction was completed with all necessary solemnities. The Subordinate Judge, upon an exhaustive review of the oral evidence and the circumstances disclosed or established therein, has come to certain findings, which go to indicate that the transaction was hatched in secret and there were elements of suspicion attaching to it. Before us an endeavour has been made on behalf of the respondents to improve upon those findings and to lead us to the conclusion that the lady was overreached by Sujat Ali and others, as was deposed to by the lady herself in order to serve their own ends, and she did not understand that she was making a wakf and never understood its contents. Indeed it has been suggested on behalf of the respondents that there was a conspiracy amongst persons, who really were no relations of the lady, to pose as her relations or as persons otherwise interested in her and to get the deed executed and registered; and at one stage of their arguments, doubts were sought to be cast even upon the factum of the execution and registration of the deed by the lady herself. We are not prepared to attach any weight to these findings or arguments. The evidence of the lady cannot obviously be taken at its face value. The fact that she executed the deed with full knowledge of its contents and of its import is a fact on which we entertain no doubt whatever. In fact it seems to us that such contentions as have been advanced before us in this respect are self-destructive and are also antagonistic to the other part of the lady's case, which is that the transaction was resorted to serve as an effective shield against her brother's creditors.

The question, in such circumstances, is the question of intention. The law in this respect is well-settled. The intention of the settler has to be inquired into in order to make out whether the wakf was real or not, and for the purposes of such enquiry, facts and circumstances showing or suggesting that it was never intended to be acted upon are relevant. The conduct of the settlor himself at the time of the transaction, as also his subsequent conduct, if it is merely in continuation of his conduct at the time and of a piece with it, are relevant in such an enquiry. The question whether in fact the wakf was acted upon or not is not relevant except as a means of or by way of a step for determining that intention: in other words, if the intention that it should be operative is established, the fact that it was not acted upon by the settlor himself would not detract from its validity in the least, but would be only evidence of a breach of trust on the part of the settlor. Bearing this law in mind we have to see how the case stands.

The first and most important thing to be taken note of in this connexion is the age of the lady at the date of the transaction. At that date she was a young widow, for whom a complete renunciation of worldly affairs or even a partial gift of her properties to charitable objects cannot be readily predicated. Her subsequent second marriage, though not conclusive, is at least relevant on the question of her frame of mind at the time. There is no motive conceivable why she should think of making a wakf, and on the other hand ample motive has been made out why she should make a document for keeping away the properties from her brother's creditors and her co-widow's claim, for she had a co-widow in the shape of another widow of her first husband. There is not the faintest suggestion that either at the time or even afterwards the properties were treated as wakf properties, and on the other hand she notwithstanding the deed continued to own, possess and enjoy them as their owner. The learned Judge has referred to the evidence on this point in detail and with his conclusions on them we can see no reason to differ. A feeble attempt has been made on behalf of the respondents to establish that the poor used to be fed and alms and clothes used to be distributed to them from out of the income of the properties, but that attempt in our opinion has not proved a success.

It has been argued on behalf of the appellant that if the wakf was not a real transaction, she would have at some time or other taken effective steps to declare it as such, and that at least two occasions had presented themselves on which she could and should

have done so. namely when she executed the mortgage and again when she made the sale in favour of the plaintiff, but that she did not do so. We are not prepared to hold that her omission in this respect is of any significance : the mortgage and the sale by themselves were sufficient declaration that no wakf existed. And in this connexion it may also be pointed out soon after the wakf came into being there was the litigation with her co-widow in which she could have easily set up the wakf, but never cared to do so. We think we must, in agreement with the learned Judge, hold that the wakf was not a real, but a sham transaction never intended tc be acted upon.

Another contention advanced on behalf of the appellant is that the question of title which was raised in this suit was concluded on the principle of res judicata by reason of the decision in Title Appeal No. 163 of 1923. The facts on which this contention is founded are the following : The plaintiff had instituted a suit for ejectment with claim for rent due against one Abdul Jabbar. The defence of Abdul Jabbar was a two-fold one : Firstly that not Abdul Jabbar, but his brother was the real tenant ; and secondly that the property belonged to the wakf which Mariumunnessa Bibi had created, and so the plaintiff had acquired no title by his purchase. The trial Court held that the wakf was valid, and so the plaintiff had no title. It also held that Abdul Jabbar alone was not the tenant, but his brother's widow and sons were also joint tenants with him. On both these grounds the trial Court dismissed the suit. The plaintiff took an appeal from that decision, and thereafter applied for withdrawal of the suit with permission to institute a fresh suit. The prayer for withdrawal of the suit was refused. At the hearing of the appeal the plaintiff as appellant admitted that Abdul Jabbar was not his tenant, and the Court upheld the trial Court's decision on that ground alone, holding that by that admission the foundation of the plaintiff's case was gone.

The Court therefore declined to go into the question of the plaintiff's title, and expressly left it open, and dismissed the appeal. It is not possible to see how the decision of the trial Court on the question of title which did not form a ground of the decision of the appeal and was on the contrary expressly left open can operate as res judicata. The case of *Kali Prasanna* v. *Panchanan Nandi* (1), has been cited on behalf of the appellant in this connexion. It is enough to say of that case that it is a decision on the question whether a plaintiff should be allowed to withdraw his suit with liberty to institute a fresh suit after he has adduced all his evidence and finds that the evidence is insufficient to establish his case and it could only have a bearing on the question of res judicata if it could be shown that there was a permission to withdraw the suit or a part of it granted in contravention of O. 23, R. 1, Civil P. C. That is not what happened in the present case. The appellate Court whose decision is the test by which the question of res judicata is to be determined, had, on the appeal before it, ample authority to dispose of the appeal on one of the grounds on which the decision of the trial Court was founded, and to leave open and undecided the other issue in the case ; and in such circumstances as was observed by their Lordships of the Judicial Committee it would be contradiction in terms to say that the appellate Court had finally decided the issue though in fact the issue was left untouched and undecided : see *Parshotam Gir* v. *Narbada Gir* (2). In our opinion the appeal fails and must be dismissed with costs.

K.S. *Appeal dismissed.*

1. (1917) 44 Cal 367=33 I C 670.
2. (1899) 21 All 505 = 26 I A 175 = 7 Sar 538 (PC).

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MITTER AND RUSSELL, JJ.

Brajabala Dhar and *others* — Appellants.

v.

Nityamayee Biswas—Respondent.

Appeal No. 194 of 1931, Decided on 10th April 1933, from original decree of Dist. Judge, Mymensingh, D/- 25th May 1931.

(a) Evidence Act (1872), S. 6—Evidence of witnesses that complainant informed them about theft long after incident is not admissible.

Evidence of witness to whom complaint was made long after a theft is not admissible as such evidence does not come under res gestae.

[P 19 C 1]

(b) Will—Existence of will at time of testator's death not proved—Presumption is that it was revoked.

Where it is not established that the will was found at the death of the testator the ordinary presumption arises that it must have been revoked by the testator: *Allin* v. *Morrison*, (1900) *A. C.* 604, *Welch* v. *Phillips*, 1 *Moo P C* 299, *Ref.* [P 19 C 2]

(c) Will — Unregistered inofficious will — Contents have to be scanned carefully.

Where a will is anunregistered inofficious will, its contents have to be scanned carefully before it should be given effect to. [P 20 C 1]

(d) Will—Will proved only by parol evidence — Such evidence must be of extreme cogency.

In order to support a will propounded, when it is proved by parol evidence only, that evidence ought to be of extreme cogency, and such as to satisfy one beyond all reasonable doubt that there is really before one, substantially, the testamentary intentions of the testator: *Edward Francis Woodward* v. *Ebrabeth Goulstone*,(1886) 11 *A. C.* 469, *Foll.* [P 21 C 1]

Brojolal Chakrabarty and *Birendra Kumar De*—for Appellants.

Annada Charan Karkoon — for Respondent.

Mitter, J.—This is an appeal from a decree of the District Judge of Mymensingh dated 25th May 1931, by which he granted what is described in the decree as letters of administration of a lost will. It appears that one Gopinath Biswas who was an aged and practising Muktear of Netrokona is said to have executed a will a short time before his death. The testator died on 26th September 1923. The will according to the case of the proponent was executed some time in October 1914, It was registered in the Local Registry Office as will appear from the paper which although not exhibited was filed along with other papers with the application for grant of letters of administration. That paper was one of the unexhibited documents and has been printed in the last two pages of part II of the paper book. Unfortunately the Registration Office was burnt and we have not got a copy of the certified copy of the will. The case of the proponent is that the testator retired with his wife to Benares in November 1916. Along with him went his daughter Brajabala one of the objectors to the granting of the letters of administration and his son-in-law, Debendra. The testator is said to have returned in 1917 and as has already been stated died in 1923. It is significant that the present application for letters of administration was not made till 21st December 1929.

The objectors to the granting of letters of administration really raised two contentions before the learned District Judge. It was said in the first instance that as the will was not traced after the testator's death and could not be found the presumption is that the will must have been revoked by the testator. The second contention in opposition to the granting of letters of administration was that the oral evidence which had been given regarding the terms of the will is not such as should have been relied upon by the learned District Judge. After taking the evidence of both sides the learned District Judge has over-ruled the objections of the objectors and has granted the letters of administration and it is against that decree that the present appeal has been brought.

The first question which we have to consider in this appeal is as to whether on the evidence it has been established that the will was found after the death of the testator Gopinath and in the second place we have to determine whether all the evidence which the District Judge has relied on for the determination of the contents of the will on oral evidence was sufficient. With regard to the first point the learned District Judge has relied on the evidence of the proponent of the will, viz., the widow of the testator and a number of witnesses to whom, it is alleged, she complained that shortly after the death of the testator the will had been taken away by her son-in-law, Debendra. It is to be observed in this connection that Debendra did not live long after the death of the testator. He died on 6th January 1925; and the evidence on which reliance has been placed by the learned District Judge with regard to her complaint that the will was taken away by her son-in-law consists of testimony of a number of witnesses. With regard to the evidence of the witnesses to whom she is said to have made the complaint it may be mentioned that one Kamini Kumar Sinha whose evidence is to be found at p. 51 of the paper-book states that he heard the complaint five or six months after the death of Gopinath. It is pointed out on behalf of the appellants that this evidence contradicts the evidence of the widow as to the time when this com-

plaint was made for it is the case of the widow that complaint was made to this witness only a few days after the death of the testator and even before the Sradh of Gopinath was performed. With regard to the other witnesses who speak to the complaint they all put it some time within one year of the death of the testator. It has been rightly complained on behalf of the appellants that such a testimony should not be admitted in evidence. It is said that the evidence of the complainant if made within a short time after the death of the testator might be admissible on the ground of such evidence being res gestae, but no such ground exists admitting the evidence of witnesses to whom complaint was made long after the death of the testator.

We are of opinion that the evidence of such witnesses may be discarded on that ground. But apart from that, even assuming that such evidence can be taken into account, they really are contradicted by the very important statement which is said to have been made on behalf of the widow in the certified copy of the petition filed on her behalf on 12th January 1926. This petition which is to be found at p. 37, part 2 of the paper book contains in para. 2 a very important statement on the question as to whether the will was traceable after the death of the testator. She states this:

"The late Gopinath Biswas executed a will before his death, but the same not being traceable as yet though searched for, and there being no probability of the same being found out, petition is made for certificate on the present claim. The deceased has left no other heirs."

This shows that the widow has now come forward with a new case that the will is not traceable and that Debendra had taken it away. One would have expected that in this petition, filed a short time after the death of Debendra, when she was filing this petition there was nothing to prevent her from stating that the will was found after the death of the testator but could not be produced because it has been taken away by Debendra and had been secreted by the son-in-law against whom allegations of ill-feeling are made in the present petition. In these circumstances we are of opinion that the evidence does not satisfy us that the will was traced at the death of the testator. In addition to this we have to point out that in the application for mutation of names which is to be found at pp. 50 to 52 of the paper book the widow Nrityamoyi applied to be registered as the proprietress "holding life-interest by inheritance" and wanted to be substituted in place of her deceased husband, the late Gopi Nath Biswas. There is no mention whatever of her getting this property on the basis of any bequest. It is further to be noticed that her case is that this will was kept in a box along with other documents and yet we have been shown by the learned advocate for the appellants that a number of documents which have been produced in this case and on which she relied were kept in the same box. This circumstance discredits the story that the will was in the box which contained other documents also. In this view seeing that it could not be established that the will was found at the death of the testator the ordinary presumption arises that it must have been revoked by the testator. In this connexion reference may be made to the case cited at the bar of *Allan* v. *Morrison* (1) decided by their Lordships of the Judicial Committee where the following observations were made by Lord Davey who delivered the judgment of the Privy Council:

"It was not denied that there is a presumption, to use the language of Lord Wensleydale in *Welsh* v. *Phillips* (2), that if a will traced to the possession of the deceased and last seen there is not forthcoming on his death, it is presumed to have been destroyed by himself; and that presumption must have effect unless there is sufficient evidence to rebut it. Whether this should be called a presumption of law or fact does not seem material. It may of course be rebutted, and, as said by Cockburn, C. J., in *Sugden* v. *Ladst. Leonards* (3), the presumption will be more or less strong according to the character of the custody which the testator had over the will."

It would appear that in this case the will was last seen at Benares where according to the case of the proponent the will had been taken by the testator when he went there with his wife, daughter and son-in-law. One of the reasons which have been suggested as to why the will was taken away by Debendra is that there was considerable ill-feeling between Debendra and the testator when he (Debendra) came to know of the contents of the will which is said to be a will giv-

1. (1900) A C 604=69 L J P C 141.
2. (1836) 1 Moo P C 299.
3. (1876) 1 P D 154.

ing complete proprietary interest in favour of Nrityamayi and power to adopt five sons in succession. Our attention has been drawn to a number of letters which are proved and admitted to have been written by the testator to Debendra which would go to show that there was abundant good-feeling between the father-in-law and the son-in-law. Reference may be made in this connexion to some of the letters which were printed in the paper-book at or about the time of the execution of the will. It is not necessary to refer to these letters in detail. It is sufficient to state that the letters satisfy us that there was much good-feeling between the testator and the son-in-law. A number of witnesses have spoken to the circumstance that after the death of the testator feelings between the mother-in-law and the son-in-law were strained for some time and sometimes they were on the best of terms. This evidence has been relied on for the purpose of showing as to why an application for letters of administration was not made earlier. Be that as it may it seems somewhat singular that, even if the feelings between the father-in-law and the son-in-law were such as has been alleged on behalf of the proponent, that should be any reason for disinheriting the daughter and the daughter's son.

The contents of the will, as we shall discuss presently show that the will, in so far as the daughters and the daughters sons were concerned is inofficious as they were disinherited. The will was also an unregistered inofficious will and the alleged contents have to be scanned carefully before it should be given effect to. We now proceed to deal with the other issue in the case, namely, whether the evidence which has been given on behalf of the proponent of the terms of the will is sufficient to satisfy the conscience of this Court that those were the contents of the will of Gopinath. A number of witnesses have been examined and it is said that they are all witnesses of respectability. The learned District Judge has relied on their testimony and there is evidence even on behalf of the objectors to show that they were men of respectability. But it is to be noticed that it is a rather singular coincidence that some of the important witnesses to the will are witnesses to a kabuliyat which was executed by one Mahim Chandra Sen in favour of Nrityamoyi Dasi and dated 10th September 1928. It was the contention of the objector that it is after this kabuliyat of 10th September 1928 was granted where for the first time an assertion was made that Nrityamoyi was the heiress of her husband as also the successor to his properties by purchase and bequest with the right of gift and sale that the idea was conceived of setting up a will. This indeed is a very important circumstance and has to be considered in determining the credibility of these witnesss. It is also to be borne in mind that the witnesses were speaking of an event which happened nearly 17 years before the death of Gopinath and no good reason has been given as to why the witnesses should remember the contents of the will at such a distant date. On the other hand it appears that some of the witnesses have not even seen the terms of the will.

As has been pointed out already in connexion with the first point the case of the widow regarding the contents of terms of the will as spoken to by the witnesses is inconsistent with the lady's own application with regard to the matter in the Land Registration Office where she distinctly said that she was possessing the life interest of a Hindu widow in respect of her claim to her husband's properties. It is to be noticed that the application was filed by Sashi Kumar Chakravarty a pleader who is said to be one of the witnesses to the will; and the suggestion which is made by the learned advocate for the appellant is that the idea of setting up this will was really conceived of for the first time when Sashi appeared on the scene and that the application, Ex. B, was made in 1926. An indication was given in the said application that there was a will which was not traceable. It also appears that some of the witnesses to the will were not on good terms with Gopinath and complaint is made and rightly made that it is not likely that these witnesses who were inimically disposed towards Gopinath should be called as attesting witnesses to the will; and the suggestion is that the real attesting witnesses were not called. It has already been pointed out that if we compare the names of the witnesses as

given in the ijara for Rs. 200 with the names of the witnesses who have been called to prove the will it will appear that they were all interested parties as they had to support this ijara and it could only be effective if Nrityamoyi had an absolute interest in the property as it was set up in that document. For the respondent comment has been made that even if she had no absolute interest in the property as the Ijara was only for a term of nine years it was one which she could grant as it would be good for her life-time. The point is that in that document a statement is made to the effect that she had an absolute right in the property. It is very difficult at this distance of time to rely on loose statements based on the recollection of the witnesses with regard to what was contained in a will made several years before the death of the testator. In this connexion it would not be inappropriate to refer to a passage from the decision of their Lordships of the Judicial Committee in the case of *Edward Francis Woodword* v. *Ebrabeth Goulstone* (4). Lord Herschell, L.C., said this at page 475 of the report :

"Now I cannot but be alive to the extreme danger of establishing a will merely by parol evidence of its contents. The legislature has endeavoured to safeguard the interests and rights of testators by requiring that the expression of their testamentary intentions shall be authenticated in such a manner as to leave no doubt, if possible, that the Court has before it that which really expresses the will and intention of the testator. It is nbt enough that it is in his own handwriting; it must, even if in his own handwriting, be authenticated by witnesses who must be present and see the testator sign, and must sign in each other's presence. But if upon mere loose statements of the recollection of witnesses as to what has been said to them at some time or other, your were to grant probate of, and to establish as the will of the testator, something which no one had ever seen or purported to be able to depose to from recollection. it seems to me that you would be doing that which would be in the highest degree dangerous, and the more so when those statements are statements of witnesses (and one knows how fallible human memory is even when there is no interest to bias it) who have the strongest possible interest in remembering what they remember and in forgetting what they forget. I think therefore that in order to support a will propounded, when it is proved by parol evidence only, that evidence ought to be of extreme cogency, and such as to satisfy one beyond all reasonable doubt that there is really before one substantially the testamentary intentions of the testator."

4. (1886) 11 A C 469.

Keeping these observations in mind we are of opinion that having regard to the character of the evidence, having regard to the witnesses deposing to the events which happened 17 years ago, having regard also to the fact that there is no special reason for these witnesses for remembering the contents of the will, having regard further to the fact that one of the these witnesses made statement of including a provision with regard to a bequest in favour of Lord Biseswar which has not been spoken to by other witnesses, and having regard also to the fact that the will excludes the daughter and the daughter's sons, we do not think that we should be justified in granting probate or letters of administration on this oral evidence. We are also alive to the circumstance that the learned District Judge had the advantage of examining the witnesses himself which we have not. Considering all these circumstances and probabilities of the case and the facts to which we have already referred we are of opinion that it has not been established that the contents of the will were as alleged and the order directing grant of letters of administration of the will should be set aside. The result is that this appeal is allowed. The order of the Court below granting letters of administration is set aside. The respondent must pay to the appellants all the costs incurred by them both in this Court as also in the Court below. The hearing-fee of this Court is assessed at five gold mohurs.

Henderson, J.—I agree I cannot place any reliance on the evidence on which the petitioner relies to establish the contents of the will. As my learned brother has pointed out, the learned Judge had the advantage of seeing the witnesses himself, but the circumstances which have led us to reject their testimony are in no way connected with their demeanour in the witness box.

K.S. *Appeal allowed.*

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MITTER AND M. C. GHOSE, JJ.

Kshetra Mohan Ghose and *another*—Decree-holders—Appellants.

v.

Gour Mohan Kapali — Judgment-debtor—Respondent.

Appeal No. 335 of 1932, Decided on 1st March 1933.

Civil P. C. (1908), S. 148—Court cannot extend time fixed by decree.

Where a certain time is fixed by a decree for making some payments and it further directs that on failure of so paying within the time limited the case should stand dismissed, the Court cannot extend the time limited by the decree. [P 22 C 2]

Rupendra Kumar Mitra and *Samarendra K. Deb*—for Appellants.

Mitter, J.— This appeal is directed against three orders of the learned Subordinate Judge of Jessore, the last of which is dated 15th June 1932. It appears that the present appellants applied to execute a solenama decree by which it was agreed that the appellant would be entitled to recover khas possession of the land in dispute in the suit in case the petitioner, the judgment-debtor, admitted that he could not pay in time and hence the Munsif who dealt with matter in the first instance disallowed the objection of the judgment-debtor. Against that order an appeal was taken to the Court of the Subordinate Judge of Jessore who made an order the material portion of which is as follows:

"If the payment of Rs. 30 be not made according to the above direction the appeal shall stand dismissed with costs."

The direction was that it was to be paid within seven days from the date of the order. The direction given is substantially as follows:

"So apart from the question of legality of the terms incorporated in the decree I think the most appropriate order would be to allow the appeal on payment of the balance Rs. 30 within seven days from this date and to disallow the appeal on failure of payment."

This sum was not paid during the seven days of the date of the order of the lower appellate Court which was passed on 30th May 1932. On 6th June 1932 the present respondent (judgment-debtor) put in a petition for time to deposit the amount ordered by the decree, and on 15th June the Court allowed the appeal from the order of the Munsif and allowed the application of the judgment-debtor as the sum of Rs. 30 was deposited. Against this order the present appeal has been preferred and it is contended on behalf of the appellant that it was not open to the lower appellate Court to extend the time for the payment of Rs. 30 which was fixed by the decree of the Court. In support of this contention reference was made to several cases which lay down that S. 148, Civil P. C., does not entitle the Court to extend time fixed by a decree in a suit. Reference may be made to the decisions in the case of *Suranjan Singh* v. *Ram Bahal Lal* (1), to a decision of this Court in the case of *Bibi Sharofan* v. *Mahomed Habibuddin* (2), and to a decision of the Madras High Court in the case of *Dharmaraja Ayyar* v. *K. G. Srinivas Mudaliar* (3). The Patna High Court, however, takes a different view. But it seems that the attention of the Patna High Court was not drawn to the Allahabad decision. The decision of the Patna High Court was in the case of *Abu Muhammad Mian* v. *Mukut Pertab Narain* (4). Having regard to the preponderence of the judicial authority in favour of the contention of the appellants we think that the appeal should be allowed and the order of the Subordinate Judge allowing the appeal against the order of the Munsif should be set aside. The result is that the order of the Munsif dated 19th December 1931 is restored. No order is made as to costs as the respondent does not appear.

M. C. Ghose, J.—I agree. The learned Subordinate Judge in disposing of the appeal stated thus in his judgment dated 30th May 1932:

"If the payment of Rs. 30 be not made according to the above direction the appeal shall stand dismissed with costs. Pleader's fee Rs. 4."

This was an express order of the Court that unless payment was made within seven days from the date of the decree the appeal would stand dismissed. After such a solemn order it was not open to the learned Subordinate Judge to vacate the order and extend time to the judgment-debtor. He could only have done so on a review after hearing both sides on the matter. The order of extension of time passed upon the judgment-debtor's petition without a proper review appears to me to be wrong.

R.K. *Appeal allowed.*

1. (1913) 35 All 582=21 I C 585.
2. (1911) 10 I C 148.
3. (1916) 39 Mad 876=31 I C 240.
4. (1916) 1 Pat L J 92=34 I C 88.

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GUHA AND BARTLEY, JJ.

Dacca Co-operative Industrial Union Ltd.—Defendant—Petitioner.

v.

Dacca Co-operative Sankha Silpa Samity Ltd. and *others*—Plaintiffs—Opposite Parties.

Civil Rule No. 465 of 1933, Decided on 9th May 1933, from order of First Court, Sub-Judge, Dacca, D/- 23rd January 1933.

(a) Co-operative Societies Act (1912), S. 43—Rules framed under—Suit filed under Act referred to arbitration—Subsequent suit questioning reference to arbitration, appointment and procedure adopted by arbitrator and for declaring award as invalid is entertainable by civil Court—Civil P. C. (1908), S. 9.

A suit filed under the provisions of the Co-operative Societies Act and the rules framed thereunder was referred to arbitration and award was made by the arbitrator.

Held : a suit to have the award declared invalid questioning the reference to arbitration, appointment of arbitrator and the procedure adopted by the arbitrator was entertainable by the civil Court. [P 24 C 2]

(b) Arbitration—Order by person appointed as arbitrator who could not be so appointed is nullity.

An order, if made by a person appointed as arbitrator, who could not be appointed such an arbitrator under the law, or an order made by such an arbitrator, in the abuse of the powers conferred upon him, is a nullity, and cannot affect the rights and obligations of the parties. [P 24 C 2]

Sarat Chandra Basak and *Nasim Ali*—for Petitioners.

Ramendra Chandra Roy—for Opposite Parties.

Order.—The allegations of fact contained in the plaint in Suit No. 54 of 1932, in the First Court of the Subordinate Judge, Dacca, against an order passed in which the application to this Court on which this rule was issued, was directed, are set out in the affidavit filed in this Court on behalf of the opposite parties in this rule, the plaintiffs in the suit. The plaintiffs are firms eight in number carrying on business as Dacca Co-operative Sankha Silpa Samity Ltd., (Nos. 1 to 8), the defendants in the suit being the Dacca Co-operative Industrial Union Ltd., the opposite parties in this rule. It appears that the plaintiffs became the share-holders of the defendant Union in the year 1924, on subscribing shares which were fully paid up. It was stated in the plaint that there was an agreement for reduction of shares of the plaintiffs in the defendants' business and for adjustment of accounts with a view to make the plaintiffs free from liability to the defendants. The accounts were, it was alleged, not adjusted; and demand notices were issued on 13th September 1930, upon the plaintiffs for payment of arrears stated to be due from them. Objection was raised to the demand thus made and liability was denied by the Samitys. Suits were thereupon instituted according to the provisions of the Co-operative Societies Act, 1912 and the rules framed thereunder, by the Secretary to the defendant Union. The plaintiffs in the suit, the petitioners in this Court, allege that they did not know whether plaints were filed by the Secretary of the defendant Union or whether any reference was made by the Union; the plaintiffs did not receive any copy of the plaint or any other material or materials excepting the summons from the Inspector of Co-operative Societies, intimating that the suit was fixed for final disposal on 16th September 1930.

It appears that the plaintiffs appeared before the Inspector on 16th September 1930, and were informed that he had been appointed arbitrator by the Assistant Registrar, Co-operative Societies. The plaintiffs applied to the Assistant Registrar on 24th September 1930 for the appointment of an arbitrator on their behalf, under R. 22 of the Rules under S. 43, Co-operative Societies Act. No order was however made on the application so made. On 26th October 1930 the case was heard by the arbitrator appointed by the Assistant Registrar. The deposition of the Head Clerk of the defendant Union was recorded, and some evidence on the side of the plaintiff Samitys was also recorded although they had no notice to appear before the arbitrator on 26th October 1930. It was further alleged that the evidence sought to be adduced on behalf the different Samitys, three of whom only were informally represented before the arbitrator, was not taken; the evidence tendered by the other Samitys was not received. On 4th November 1930, the plaintiffs Samitys appear to have filed written statements before the arbitrator; witnesses were cited, some documents were filed, others were called for; the arbitrators however did not accede to the prayers made by the petitioners in

the matter of summoning witnesses and production of documents.

An award against the plaintiff Samitys followed; and the suit out of which this application has arisen was thereupon instituted by the Samitys calling into question the reference to arbitration, as also the appointment of the arbitrator and the procedure adopted by the arbitrator. The allegation of the plaintiffs in the suit pointed clearly to the fact of the abuse of the power of the arbitrator, who had fixed a liability of Rs. 82,081-12-6, so far as the plaintiffs were concerned and a declaration was prayed that the award was invalid, void and without jurisdiction, and not enforceable in law. Prayer was also made in the suit for setting aside the award. The defendants in the suit, the Dacca Co-operative Industrial Union Limited, raised the defence that the Civil Court had no jurisdiction to entertain the suit, which was considered by the Court below at their instance, before evidence was gone into, on the merits of the case, as in the words used by the learned Subordinate Judge as "a point which cuts to the merits of the suit." The learned Judge has held by his order, recorded on 23rd January 1933, that the jurisdiction of the civil Court was not ousted to consider the points whether the appointment of arbitrator was valid, and whether the arbitrator abused his power or not. It has further been stated by the learned Judge in his order that those points could not be decided at the present stage, and a final decision on the question of jurisdiction as raised by the defendant, could not be given before evidence in support of the allegations of fact made in the plaint have been considered in the light of facts proved in the case, and that the issue on the question of jurisdiction was to be further considered after evidence in the case has been adduced. The question for consideration in this rule is whether the Court below was right in holding that the civil Court had jurisdiction to entertain the suit. It may be stated at the outset that we are not very much impressed with the reasons given by the learned Judge in the Court below for over-ruling the contention of the petitioners in this Court that R. 22 (6) framed by the Local Government under S. 43, Co-operative Societies Act, was not ultra vires. As it is however not necessary for us to give our decision on that question, in the case before us, we refrain from expressing any opinion on the same.

On the question of jurisdiction of the civil Court, we are clearly of opinion that there is nothing contained in Rule 22 (6) to which reference has been made above, which would lead to the conclusion that the civil Court had no jurisdiction to entertain the suit as framed. It would not be right to hold, on the definite allegations of fact made in the plaint before the Court, that there was any admission of fact which could oust such jurisdiction. The power to appoint the arbitrator was questioned by the plaintiffs, on averments of fact; the exercise of jurisdiction by the arbitrator was questioned; it was definitely alleged that the arbitrator had abused his powers; and that a decision was given by the arbitrator against the plaintiffs after following a procedure which was wholly irregular and illegal. In our judgment, the decision of the arbitrator, which it appears was affirmed on appeal to the Assistant Registrar, Co-operative Societies, could not be treated as conclusive between the parties concerned, in view of the allegation made in the plaint filed before the Subordinate Judge in the Court below; nor are we in a position to hold that on the allegations in the plaint the plaintiffs were debarred from asserting their rights before a Court of civil judicature. A question of jurisdiction was involved, on the facts stated in the plaint before the Court, and it was for the Court to decide whether the decision of the arbitrator given against the plaintiffs, the petitioners in this Court was one made with jurisdiction. An order if made by a person appointed as arbitrator, who could not be appointed such an arbitrator under the law : or an order made by such an arbitrator, in the abuse of the powers conferred upon him is a nullity, and cannot affect the rights and obligatiens of the parties. In the case before us, regard being had to the facts alleged in the plaint, the Court below has rightly held that the decision on the question of jurisdiction of the civil Court to entertain the suit, as raised by the defendants, petitioners in this Court, depended on the consideration of facts, and such decision could

only be given after evidence has been adduced by the parties. The suit as instituted by the plaintiffs was maintainable, and could not be thrown out at the present stage.

In view of the conclusion we have arrived at as mentioned above, this rule must be discharged, and the order of the Court below passed on 23rd January 1933, affirmed; and we direct accordingly. The petitioners are to pay the costs of the opposite parties in this rule; the hearing fee is assessed at two gold mohurs.

K.S. *Rule discharged.*

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MALLIK AND JACK, JJ.

Hafiz Mahammad Fateh Nasib—Petitioner.

v.

Aminuddin and *others*—Opposite Parties.

Civil Rule No. 1131 of 1932, Decided on 7th February 1933, from order of Offg. Frst Court Sub-Judge, 24-Parganas, D/- 16th August 1932.

Civil P. C. (1908), O. 33, R. 1—Suit instituted in ordinary way can be continued as pauper suit.

A Court has the power to allow a plaintiff to continue a suit instituted in the ordinary way, in forma pauperis : *A I R* 1932 *Cal* 685, *Expl* ; 2 *Cal* 130 ; 8 *Bom* 615 ; *A I R* 1933 *Cal* 238, *Rel on.* [P 25 C 2]

S. Suhrawardy, *Jahnabi Charan Das Gupta* and *Jogesh Chandra Sinha*—for Petitioner.

Nasim Ali and *Farhat Ali*—for Opposite Parties.

Mallik, J.— This Rule is directed against an order made by the learned First Subordinate Judge of the 24 Parganas on 16th August 1932, whereby he rejected an application of the petitioner plaintiff, for permission to continue a suit instituted by him in the ordinary way, in forma pauperis. What happened in the case was this: the petitioner brought a suit against the opposite parties for recovery of some property on the allegation that it was a part of a wakf estate of which he, the petitioner, was the Mutwalli. The suit was valued by him at Rs. 5,100 and the plaintiff petitioner paid ad-valorem court-fees on that sum. The defendants opposite parties pleaded inter alia that the property in suit had been under-valued. The question of valuation was heard by the learned Subordinate Judge on 6th July 1932 and the orders were reserved. On 8th July 1932 the petitioner made an application to continue his suit in forma pauperis. On 16th August 1932 the learned Judge refused the petitioner's application to continue the suit as a pauper without investigating the question whether the petitioner was a pauper or not, apparently on the ground that after the suit had been instituted in the ordinary way the Court had no powers to allow the plaintiff to continue it in forma pauperis, and by a subsequent order on the same day the learned Judge came to the conclusion that the suit had been undervalued, that the proper valuation was Rs. 20,000 and called upon the petitioner to deposit the deficit court-fees.

The only question that arises for our consideration in the present Rule is whether a Court can allow a suit after it has been instituted in the ordinary way, to be continued in forma pauperis. This question on the authority of some decisions of this Court as well as of the Bombay High Court should, in my opinion, be answered in the affirmative. In the case of *Nirmul Chandra* v. *Doyal Nath* (1) and in *Thompson* v. *The Calcutta Tramway Co. Ltd.* (2) it has been distinctly held that a Court has the power to allow a plaintiff to continue a suit instituted in the ordinary way in forma pauperis and the Bombay High Court also in *Revji Patil* v. *Sakaram* (3), has held the same view. The learned Subordinate Judge thought that the correctness of these decisions has been doubted in the case of *Mrs. Selima Sheehan* v. *Hafez Mahammad Fateh Nashib* (4), a decision to which one of us was a party. But *Selima Sheehan's* case is no authority for the proposition that a Court has got no powers to grant an application to continue a suit in forma pauperis. If the learned Judges in *Selima Sheehan's* case interfered with the order of the lower Court it was not so much on the ground that the Court had no authority to grant an application to continue a suit as a pauper, as on the ground that the Court should, under the provisions of O. 7, R. 11, Civil P. C., have rejected the plaint. Such a contingency

1. (1876) 2 Cal 130.
2. (1893) 20 Cal 319.
3. (1884) 8 Bom 615.
4. AIR 1932 Cal 685=139 I C 520.

however did not arise in the present case. In the present case the application to continue the suit in forma pauperis was rejected without any investigation of the question of the petitioner's pauperism and before the petitioner was actually called on to put in any deficit court-fees.

Mr. Nasim Ali for the opposite parties drew our attention to the fact that the cases of *Nirmal Chandra* v. *Doyal Nath* (1) and *Thompson* v. *Calcutta Tramway Co. Ltd.* (2) (supra) were cases on the Original Side of this Court, where the provisions of O. 7, R. 11 of the Code were not applicable. But these two cases as also the case of *Revaji Patil* v. *Sakharam* (3) (Supra), appear to me to have been decided in the way in which they were decided, on general principle—the general principle that where a Court can allow a plaintiff to sue as a pauper, it is only reasonable to hold that that Court has the power to allow him to continue a suit that has been instituted in the ordinary way in forma pauperis. The same view has been held in a very recent decision of this Court in *Surendra Chandra Roy* v. *Showdamini Roy* (5). For the reasons stated above I would make the Rule absolute with costs, hearing-fee one gold mohur. The order of the learned Subordinate Judge refusing to entertain the petitioner's application to continue the suit in forma pauperis is set aside, and it is directed that the learned Judge should proceed with the consideration of that application on its merits. In view of what we have got to decide in the preseut Rule it is not necessary for us to say anything as to what would be the effect of the provisions of R. 8, O. 33 of the Code, on the petitioner's application.

Jack, J.—I agree.

K.S. *Rule made absolute.*

5. AIR 1933 Cal 238=141 I C 135.

A. I. R. 1934 Calcutta 26

COSTELLO AND MALLIK, JJ.

(*Sree Sheikh*) *Arip*— Judgment-debtor —Petitioner.

v.

Brojendra Kishore Roy Chowdhury and *others*—Opposite Parties.

Civil Rule No. 546 of 1933, Decided on 30th August 1933, from order of Dist. Judge, Mymensingh, D/- 11th February 1933.

(a) Bengal Tenancy Act (1885), Ss. 174 (5) and 143 (2)—Appeal under S. 174 (5) can be disposed even without short judgment under Civil P. C. (1908), O. 41, R. 11.

In connexion with a matter in proceedings under S. 174, where there is an appeal under sub-S. (5) of that section it is competent to the appellate Court to dispose of the appeal in the manner provided for in R. 11, O. 41. It is not incumbent upon the Judge when dismissing the appeal under R. 11 to give a short judgment stating reasons for the action. [P 27 C 1]

(b) Bengal Tenancy Act (1885), S. 174 (5)—Appeal disposed of under Civil P. C., O. 41, R. 11—No revision lies — Civil P. C. (1908), S. 115—(*Obiter*).

It is doubtful whether S. 115, Civil P. C., applies to an appeal preferred under S. 174 (5), Ben. Ten. Act, but disposed of under O. 41, R. 11, Civil P. C. [P 27 C 1]

Surajit Chander Lahiri and *Ganga Prosad Bose*—for Petitioner.

Naresh Chunder Sen Gupta and *Bama Prosanna Sen Gupta*— for Opposite Parties.

Costello, J. — We see no reason for interfering with the decision of the Court below. The two points argued by Mr. Lahiri and argued if I may say so very ably and cogently are, first of all, that in connexion with a matter in proceedings under S. 174, Ben. Ten. Act, where there is an appeal under sub-S. (5) of that section it is not competent to the appellate Court to dispose of the appeal in the manner provided for in R. 11, O. 41, Civil P. C. Mr. Lahiri has based his argument with regard to that on the fact that there is a proviso to sub-S. (5), S. 174 which requires that before an appeal under that section can be admitted the unsuccessful assailant of a sale must deposit the amount recoverable in the execution proceeding. That procedure was adopted in the present instance and therefore, says Mr. Lahiri, the appellant had a right to insist on the appeal being heard at length. We need not however discuss this point at any length because it seems to us that the matter is concluded by the provisions of S. 143, sub-S. (2), Ben. Ten. Act, which provides in effect that unless specially excluded the Code of Civil Procedure shall apply to suits which are brought under the terms of the Bengal Tenancy Act. It is to be observed that in S. 174 itself certain provisions of the Code of Civil Procedure are excluded ; nothing is said as to O. 41 or any of the provisions of the Code dealing with the actual filing of suits or hearing of appeals.

The other point taken by Mr. Lahiri is that it was incumbent upon the learned Judge when dismissing the appeal under R. 11 to have given at least a short judgment stating reasons for his action ; and, in support of that, some authorities are cited before us. No doubt it would have been more satisfactory if in a case of this kind the learned Judge had said at any rate sufficient to indicate that he had properly applied his mind to the matters in issue between the parties; but we do not think that the authorities go further than to say that where the order summarily dismissing an appeal is itself subject to an appeal then the appellate Court below must give reasons for the judgment in order to enable the second Court of appeal to form some opinion as to whether that judgment is correct or not. In the present case the decision of the District Judge of Mymensingh is not subject to an appeal and that is why the matter comes before us in revision. It is extremely doubtful, in my opinion, whether S. 115, Civil P. C., applies at all to this application. Only a short time ago the Acting Chief Justice and myself gave a decision in connexion with a matter which was concerned with another part of S. 174 to the effect that it was not a matter subject to revision under S. 115. However, that is not a point with regard to which we need express any opinion. It is sufficient to say that having carefully weighed all the arguments put before us by Mr. Lahiri we are quite satisfied that there is nothing in this case which calls for intervention by this Court. The Rule is discharged with costs; hearing-fee two gold mohurs.

Mallik, J.—I agree.

R.K. *Rule discharged.*

A. I. R. 1934 Calcutta 27

MITTER AND M. C. GHOSE, JJ.

Sashi Bhusab Maity—Appellant.

v.

Fani Bhusan Bose and *others*—Respondents.

Appeal No. 273 of 1931, Decided on 7th March 1933, against order of Dist. Judge, Midnapore, D/- 22nd April 1931.

Provincial Insolvency Act (1920), S. 10—If there are prima facie grounds for believing that insolvent is unable to pay debts adjudication order should be passed — Court should not hold enquires whether debts are real or fraudulent.

If there are prima facie grounds for believing that the person who applies for adjudication is unable to pay his debts, the Court should not hold an inquiry for the purpose of determining whether some of the debts mentioned in his petition are real debts or whether there has been fraudulent concealment of his property or whether he has transferred his property benami to defraud his creditors. These are matters to be dealt with upon the debtor's application for his discharge. [P 28 C 1]

Brojolal Chakraburty, Khirode N. Bhuiya and *Dhirendra K. Roy*—for Appellant.

Sarat Chandra Bose, Sarat Chandra Jana and *Saroje Kumar Maity* — for Respondents.

Mitter, J. — This appeal is directed against an order of the District Judge of Midnapore, dated 22nd April 1931, refusing the application of one Sashi Bhusab Maity, now appellant before us, whereby he sought to be adjudicated an insolvent. The petition for insolvency was filed on 21st November 1930, and in the said petition it was stated that the debts of the petitioner were in excess of Rs. 500 and that the petitioner was unable to pay his debts. The applicant for insolvency gave his evidence in the case and he stated in Court that properties would be worth about Rs. 8,000 although in his petition he stated that he had assets to the extent of Rs. 4,608-8-0. The learned District Judge has noticed the circumstance, but he has really based his decision on the two transactions which he considers are merely colourable transactions and must be taken into account for the purpose of considering as to whether the assets of the petitioner are in excess of the amount of his debt. The first transaction is one which is referred to as a deed of dedication in favour of the family idol dated 14th July 1928, executed more than two years before the application for adjudication. He has also relied on the second transactions, namely, a potta executed by the appellant Sashi Bhusab Maity on a selami of Rs. 6,000 and that was in the year 1336 B. S., corresponding to some time in 1929.

It has been contended on behalf of the appellant by Mr. Brojolal Chakraburty that in arriving at a conclusion adverse to the petitioner, now appellant before us, the learned District Judge should not have relied on these prior

transactions and that was really a matter which should be considered at a later stage of the proceedings. On this point he has drawn our attention to a number of authorities both of this Court and of other Indian High Courts. The true legal position under the Provincial Insolvency Act of 1920 has been formulated in the very learned Tagore Law Lectures on Insolvency Lecture No. 5 at p. 142. The learned author points out this:

"If there are prima facie grounds for believing that he is unable to pay his debts, the Court should not hold an inquiry for the purpose of determining whether some of the debts mentioned in his petition are real debts or whether there has been fraudulent concealment of his property or whether he has transferred his property benami to defraud his creditors. These are matters to be dealt with upon the debtor's application for his discharge."

The learned author cites a number of authorities of the different High Courts of India in support of this view. We are of opinion that this contention of the learned advocate for the petitioner appellant is well founded and is supported by the authorities which have been cited in the Tagore Law Lectures. In this view we think that the learned District Judge was not justified in refusing the application of the petitioner appellant to be adjudicated an involvent. It appears also from the statements of some of the creditors themselves that the debts are in excess of what is stated in the petition for adjudication. As for instance reference may be made to the statement of objection of the creditor No. 10, Govinda Chandra Bhakta at p. 25 where he says that as payment was not made according to the terms of the solenama a sum of Rs. 2,075 had become due to the objector from the applicant. In those circumstances the creditor was entitled to get a sum of Rs. 2,075 without any deduction, whereas the debt is shown to be Rs. 600 odd. Similarly another creditor—creditor No. 11—Bepin Behari Bera at p. 24, para. 8 of the paper-book states that the applicant borrowed Rs. 476 by executing a hand note in favour of this objector on the 25th Baisakh 1336 B. S. and that the applicant fraudulently made a false statement that the said hand note was for Rs. 400. In these circumstances we are of opinion that a prima facie case has been made out on the evidence of the applicant which entitled him to an order of adjudication.

The result is that the judgment and order of the District Judge are set aside and we hold that the appellant is entitled to be adjudicated an insolvent. There will be no order as to costs.

M. C. Ghose, J.—I agree.

K.S. *Order set aside.*

A. I. R. 1934 Calcutta 28

GUHA AND BARTLEY, JJ.

Ayatulla and *another*—Defendants—Appellants.

v.

Nabin Chandra Das and *another*—Plaintiffs—Respondents.

Appeal No. 726 of 1931, Decided on 9th May 1933, from appellate decree of Fourth Court Addl. Sub-Judge, Sylhet, D/- 11th November 1930.

(a) Landlord and Tenant—Abandonment—Usufructuary mortgage by tenant—Tenant's complete cessation of possession—No arrangement of payment of rent—Abandonment is complete—Bengal Landlord and Tenant Procedure Act (8 of 1869), S. 52.

Where the tenants of the holdings have usufructuarily mortgaged and have ceased completely to possess the lands appertaining to the holdings, including the homestead plot without making arrangement for payment of rent payable in respect of the tenancies, there is complete abandonment by the tenants of the holdings. The landlord is in such a case, under the general law entitled to bring a suit for getting possession of the lands as appertaining to the tenancies which the tenants had ceased to possess and for which the tenants were not willing to pay rent. S. 52 is not applicable to such a case. [P 29 C 1, 2]

(b) Landlord and Tenant—Abandonment Whether usufructuary mortgage amounts to depends on particular facts.

Whether a usufructuary mortgage by a tenant amounts to abandonment of the holding depends upon the facts of the particular case before the Court. [P 30 C 1]

(c) Landlord and Tenant—Abandonment more than year prior to suit—Landlord is entitled to ejectment.

A landlord is entitled to assert right to recover possession of the land which has been abandoned by the tenants, more than a year before the date of the institution of the suit: *A I R* 1928 *Cal* 891, *Rel on.* [P 30 C 1]

Hemendra Kumar Das—for Appellants.

Gopal Chandra Das and *Nikunja Behari Roy*—for Respondents.

Judgment.—The plaintiffs in the suit out of which this appeal has arisen prayed for ejectment of the defendants on a declaration of their title to the lands in suit, which appertained to a tenancy which were admittedly non-

transferable holdings. The plaintiffs' claim in the suit was resisted by defendants 1 and 6 who filed separate written statements in the Court of first instance.

It may be mentioned that the plaintiffs' cause of action in the suit was based upon the allegation that the non-transferable holdings to which the lands in suit appertained were transferred by the tenant-defendants 5 and 6 to defendant 1 by a usufructuary mortgage-deed dated 1st May 1927. The suit was brought by the plaintiffs on 20th July 1928 on the ground that the original tenants, defendants 5 and 6, had abandoned the holdings. The material issue raised for determination in the suit was issue 2, "Have the jotes in question been abandoned by defendants 5 and 6? If so, can the plaintiffs get khas possession?" On this main question in controversy between the parties the Court of first instance came to a decision against the plaintiffs. According to the trial Court there was no abandonment of the holding by the tenants, defendants 5 and 6. The plaintiffs were not therefore entitled to possession and the suit was accordingly dismissed. On appeal by one of the plaintiffs the Additional Subordinate Judge, fourth Court, Sylhet, reversed the decision of the trial Court and passed a decree in favour of the plaintiffs entitling them to recover the lands in suit. On the findings of fact arrived at by the Court of appeal below, this appeal must be dismissed. The learned Subordinate Judge has definitely found as a fact that defendants 5 and 6, that is, the tenants of the holdings, had ceased completely to possess the lands appertaining to the holdings, including the homestead plot. The learned Judge in the Court of appeal below has further held that the original tenants did make no arrangement for payment of rent payable in respect of the tenancies.

The effect of the findings thus arrived at by the Court of appeal below was that there was complete abandonment by the tenants of the holdings, and that the plaintiffs' claim for possession could not be resisted by the defendants. It has however been argued by the learned advocate appearing for defendants 1 and 6, appellants in this Court, that the Court of appeal below should have held that under the provisions of Act 8 of 1869 applicable to the case, there was no right in the landlord to eject tenants on the ground of abandonment and that the right of the landlord was to proceed under S. 52 of the Act to eject the tenants for non-payment of rent. It is to be mentioned in this connexion that there was no question of non-payment of rent in the case before us. The question was, as has been discussed by the Courts below, whether the original tenants had ceased to possess the lands in suit appertaining to the tenancies held by the original tenants, defendants 5 and 6. The further question raised was "Did the original tenants cease to pay rent in respect of the land in suit?" The learned Subordinate Judge has come to a definite finding that the original tenants had given up possession of the lands in suit as appertaining to the tenancies which originally belonged to them. It has further been found that there was no arrangement made by the original tenants so far as the payment of rent in respect of the tenancies in question was concerned. Therefore it was not a case in which the landlord could seek to eject the original tenants on account of non-payment of rent; it was a case in which the lands in suit could be treated to have been completely abandoned by the tenants, that is to say, the lands were given up by the tenants who held the tenancies in question. Further, the original tenants had not made arrangements for payment of rent and the landlord was therefore under the general law entitled to bring a suit of the present description, for getting possession of the lands in suit as appertaining to the tenancies which the tenants had ceased to possess and for which the tenants were not willing to pay rent. S. 52, Act 8 of 1869 relates to ejectment of tenants on the ground of non-payment of rent. The cause of action in the suit was not, and could not, in the circumstances of the case, be non-payment of rent payable in respect of the tenancies by the tenants, but failure on the part of the tenants to make any arrangements for payment of rent—the tenants having abandoned the lands in suit altogether, they having ceased to have any connexion with the tenancies in question. The contention raised on behalf of the appellants as to the applicability or otherwise of Act 8 of 1869 must in our judgment be overruled.

The other point raised in support of the appeal to this Court is that in the case of a usufructuary mortgage of the description with which we are concerned in the present litigation, it could not be held that the tenants had abandoned the holding. The determination of that question must depend upon the facts of the particular case before the Court. In the present case the finding is quite definite that after the execution of the mortgage in favour of defendant 1 the tenants had ceased to be in possession of the land comprised in the tenancies, and it could not be said that the tenants had still subsisting in them such interest as might entitle the Court to come to the conclusion that the tenants were still exercising acts of possession in respect of the land comprised in the tenancies in question. Our attention has been drawn by the learned Advocate for the appellant to the decision in the case of *Aswini Kumar Dhupi* v. *Har Kumar Ghose* (1) in support of the proposition that some time must be allowed to the tenant before a suit for possession on the ground of abandonment by the tenant can be brought by the lordlord. In that particular case the learned Judges came to the conclusion that the suit was brought rather too hastily by the landlord. On the materials to which reference has been made by the learned Judge in the Court of appeal below it is impossible for us to hold that the plaintiffs landlords were not entitled to assert his right to recover possession of the land which had in this particular case been abandoned by the tenants, more than a year before the date of the institution of the suit. In view of the conclusion we have arrived at, we have no hesitation in agreeing with the decision and decree passed by the Court of appeal below in favour of the plaintiff in the suit. The appeal is dismissed with costs.

R.K. *Appeal dismissed.*

1. A I R 1923 Cal 891=114 I C 482.

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RANKIN, C. J. AND PEARSON, J.

Madan Mohan Dhur—Plaintiff—Appellant.

v.

Netai Gour Jew and *others* — Defendants—Respondents.

Appeal No. 74 of 1930, Decided on 22nd April 1931.

(a) Hindu Law—Religious endowment — Claimant to shebaity cannot set up any worshipper to litigate question of claimant's right.

A right to an office or a share in a hereditary office must be asserted by the person claiming it, and it is not open to any worshipper to assert such a right on behalf of another person. Hence a claimant to the shebaity cannot set up any worshipper to litigate the question of the claimant's right to shebaity: 29 *Mad* 283 (*P C*), *Relon*; *AIR* 1925 *P C* 139, *Dist.* [P 32 C 2]

(b) Practice—Court is under no obligation to discuss hypothetical questions.

It is in no way obligatory upon Courts to discuss purely hypothetical questions which may never arise. [P 33 C 1]

L. P. E. and *Pugh P. C. Bose* — for Appellant.

S. N. Banerjee (Sr.), *S. N. Banerjee (Jr.)*, *A. K. Roy*, *N. C. Chatterjee* and *P. N. Banerjee*—for Respondents.

U. C. Laha—for Administrator-General.

Rankin C. J.—The following genealogical tree shows the relationship of the parties in this case:

LUKHYNARAIN DHUR—KADAMONI
(died 26th March 1927)

Kartick (died 24-5-27)	Gonesh (deft. 7)	Ram Chunder (died 17-10-28)
Netai Chand (infant deft. 5)	Madan (plaintiff)	

Lal Behari, deft. 2.	Bou Behari (infant deft. 3).	Rash Behari (infant deft. 4).	Banku Behari (infant deft. 5).

Lukhynarain Dhur, the testator, died on 26th March 1927, leaving three sons of whom the eldest, Kartick, survived him only by a few months, dying on 24th May 1927, leaving Netai Chand, an infant, as his heir. The plaintiff Madan Mohan Dhur, is the son of the testator's second son, Gonesh (defendant 7). The testator's third son, Ram Chunder, died in October 1928 after the institution of the present suit on 21st August 1928. Ram Chunder left four sons of whom the eldest, Lal Behari, is a major, the other three being minors.

The testator's will, which was made on 18th November 1923, was the subject of certain probate proceedings in this Court instituted by Ram Chunder as the surviving executor. His brother Gonesh had filed a caveat. The probate proceeding was settled, Gonesh consenting to an order that the caveat be discharged and that probate of the will should issue. In

consideration that Ram Chunder agreed to pay Gonesh's costs. Gonesh undertook inter alia not to bring any further suit regarding the will. This was on 13th March 1928, and on 24th August following the present suit was begun by Gonesh's son Madan. It appears that immediately after the testator's death Gonesh transferred his interest in his father's estate to one Manick Lal Dutt and on 18th August 1928, that is immediately before the present suit, Manick Lal Dutt conveyed the interest of Gonesh to the plaintiff Madan.

The testator's will was very simple. He gave all his movable and immovable properties to his executors upon trust to convert the movable properties into money, and directed them to pay out of the income of his estate certain monthly sums during the lifetime of certain legatees. In this way he directed an expenditure of Rs. 180 per month distributed in varying sums between his wife, his eldest and youngest sons and his daughters. He also gave a monthly sum of Rs. 30 to Madan on certain terms. Subject to these payments, he gave the rest of his estate to his executors upon trust to pay the balance of the income to the shebaits for the time being of certain Thakurs established by the testators and he directed that after the death of all the legatees, the executors should make over the whole of the corpus and undrawn income of his estate to the shebait or shebaits for the time being. He dedicated his house for the location and use of the Thakurs and he appointed his sons Kartik and Ram Chunder to be the shebaits of the Thakurs, giving certain directions as to the line of succession to the shebaity. By the plaint in this suit, Madan sought to have a construction of the will and propounded several questions to the Court.

Upon Ram Chunder's death, the plaint was amended by substituting his sons in his place, and the Administrator-General of Bengal was added as executor. By his plaint Madan contended first of all that the trusts in favour of the idols were illusory and colourable and thus invalid, and that even if valid, they amount merely to a charge upon the properties for such small sum as is necessary to maintain the ordinary worship of the family deities. On this footing the plaintiff would be entitled to his father's one-third share in the bulk of the testator's properties, subject to the legacies. As regards the debutter created by the will, the plaintiff says that Ram Chunder, and after him his son, Lajbehari, acting as shebaits, had not been performing the sheba properly and that Ram Chunder had been misappropriating the funds of the endowment and had been illegally preventing the plaintiff from taking part in the worship of the duties. He alleged originally that Ram was unfit to be shebait and should be removed and upon Ram Chunder's death he alleged the same thing of Lalbehari. He further claimed that the devolution of the shebaity as laid down in the will was void and illegal with the result that upon the death of Kartick and Ram Chunder, the office of shebait belonged to all the heirs of the testator, of whom his father, Gonesh, was one. Accordingly he claimed that his father Gonesh should be appointed shebait.

At the trial, no evidence whatever was given in support of the attack made upon Ram Chunder or Lalbehari, either as regards misappaopriation of funds or as regards exclusion of the plaintiff from the worship, or as regards their unfitness to be shebaits. Nor was it even contended at the trial that the debutter was only illusory and colourable. Two points only were taken before the learned Judge and the same two have been taken before us. The first point arises upon Cl. 9 of the will and the question to be decided is whether this creates a mere charge upon the properties for the expenses of the worship with the result that, subject to this charge and subject to the legacies, the testator's property, other than the dwelling house, is undisposed of by the will and must go to the testator's heirs as upon an intestacy. It is contended for the defendants that the gift is an absolute gift to the Thakurs and that nothing is left undisposed of by the will.

The clause has been set out in the judgment of the learned Judge who has held that subject to the legacies the whole of the residue is given absolutely to the Thakurs and that what they took under the will is not the benefit of a mere charge upon the residue for the customary expenses of the family worship, but that they took the residue absolutely. In my opinion the learned Judge is right.

in his construction. The whole of the balance of the income is to be paid to the shebaits until the legacies have come to an end. And thereupon the direction is that the whole of the corpus and undrawn income is to go to the Thakurs. On this point the appeal fails. The second question arises upon Cl. 11 of the will.

Upon this it is contended that it is not possible in law to limit a hereditary office so that it shall descend in a manner unknown to the Hindu law, namely, to the person who at the time of each succession is the eldest male lineal descendant. The plaintiff before the learned Judge contended, as would appear from his judgment, that the directions in Cl. 11 should not take effect after the death of the testator's grandsons. Before us it was contended that the clause is good only in so far as it appoints Kartick and Ram Chunder to be shebaits in their own lifetime and that on the death of these two, it does not operate at all notwithstanding that grandsons were alive at the testator's death. That is to say, that at present the right to the shebaity is in all the heirs of the testator, including Gonesh and Lalbehari's younger brothers. Some interesting and difficult questions arise upon this contention, but the first question which arises is not less important than the others, namely, whether the Court at the suit of Madan will entertain a claim that Gonesh should be shebait.

Madan, during his father's lifetime, had no interest whatever in the shebaity and claims none by his plaint. Gonesh by his written statement, supports the claim that he should be made shebait, but brings no suit of his own to assert his right. Whether his undertaking of 13th March 1928 in the probate proceeding not to bring any further suit regarding the will would be effective to prevent Gonesh from bringing a suit of his own need not be considered. If it would, the existence of the undertaking is all the greater reason for not permitting a suit to be brought by his son on his behalf if the son has no right of his own to maintain the suit.

Before us Mr. Pugh for the appellant has contended that the plaintiff has no right to the shebaity, but that he, as a person interested in the worship, as a member of the family, is entitled to bring a suit to secure that another person who has a right to the shebaity should be put in possession of the office. In support of this contention he has referred us to the case of *Pramatha Nath Mullick* v. *Pradyumna Kumar Mullick* (1). The question in that case was whether a shebait should be allowed to remove the idol from the thakurbari to his own house. As this question affected the question of the location and worship of the deities, it was held by the Judicial Committee that all persons having a right to worship have an interest in the question and even the females of the family were held to have an interest, and indeed a special claim to protection seeing that they are excluded from the managership of the idols.

The question before us however is solely the question whether Gonesh, as heir, has any right to be shebait and whether he should be put in joint possession of the office with the other de-jure shebaits. In my judgment, the appellant's contention that he, in his mere capacity as a person with a right to worship the deities, can bring a suit to assert another person's claim to the shebaity is altogether unfounded. I know of no case which affirms or suggests any such doctrine. The doctrine moreover is, as a matter of practice, inconvenient to the point of absurdity. If it were once accepted, then no person claiming to be shebait would ever bring a suit in his own name. Such suits would almost invariably be brought in the name of some female of the family and the door would be opened wide to manifest abuse. If the worship is not properly conducted, if the funds of the endowment are not properly applied, the Courts are doubtless open to any worshipper as Lord Macnaghten intimated in the case of *Bamanathan Chetti* v. *Murugappa* (2). But a right to an office or a share in a hereditary office must be asserted by the person claiming it, and it is not open to any worshipper to assert such a right on behalf of another person. The joint holders of the office of shebait can make any proper arrangement which they may choose as bet-

1. A I R 1925 P C 139=87 I C 305=52 I A 245 =52 Cal 809 (P C).
2. (1906) 29 Mad 283=33 I A 139=16 M L J 265 (P C).

ween themselves for discharging the duties of management and conduct of the worship. The right of the shebait is a legal right; a partition may be obtained by a shebait to enable him to enjoy his right in severalty by a scheme for pallas or turns of worship. In my judgment the doctrine that a claimant to the shebaity can set up any worshipper to litigate the question of the claimant's right to the shebaity is a new doctrine and a bad doctrine.

At the hearing of this appeal it was intimated to us by the learned counsel for the appellant, and also by the learned counsel for Gonesh, that in order to enable the plaintiff to succeed, Gonesh would be willing to relinquish his right to the shebaity, with a view to giving the plaintiff a right to his father's place. This is entirely contrary to the form of the suit and no such relinquishment has yet taken place. These offers may therefore be ignored. At present there is no certainty that Madan, on any view, will ever become entitled to be shebait. There is no complaint before us on the part of Nitai Chand or on the part of Lalbehari's younger brothers. Lalbehari is, in any view, one of the shebaits. As the attack on the conduct of the endowment has so little in it that it was not even attempted at the trial, I am of opinion that it is in no way obligatory upon this Court to discuss purely hypothetical questions which may never arise; and that the learned Judge rightly refused to entertain this part of the plaintiff's case.

The argument for the plaintiff is not bettered by asking us to act on the analogy of a Hindu widow and the prospective reversioner. I do not quite know why the law as to a Hindu widow should be applied to a Dayabhaga father but in any case a suit by the prospective reversioner to put the Hindu widow into possession is not a very hopeful form of suit : neither is the Court obliged to entertain a suit by one reversioner against another to settle in the widow's lifetime their respective claims to the succession upon the hypothesis that both would survive the widow.

Complaint was made before us that the learned Judge had not properly exercised his discretion in making the plaintiff pay one set of costs to the defendants. In my judgment, in the circumstances of this case, the learned Judge exercised his discretion very reasonably. The appeal should be dismissed with costs to the Administrator-General and with one set of costs to be divided between Lalbehari and Nitai Chand.

Pearson, J.—I agree.

K.S. *Appeal dismissed.*

A. I. R. 1934 Calcutta 33

RANKIN, C. J. AND PEARSON, J.

Benarasidas Khandelwal and *another* —Appellants.

v.

Anriga Debi and *others*—Respondents.

Appeal No. 93 of 1932, Decided on 21st February 1933, against order of Ameer Ali, J., D/- 20th July 1932.

(a) Partnership—Suit for accounts by one partner — Plaintiff dead — Executors substituted—Suit referred to arbitration and almost finished—Administration suit in meantime filed—Order of administration passed—Partnership suit should not be stayed by adminis. tration order—Administration.

R brought a suit for partnership accounts. Subsequently *R* died and the executors of his estate were substituted in his place. The suit was referred to arbitration. The arbitrators made their award and a preliminary decree for partnership accounts was passed. The arbitrators then proceeded to take accounts and made an award regarding the monies payable by the partners reserving only one point regarding interest to the decision of umpire. In the meantime an order for administration of the estate of *R* was passed in an administration suit by one of the executors. Soon after this order, a decree in accordance with the final award was passed in the partnership account suit. A daughter of *R* then obtained an order from Court that the partnership suit should be stayed altogether and that all the creditors must come in and establish their rights in the administration suit:

Held: that stay of the partnership account suit should not have been granted. [P 36 C 2]

(b) Administration—Suit pending against estate should be transferred ordinarily to administration Judge unless such procedure would cause injustice and fail to produce economy in administration.

When an administration decree is made it is in the power of the Court to transfer to itself any suit that may be outstanding against the deceased's estate in most cases it is better to have all the questions affecting the estate decided in one suit than to have them decided in a number of suits. But where such procedure would work obvious injustice and fail altogether to produce economy in the administration it should not be followed. [P 35 C 1]

A. K. Roy and *N. C. Chatterjee*—for Appellants.

S. N. Banerjee and *Khaitan*—for Respondents.

Rankin, C. J.—This is an appeal from an order made on 20th July last by my learned brother Ameer Ali, J., restraining the appellants Benarasidas Khandelwal and another from further proceeding with suit No. 2075 of 1923. It appears that the appellants are persons who were doing certain business in partnership with one Raghumull Khandelwal and that Raghumull Khandelwal filed suit No. 2075 of 1923 on 12th July 1923 against the appellants asking for partnership accounts. It does not appear that there were any partnership assets which required winding up, but the claim was that a large sum of money would be due to Raghumull from the appellants if the accounts of the partnership transaction were properly taken. Some short time afterwards the appellants began a cross suit against Raghumull Khandelwal at Delhi, but this suit was stayed. Raghumull died on 5th September 1926. I may say here that there is very little doubt that Raghumull died a rich man. He had a number of large assets, but he appointed some five persons to be executors of his will. There was one Gopaldas Modi; there was one Dinonath; there was Hansraj his son-in-law, being the husband of his daughter Sm. Angira Debi; the widow had power to nominate an executor and she nominated herself; so that, at any rate, there were five executors to administer the estate.

In the partnership suit with which we are concerned the executors were substituted for the deceased plaintiff in October 1926 and the suit came on for hearing as long ago as 28th March 1930 when by an order of Buckland, J., all disputes including the question of costs were referred to the arbitration of Sir N. N. Sircar and two Attorneys. Sir N. N. Sircar was to be the umpire and, to begin with, he was to decide the terms of the partnership business and all the transactions entered into so that a preliminary decree for accounts might be properly framed, and if there was any difference in the accounts to be taken under the preliminary decree between the Attorneys acting as arbitrators, then also he was to act as umpire. First of all, with regard to the preliminary decree there was an award by Sir N. N. Sircar on 29th May 1930 which on 12th June 1930 was confirmed by the Court which made a preliminary decree in accordance therewith. So this partnership suit had proceeded to a decree for partnership account. Thereafter the arbitrators proceeded with the reference as to accounts. They differed on certain points; the matter was referred to the umpire and the umpire made a second award on 8th December 1930. That award was challenged by litigation on the part of the executors up till March 1931 unsuccessfully. In January 1931 there was a decree passed on the second award. In January 1932 the arbitrators disposed of all the questions remaining on the accounts except one, namely, what should be the basis of interest and the period for which interest was to be allowed.

I understand that to mean whether the partners who had moneys belonging to the partnership in their hands in the course of the business were to be charged with interest or not. On that point the arbitrators could not agree and they referred it to the decision of the umpire; but I am satisfied from their award that upon the decision of that matter a statement of account could be finally got out without difficulty. The arbitrators made their award stating the single matter which was to go to the umpire. In the meantime since September 1926 much had been happening to the estate of Raghumull, the deceased. Exactly how badly it was managed we do not at the moment know. There is no evidence before us that it will be insolvent in the sense that the creditors of this rich man will be unable to be paid; but the executors having fought considerably among themselves for a long time one is naturally inclined to think that in the end the estate will be insolvent. In any case on 2nd February 1932 a charge of mismanagement by one executor against another was sufficiently serious to result in a decree for administration against the estate. It was made in a suit brought by the executor Gopaldas Modi on 29th July 1929 and soon afterwards on 10th February 1932 judgment in accordance with the award of 29th January was passed in the partnership suit. It seems that the result of the decisions of the umpire and of the arbitrators has been adverse to Raghumull Khandelwal, the original plaintiff, and his estate; and it was getting manifest that his partners, the defendants, namely the appellants

before us, were going to get the better of the partnership account.

On 8th June a notice of motion was taken out by the daughter of Raghumull Khandelwal—Sm. Angira Debi—the wife of Hansraj—one of the persons who had consented to the order made by Buckland, J., on 28th March 1930, asking that the partnership suit should be stayed altogether. Apparently the intention of the motion was that stay should be made in the partnership suit in order that all the matters which had been litigated between Raghumull and his partners might be re-opened and dealt with in chambers in the course of the administration suit. The learned Judge has accepted that view and has made the order. He has felt considerable sympathy with the creditors by which he seems to mean the partners and he says that the partnership suit "has almost reached a conclusion and at the last" moment this application is made. The matter he says, is one of principle and the question is whether he ought to make an exception. Accordingly he says that the principle is that "once there is an effective administration decree all the creditors" must come in and establish their rights in the administration:

"They must do it much as in a liquidation or in an insolvency. Even if they have a decree they must prove it. If they have not got a decree they should not be allowed to proceed further towards a decree against the executors alone. Whatever steps they take after the preliminary administration decree should be taken vis a vis the body of creditors as a whole."

I am afraid I have been too many years in this Court and too few years in the Chancery Division to undertake to explain thoroughly the present Chancery practice in such matters; but it is evident enough that when an administration decree is made it is in the power of the Court to transfer to itself any suit that may be outstanding against the deceased's estate. It is further evident enough that in most cases it is better to have all the questions affecting the estate decided in one suit than to have them decided in a number of suits. Also under an administration decree it is possible to allow a creditor to take an affective part in disputing the claim of other persons claiming to be creditors. But if an illustration were required of circumstances in which the principle laid down by the learned Judge would work obvious injustice and fail altogether to produce economy in the administration I think the present case affords it. To begin with, this was not a creditor's suit at all. It was a suit filed by the testator himself, Raghumull Khandelwal. It is quite true that he has got the worst of it and that the appellants before us were more successful on the disputes about the account.

But this suit had been going on for three years before Raghumull died. At a time when, so far as we know, all these executors were working together they all agreed that the best way to take these partnership accounts was by a somewhat drastic arrangement for arbitration under Sch. 2, Civil P. C.—not that the suit was to be stayed but that it was to be proceeded with as regards details in a certain manner. They were all agreed about it. Then the main questions were decided by June 1930 and a preliminary decree disposed of several very important matters. Other important matters were decided and after litigation the umpire's second award was embodied in a decree in January 1931. Since then every matter except the short, and I presume, simple matter of interest in this account appears to have been cleared up; then because these executors had fought among themselves the Court has thought it necessary to protect the creditors by making an administration decree on 2nd February 1932 since when I may point out judgment has been obtained in the partnership suit on a certain number of points. It is said that the Court on principle has no option but to bring these proceedings to an end. The learned Judge has not even made it a condition of his order restraining the defendants from proceeding with the partnership suit that there should be in the administration suit no re-opening of any matter which had been decided in the partnership suit.

In my judgment, this is not to be regarded as a matter of principle but as a matter of practice and it is the duty of the Court to see which is the least expensive and the least unfair way of having the issues that remain to be decided in the partnership suit determined. I do not accept any rigid principle as laid down by the learned Judge although they are very good unless for practical

purposes. In the present case it seems to me entirely wrong that the benefit of the arbitration machinery should be taken away from these defendants—the partners of Raghumull whom he had sued. It seems to me that it leads to nothing but considerable and unnecessary expense, if any change is to be made in the method by which that partnership suit is to proceed. In my opinion the proper course for us is to allow that matter to come to conclusion very speedily. If judgment is obtained, the person obtaining the judgment would not be able to levy upon the assets in the hands of the Court in the administration suit without leave and without taking proper steps. There is no danger to be apprehended if the partnership suit were allowed to go on to judgment. It appears to me that that would be the proper order.

Considering whether the reasonable order would be to stay the partnership suit on terms, that none of the matters which were decided in the partnership suit should be re-opened, so that the little matter about interest should alone be determined in the administration suit, it seems to me that it is inconvenient and unnecessary to do so. In these circumstances, it appears to me that the appeal should be allowed, the order of the learned Judge should be set aside and that the appellants should have their costs in the appeal and also before the learned Judge.

Pearson, J.—I agree.

R.K. *Appeal allowed.*

A. I. R. 1934 Calcutta 36

C. C. GHOSE, AG. C. J. AND MALLIK, J.

Sarat Chandra Bhattacharjee—Defendant—Petitioner.

v.

Shambhu Nath Bhattacharjee and *others*—Opposite Parties.

Civil Revn. Petn. No. 340 of 1933, Decided on 8th June 1933, from decree of Sub-Judge, Dacca, D/- 18th February 1933.

Bengal Tenancy Act (8 of 1885), S. 26-E—Decree-holder purchasing occupancy holding in execution of decree and depositing landlord's fee—Withdrawal by landlord of landlord's fee pending proceedings to set aside sale taken by judgment-debtors—Notice of proceedings not given to landlord and sale set aside by compromise—Decree holder is not entitled to refund of landlord's fee.

Plaintiff obtained a decree against the opposite party and in execution of it he got their occupancy holding which was under the petitioner sold and he himself purchased the said occupancy holding. To complete the said sale and purchase, plaintiff deposited the landlord's fee under S. 26-E and the said sale was confirmed. Thereafter the opposite party filed an application for setting aside the sale on the usual grounds of material irregularity and fraud. This application was disposed of on a conditional compromise petition by which the plaintiff got almost double the decretal money and consented to the setting aside of the sale. No notice of this application was given to the petitioner nor was he made a party thereto; during the pendency of the application for setting aside the sale the petitioner withdrew the landlord's fee.

Held: that the plaintiff was not entitled to refund of the fee withdrawn by the petitioner.

[P 37 C 1]

Jogesh Chandra Roy, Prokash Chandra Pakrashi and *Prem Ranjan Roy Chaudhury*—for Petitioner.

Gopendra Nath Das — for Opposite Party.

Facts.—The plaintiff opposite party No. 1 instituted Suit No. 755 of 1932 in the Court of Small Causes, Dacca, against the petitioner as principal defendant and the opposite party Nos. 2—8 as proforma defendants for realisation of Rs. 326-2-9 as money due for return of landlords fee and damages.

The allegations in the plaint are that the plaintiff obtained a decree, in Suit No. 7646 of 1929 in the Court of the Munsiff, Dacca, against the opposite party Nos. 2—8, for about Rs. 71, in execution of which he got their occupancy holding which was under the petitioner at a yearly rent of Rupees 52-2-11 sold and he himself purchased the said occupancy holding, on 11th November 1930. To complete the said sale and purchase on 6th January 1931 the plaintiff deposited Rs. 260-15-0 as landlord's fee under S. 26-E, Ben. Ten. Act. The said sale was confirmed, on 10th January 1931 and delivery of possession was given through Court on 28th April 1931. Thereafter on 27th May 1931 the opposite party Nos 2—8 filed an application, under O. 21, R. 90, Civil P. C., for setting aside the sale on the usual grounds of material irregularity and fraud. This application was disposed of on a conditional compromise petition by which the plaintiff got almost double the decretal money and consented to the setting aside of the sale on 21st November 1931. No notice of this application

was given to defendant 1 nor he was made a party thereto.

During the pendency of the application for setting aside the sale defendant 1 withdrew the landlord's fee. Hence this present suit. The written statement of the petitioner contained inter alia that the petitioner not having been made a party to the application for setting aside the sale the suit ought to have been dismissed as no notice, as required by O. 21, R. 92 was served on him; that the order setting aside the sale was a nullity as it was made on a compromise and no fraud or irregularity was found; that the Court had no jurisdiction; that the suit was barred under the provisions of S. 144, Civil P. C.

All these contentions were rejected by the Subordinate Judge who decreed the suit on 18th February 1933 for Rs. 260-15-0 only. The present rule was obtained by defendant 1 in the High Court on the following amongst other grounds: Ground (12)—For that the application for setting aside the sale having been filed after more than four months and a half the Munsif could not entertain if and could not set aside the sale to the prejudice of the petitioner Ground(15)--For that the sale having been set aside by a private agreement between the decree-holder auction purchaser and the judgment debtors, the plaintiff, is not entitled to get refund of the landlord's fee from the landlord more specially as the decree-holder himself was the auction purchaser and agreed to set aside the sale on receipt of ample consideration.

Order.—We have examined the record in this case carefully and we have considered since yesterday with equal care the submissions made on behalf of the petitioner and also on behalf of the opposite party. The facts are not in dispute. The only question is whether the defendant, who is the petitioner before us, ought to be allowed to retain the landlord's fee which he has withdrawn from Court on the sale in question having taken place, or whether he ought to be made to refund the amount of the landlord's fee which he has withdrawn. In our opinion the defendant petitioner has made good Grounds Nos. 12 and 15 taken in his petition before us; and, in that view of the matter, the Rule must be made absolute, but having regard to the special circumstance of this case there will be no order for costs.

K.S. *Rule made absolute.*

A. I. R. 1934 Calcutta 37

GUHA AND BARTLEY, JJ.

Jogendra Krishna Banerjee and *others* —Appellants.

v.

Provash Chandra Laskar and *others*—Respondents.

Appeal No. 146 of 1931, Decided on 11th May 1933, from appellate decree of Special Judge, 24-Parganas, D/- 27th August 1930.

Bengal Tenancy Act (1885), S. 50 (2)—Variation of rent need not be substantial.

In order to rebut the presumption arising under S. 50 (2), the change of rent which may not be substantial may be sufficient: *AIR* 1926 *Cal* 1214, *Rel on.*

Held: on the facts that no new tenancy was created nor any variation of rent was proved.

[P 38 C 1]

Bimala Charan Deb and *Saroj Kumar Chatterjee*—for Appellants.

Judgment. — In this appeal by the landlords who had applied under S. 105, Ben. Ten. Act, for settlement of additional rent for additional area under S. 52 as also for enhancement of rent under S. 30 (b), Ben. Ten. Act, after correction of the entry in the finally published Record-of-rights that the tenants against whom the application under S. 105 was directed, were mokarari tenants, the main question for consideration was whether the presumption in favour of the tenants arising out of the settlement records as also the presumption under S. 50, Ben. Ten. Act, had or had not been rebutted. The landlords attempted to establish their case that the tenants were not mokarari tenants in various ways. It was sought to be established that there was variation in the rent payable in respect of the tenancy in question. The Assistant Settlement Officer and the Special Judge have considered the materials placed before the Court, bearing upon the question. There was apparently a change of 4 annas in the rent. The thokas produced by the landlords showed a variation from Rs. 122-10-1 to Rs. 122-14-1. It was not, however, possible for the Court below to hold that this variation was a real change in the rent or an apparent variation, nominal in character, due to an accidental or clerical error.

The Assistant Settlement Officer has pointed out that it was "very easy to confuse the Bengali figures 10 annas and 14 annas."

The thoka of the particular year in which the variation in rent was said to have been made, was not produced, and the oral evidence on the point has been disbelieved by the learned Special Judge in the Court of appeal below. In the above view of the case, so far as variation of rent was concerned, the conclusion arrived at by the Court below has to be accepted, that there was no variation of rent which could have the effect of displacing the presumption as to fixity of rent in favour of the tenants concerned. It may be mentioned in this connexion that if it were possible to hold, in the case before us, that there was a variation, the fact that the variation was slight, and was not a substantial one, would not have weighed with us in giving effect to the contention of the landlords appellants before us, on the question raised by them in this behalf. In order to rebut the presumption arising under S. 50 (2), Ben. Ten. Act, the change of rent which may not be substantial, may, in our opinion, be sufficient. As has been pointed out in the decision of this Court in the case of *Dearish* v. *Dwijadas Chakrabarty* (1) a change in the rent or the rate of rent may not be a substantial one; but it may all the same be a change as contemplated by S. 50 (2), Ben. Ten. Act. It is not, however, necessary to consider this aspect of the case, in view of the conclusion arrived at by the Court below, upon materials before it, which must be treated as a finding of fact binding on this Court.

A point was made with reference to two documents, one described as an istafanama and another a kabuliyat, that a new tenancy was created, to which presumption under S. 50, Ben. Ten. Act, was not applicable, and the tenants would not therefore, be held to be mokarari tenants, as recorded in the settlement records. On a careful consideration of these documents which have been placed before us and have been commented upon in detail, we are unable to hold that there was any surrender or a subsequent new settlement, or that the jama of Guru Prosad Naskar was created for the first time by the kabuliyat of the year 1268 B. S., as has been contended on behalf of the landlords-appellants before us. In regard to the variation in area, the Courts below have pointed out clearly that the materials placed before the Court did not at all establish the position that the landlords were entitled to any additional rent for excess area. The inception of the tenancy in question had not been traced, and the fact of measurement at the inception of the tenancy had not been proved. The learned Special Judge has pointed out in his judgment that the Chitta of 1268 B. S. produced by the landlords in support of this part of their case, did not show that the jama in respect of which additional rent was claimed, was included in the Chitta or that it was measured at the time when the chitta was prepared. For the reasons stated above, we are unable to give effect to any of the contentions advanced on behalf of the appellants in this appeal. The appeal is accordingly dismissed with costs, the decision of the Court below being

11th May 1933. — In view of the facts and circumstances brought to our notice today, it is necessary to vacate our order relating to costs in this appeal and in supersession of the order as to costs made in our judgment delivered on 10th April 1933 we direct that the appeal do stand dismissed without costs. There is no order as to costs as the respondent in the appeal did not enter appearance.

R.K. *Appeal dismissed.*

1. A I R 1926 Cal 1214=97 I C 1007.

A. I. R. 1934 Calcutta 38

MALLIK AND JACK, JJ.

Nalinikanta Pal, In re.

Civil Ref. No. 2 of 1933, Decided on 18th May 1933, from order of First Munsif, Bajitpur, D/- 26th January 1933.

Court-fees Act (7 of 1870), Sch. 1, Art. 12 (as amended by Bengal Act 2 of 1922, S. 8)— Certificate extending beyond Rs. 1,000— Duty is payable on total amount.

Though no duty is payable in respect of the certificate, where the amount is less than Rupees 1,000, duty should become payable on the total where the certificate is extended beyond Rupees 1,000, at the rate of 2 per cent on the original certificate and 3 per cent in respect of all the extensions. [P 39 C 1]

Saratchandra Basak and *Nasim Ali*—for Reference.

Gopalchandra Das and *Bhubanmohan Shaha*—for Applicant—Objector.

Order.—The Munsif, first Court, Bajitpur, has referred to this Court for a construction of Art. 12, Sch. 1, Court-fees Act 7 of 1870, as amended by S. 8, Bengal Court-fees Amendment Act of 1922. The article is as follows:

12. Certificate under the Succession Certificate Act 1889, (now replaced by Succession Act 39 of 1925).	When the amount of any debt specified in the certificate under S. 8 of the Act exceeds one thousand rupees on such amount up to ten thousand rupees.	Two per centum on such amount and three per centum on the amount of any debt to which the certificate is extended under S. 10 of the Act.

As the article originally stood, 2 per cent was payable on the amount of certificates for less than Rs. 1,000 and the intention of the legislature was evidently to exempt small inheritances from stamp duty. However as the article is now worded, where the original application is in respect of an amount less than Rupees 1,000 no duty is payable in respect of the certificate, even though it is extended subsequently to any extent, nor is any duty payable on the extended amounts. It is clear that this was never contemplated by the legislature and that where the certificate is extended beyond Rs. 1,000, duty should become payable. In the particular case, with which the Court had to deal, the first application was in respect of debts amounting to Rs. 853-9-6; subsequently there was a further application in respect of debts amounting to Rs. 146-5-0. Up to this point the total being under Rs. 1,000 no duty was payable. Subsequently however an extended certificate in respect of debts amounting to Rs. 300 was applied for. The total amount now exceeds Rs. 1,000 and therefore duty becomes payable on the total at the rate of 2 per cent on the original certificate and 3 per cent in respect of the extensions. Court-fees should be charged accordingly.

R.K. *Reference accepted,*

A. I. R. 1934 Calcutta 39

M. C. GHOSE, J.

Govinda Chandra Choudhury and *others*—Petitioners.

v.

Nagendra Kumar Choudhury—Opposite Party.

Civil Revn. No. 169 of 1933, Decided on 3rd May 1933, from order of Third Court Munsif, Patiya, D/- 19th November 1932.

(a) Bengal Tenancy Act (as amended by 4 of 1928), S. 26-F — Application within two months—Acceptance of transfer-fee by landlord is no bar for pre-emption—Only penalty is interest at 12-1/2 per cent on the fee—Pre-emption.

The landlord may accept the transfer-fee and afterwards apply for pre-emption provided that he does so within the period of two months of the date of the notice, and if he does accept the transfer-fee, he will, when his application is granted, return the transfer-fee together with interest at the rate of 12½ per cent per annum. There is no other penalty upon him for acceptance of the transfer-fee. [P 40 C 1]

(b) Pre-emption—Vendor is not necessary party.

The vendor is not necessarily a party to an application for pre-emption. [P 40 C 1]

Narendra Kumar Das—for Petitioner.

Charu Chandra Sen and *Sudhir Kumar Kastagir*—for Opposite Party.

Order.—This Rule was issued calling upon the opposite party to show cause why the order of the learned Munsif third Court at Patya, complained of in the petition, should not be set aside or why such other or further order should not be passed as to this Court may seem fit and proper. The matter relates to an application made under S. 26-F, Ben. Ten. Act for pre-emption of the lands of the schedule of the application. It appears that one Kamini Kumar Choudhury sold certain lands to the present petitioner by a Kobala dated 10th October 1932. The applicant who is one of the landlords applied within the period of two months after receiving the notice for pre-emption under S. 26-F, Ben. Ten. Act.

Thereupon the purchaser Gobinda Chandra Choudhury mentioned in the notice appeared and stated that he had two co-sharers in the purchase. The applicant made the two other persons parties to the case. The first point taken in appeal is that inasmuch as the landlord accepted the transfer-fee which was sent to him by post along with notice, he is precluded by that fact from his right of pre-emption. The learned ad

vocate has urged that previous to the enactment of S. 26-F, Ben. Ten. Act, in 1928, the Customary law in the country was that when a raiyat transferred his land to a purchaser, the landlord either accepted a selami from him and recognized him as a tenant or refused a selami and sued to eject him from the land, that the enactment of S. 26-F has not altered the principle of the previous law, namely, that the landlord must, as soon as he gets the notice, make his election whether he would accept the transfer-fee or refuse the same and apply for pre-emption. The argument however is not borne out by the wording of S. 26-F. That section plainly enacts that the landlord may apply for pre-emption within the space of two months of the service of notice. It does not say that the acceptance of the transfer-fee will destroy his right of pre-emption. Not only does the section not say anything of that kind but upon the reading of Cl. (3) of that section it appears that the landlord may accept the transfer-fee and afterwards apply for pre-emption provided that he does so within the period of two months of the date of the notice and if he does accept the transfer-fee, he will, when his application is granted, return the transfer-fee together with interest at the rate of 12½ per cent per annum. There is no other penalty upon him for acceptance of the transfer-fee.

The next point taken is that two of the purchasers were made parties more than two months after the notice. But that is because the notice, which the purchasers were bound by law to supply to the landlord, was a defective notice. They chose to name one person as the purchaser and not three persons. Their own omission to name all the purchasers cannot be set up as a ground for defeating the landlord's claim. He made his application within two months of the receipt of the notice and impleaded the purchaser whose name was on the notice. The last ground taken is that the vendor Kamini Kumar Choudhury should have been made a party to this application. The reply is that the section does not contemplate that the vendor should be made a party. In the result this application is rejected with costs; hearing-fee assessed at one gold mohur.

R.K. *Application rejected.*

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* A. I. R. 1934 Calcutta 40

MITTER AND HENDERSON, JJ.

Kunjamohan Shaha Poddar—Plaintiff—Appellant.

v.

Karunakanta Sen Chaudhuri—Defendant—Respondent.

Appeal No. 312 of 1929, Decided on 19th May 1933, from original decree of Second Sub-Judge, Dacca, D/- 12th August 1929.

*** Contract Act (1872), Ss. 60 and 61—Creditor can exercise right of appropriation until last moment.**

If the debtor does not make any appropriation at the time when he makes the payment, the right of appropriation devolves on the creditor and he may exercise that right until the very last moment and need not declare his intention in express terms : *A I R* 1914 *Bom* 290 ; *A I R* 1919 *Mad* 534; 1 *P L J* 474 and *A I R* 1926 *Lah* 183 and *A I R* 1933 *PC* 108, *Rel on* ; *A I R* 1915 *All* 378, *Diss from.* [P 42 C 2]

Atul Chandra Gupta, Bhagirathchandra Das and *Subodhchandra Ray Chaudhuri*—for Appellant.

Debprasad Ghosh—for Respondent.

Mitter, J.—The suit in which this appeal arises was brought by the plaintiff to enforce a mortgage security executed by Sreematee Bangabasinee Chaudhuranee, Mahananda Sen and Karunakanta Sen (defendants 1, 2 and 3) on 25th Jaistha 1319, corresponding to 17th June 1912. This suit was tried along with another suit brought by the same plaintiff to enforce a mortgage bond said to to have been executed on 14th Sraban 1321 B. S., corresponding to 30th July 1914, by the first two defendants in the present suit, namely, Bangabasinee and Mahananda. The suit in which this appeal arises was numbered as Suit No. 101 of 1922 of the Court of the Subordinate Judge of Dacca. The suit in the later mortgage was numbered as Suit No. 100 of 1922. The present suit was decreed, ex parte against defendant 3 and on contest against defendants 1 and 2, on 29th January 1924. It may be mentioned here that defendant 1 is the mother and defendant 2 is the brother of defendant 3. Defendant 3 applied to set aside the ex parte decree and the decree was set aside so far as he was concerned. The suit proceeded to trial against defendant 3.

The defences of defendant 3 were, amongst others, (1) that he was a minor at the date of the execution of the bond and is not bound by the mortgage bond

in suit; (2) that the plaintiff has on receipt of a total sum of Rs. 9,000, after remitting some amount from the amount due on the mortgage bond in suit and other bonds, according to an amicable adjustment, admitted that his dues in respect of bonds in suit were all satisfied; and that, out of the said amount fixed on amicable settlement, defendant 2 paid a total sum of Rs. 6,258 within the period commencing from the month of Kartik up to 10th Magh 1326 B. S., by settling some lands owned and possessed by defendant 3 and by selling some properties to one Anandamayee Gupta; in other words, the defendant contended that the mortgage bond had been satisfied by adjustment under the amicable arragement. On the question of minority, the Subordinate Judge of Dacca has held against the defendant; on the question of the adjustment, the Subordinate Judge has found that the defendant has paid the sum of Rs. 5,218 to the plaintiff and the plaintiff was bound to appropriate the sum of Rs. 3,468 out of that sum towards the mortgage bond in suit and if he had done so the mortgage bond in suit (Ex. 1) must be held to be satisfied. He has come to the conclusion that plaintiff was not justified in appropriating the sum of Rs. 3,468 towards other debts owed only by defendants 1 and 2 and not by defendant 3, and in this view the Subordinate Judge is of opinion that defendant 3 is not liable. The Subordinate Judge below has also rested his decision on a case not raised by the pleadings and on which no issue was joined and has found that the sum due under the mortgage bond in suit was included in the sum of Rs. 3,000 for which the later mortgage bond (Ex. 1-A) was taken. On these findings, he has dismissed plaintiff's suit as against defendant 3. Defendants 4 to 7 have been impleaded, as they are said to be purchasers of portions of the equity of redemption. The result is that the plaintiff's suit has been dismissed as against defendant 3 and it has been directed that the preliminary decree passed on 29th January 1924, against the remaining defendants be made absolute. The present appeal has accordingly, been brought by the plaintiff against the decree dismissing his claim as against defendant 3.

The appellant has challenged the decree of the Court below on two grounds : In the first place, he contends that in reaching the conclusion that the mortgage bond in suit has been extinguished by the mortgage of 30th July 1914 (Ex. 1-A), the Subordinate Judge has made a new case for the defendant. It is pointed out that in para. 9 of the writen statement, it was admitted that different sums were received for the mortgage bond in suit and for the other bonds. Indeed it is said that there is no suggestion anywhere in the written statement that the consideration of the second mortgage was in part the sum borrowed on the mortgage bond in suit. Accordingly, no issue was joined on the point. The Subordinate Judge has really rested his decision on this part of the case on a statement of plaintiff's witness Rajmohan Dutta made in the course of his cross-examination by defendant 3's pleader that the sum due under the mortgage bond in suit was also included in the sum of Rs. 3,000 for which bond (Ex. 1-A) 1-A) was taken. The suggestion of the plaintiff is that this statement must have been made through inadvertence and it seems to us likely to be so, seeing that it was nobody's case that the amount due on the mortgage bond in suit formed the consideration for the later mortgage (Ex. 1-A). It is also to be noticed that defendant 3 is no party to the second mortgage bond; on the other hand, the defendant, in his examination-in-chief, said that

> " except the debt due under the mortgage bond, Ex. 1, he was not liable to the plaintiff for any other debt either before or after the said mortgage bond, Ex. 1. I never took the liability for any debt on behalf of my mother and elder brother Mahananda Sen."

It seems to us therefore that the Court below has made a new case for the parties not warranted by the pleadings and evidence and, in these circumstances, we are unable to accede to the contention of the learned advocate for the respondents that the case should be remanded for further elucidation of this aspect of the case. If there was any truth in this new case, namely, that the first mortgage bond was merged in the second, one would have expected a recital of this circumstance in the second bond. It is said that defendant 3 was not a party to the second mortgage and is not respon-

sible for any statement in the later bond (Ex. 1-A). That may be so, but his mother and brother were parties to the same and it is not likely that they should omit mention of such an important fact which would relieve them from liability under the first mortgage, i.e., the one in suit. The second contention of the appellant is that the Subordinate Judge was clearly in error in holding that the sum of Rs. 3,468 must have been meant to be appropriated towards the debt covered by the mortgage in suit, as the sum was realised from premiums obtained from tenants to whom the mortgage properties were leased out with the consent of the mortgagee and from the sale-proceeds of one the properties mortgaged to Anandamayee—properties which were the joint properties of all defendants 1, 2 and 3. It is argued that it is common ground that this payment was not made by defendant 3 and it was open to the creditor to appropriate, at his election, the sum towards any debt due to the piaintiffs from defendants 1 and 2. Defendant 3 did not personally make the payments.

On the other hand, it appears from the deed of sale by defendants 1, 2 and 3 in favour of Anandamayee for Rs. 1,850 that the money was needed to pay off the second mortgage of 14th Sraban 1321 : (see Ex. 2, p. 170, part 2). The fact that the plaintiff mortgagee was aware that the sum of Rs. 5,218 made up of Rupees 3,468 and Rs. 1,850 was raised out of the joint properties of defendants 1, 2 and 3 is not a circumstance implying that the payment is to be applied to the discharge of the debt which defendants 1, 2 and 3 owed to the plaintiff within the meaning of S. 59, Contract Act. Another reason given by the Subordinate Judge for holding that the sum of Rs. 3,468 should have been appropriated towards the debt due under the mortgage bond in suit is that the sum of Rs. 3,468 was actually received by the plaintiff on 25th and 29th Kartik 1326, B.S. and was entered as amanat jama by the plaintiff in his account book and that, on 30th Agrahayan 1326, the amount was credited on different heads and the plaintiff was not justified under the law to keep the matter in abeyance so long but he ought to have appropriated the sum then and there to proper heads under Ss. 60 and 61, Contract Act, and in support of this view the Subordinate Judge has referred to a case of the Allahabad High Court, *Kundan Lal* v. *Jagannath* (1). It is contended for the appellant that this view is wrong. It seems to us that this contention must prevail. It is now well established that if the debtor does not make any appropriation at the time when he makes the payment, the right of appropriation devolves on the creditor and he may exercise that right until the very last moment and need not declare his intention in express terms : see the observations of Lord Macnaghten in *Cory Brothers & Co.* v. *Owners of Turkish Steamship Mecca* (2).

This is no doubt the rule of English law and it was assumed to be the law under the Contract Act by the High Courts of Bombay, Madras and Patna : *S. Amerchand & Co.* v. *Ramdas Vithaldas* (3), *Munisami Mudali* v. *Perumal Mudaly* (4) and *Bishun Perkash Narain Singh* v. *Md. Siddique* (5). The High Court of Lahore has taken the same view in a recent case—see *Relu Mal* v. *Ahmad* (6). The Allahabad High Court has however held that an appropriation of payment by the creditor must be made at the time of receiving the money and that he cannot exercise the right of appropriation at the last moment, *Kundan Lal* v. *Jagannath* (1). But as has been pointed out by Sir Frederick Pollock and the Rt. Hon'ble Sir Dinshaw Mulla in their commentary on the Contract Act, the view taken by the Allahabad High Court is an arbitrary speculation and is erroneous. It seems to us there is nothing in S. 61, Contract Act which is contrary to the English law on the subject; on the other hand S. 61 is in conformity with the English law and where the creditor does not make any appropriation S. 61 provides the rule for the guidance of the Courts. We are of opinion that it was open to the plaintiff to appropriate the sum of Rs. 3,468 towards the payment of the debt due to him from defendants 1 and 2. The Allahabad view can no longer be maintained in view of the recent decision of the Judicial Committee in the case of *Commissioner of Income-tax, Bihar and*

1. AIR 1915 All 378=30 I C 92=37 All 649.
2. (1897) A C 286=66 L J P C 86=76 L T 579=45 W R 657=8 Asp M C 266.
3. AIR 1914 Bom 290=21 I C 343=38 Bom 255.
4. AIR 1919 Mad 534=52 I C 950.
5. (1916) 1 Pat L J 474=35 I C 375.
6. AIR 1926 Lah 183=92 I C 947=7 Lah 17.

Orissa v. *Kameshwar Singh* (7). In our opinion, the Subordinate Judge is wrong on both the points. This appeal must be allowed. The judgment and decree of the Subordinate Judge are set aside and plaintiff's suit is decreed against defendant 3 also. If the amount claimed with interest is not paid within three months from this date, the mortgaged properties will be sold. The entire decretal amount will carry interest at 6 per cent per annum from this date till realization. The appellants are entitled to costs in both the Courts and this is to be added to the mortgage money.

Henderson, J.—I agree. Neither of the defences, on which the learned Subordinate Judge dismissed the suit, had been taken by the defendant himself.

R.K. *Appeal allowed.*

7. AIR 1933 P C 103=142 I C 437=60 I A 146 =12 Pat 318 (PC).

A. I. R. 1934 Calcutta 43

MALLIK AND JACK, JJ.

Mohinimohan Shaha—Petitioner.

v.

Binodebihari Shaha— Opposite Party.

Civil Revn. No. 1169 of 1932, Decided on 1st June 1933, against order of Munsif, Lakshmipur, D/- 14th July 1932.

Bengal Tenancy Act (1885), Ss. 66(2) and 173 (3) — Non-transferable under-raiyati holding—Mortgagee has no locus standi to deposit money in Court to stay execution on ejectment decree.

The mortgagee of a non-transferable under-raiyati holding has no locus standi to deposit money under S. 66, Cl. (2) in order to stay execution of a decree for ejectment on the ground of non-payment of arrears of rent, as a tender cannot be made by any person other than the tenant himself or some one on his behalf. If it was the intention of the legislature to allow the mortgagee of an under-raiyati holding to make a tender under S. 66, Cl. (2) one would expect in the section a provision similar to the provision in S. 170, sub-S. (3): *AIR* 1927 *Cal* 752; *AIR* 1918 *Cal* 132; *AIR* 1929 *Cal* 572, *Foll.*, *AIR* 1919 *Cal* 195 and (1883) *Marsh* 471, *Diss from.*; *AIR* 1929 *Cal* 133, *not Foll.* [P 43 C 2

Bajendrachandra Guha — for Petitioner.

Atulchandra Gupta, and *Nagendra Chandra Chaudhuri*—for Opposite Party.

Mallik, J.—The main question that arises for consideration in this rule is whether the mortgagee of a non-transferable under-raiyati holding has any locus standi to deposit money under S. 66, Cl. (2), Ben. Ten. Act, in order to stay execution of a decree for ejectment on the ground of non-payment of arrears of rent. What happened in the case was this:—The plaintiffs filed a suit against the defendant, an under-raiyat, for recovery of arrears of rent and obtained a compromise decree, which laid down that in default of payment of a certain portion of the decretal money within a specified time, the defendant would be ejected from the holding. One Mohinimohan Shaha, a mortgagee of the under-raiyati holding, offered to deposit the money, but was not allowed to do so. It was contended on his behalf that Mohinimohan Shaha, the mortgagee, had a locus standi to deposit the money and in support of this contention reliance was placed on the decisions in the case of *Kali Kishore Das* v. *Gopal Ram* (1) and in the case of *Radamohan Mundul* v. *Buckshee Begum* (2), as also in the case of *Sailaja Sundari Rai* v. *Surja Kanta* (3). The case of *Sailaja Sundari Rai* v. *Surja Kanta* (3) is a decision of a single sitting Judge and as regards the cases of *Kali Kishore Das* v. *Gopal Ram Shaha* (1) and *Radamohun Mundul* v. *Buckshee Begum* (2), both were considered and dissented from in an elaborate judgment in the case of *Baneswar Singh* v. *Abdul Hassan* (4), where it was held that a tender cannot be made by any person other than the tenant himself or some one on his behalf. To the same effect are the decisions in the case of *Brojendra Nath Mitra* v. *Arman Sheikh* (5) and the recent case of *Raj Chandra Datta* v. *Habij Md.* (6), to which one of us was a party.

As pointed out in the case of *Raj Chandra Datta* v. *Habij Md.* (6), if it was the intention of the legislature to allow the mortgagee of an under-raiyati holding to make a tender under S. 66, Cl. (2), Ben. Ten. Act, one would expect in the section a provision similar to the provision in S. 170, sub-S. (3). On the authority of the decision in *Brojendra Nath Mitra* v. *Arman Sheikh* (5) and *Baneswar Singh* v. *Abdul Hassan* (4) and *Raj Chandra Datta* v. *Habij Md.* (6), I would hold that the petitioner mortgagee had no locus standi to deposit the money and that being so, I would dis-

1. AIR 1919 Cal 195=49 I C 766.
2. (1863) Marsh 471=2 Hay 595.
3. AIR 1929 Cal 133=117 I C 697.
4. AIR 1927 Cal 752=104 I C 180.
5. AIR 1918 Cal 132=44 I C 977.
6. AIR 1929 Cal 572=123 I C 447.

charge the rule with costs, hearing fee being assessed at one gold mohur.

Jack, J.—I agree.

R.K. *Rule discharged.*

A. I. R. 1934 Calcutta 44

C. C. GHOSE, AG. C. J. AND
S. K. GHOSE, J.

Arun Chandra Sinha Bahadur and *another*—Plaintiffs—Appellants.

v.

Sarojit Sen Gupta and *others*—Defendants—Respondents.

Letters Patent Appeal No. 4 of 1932, Decided on 15th May 1933, against appellate decree of Patterson, J., Calcutta D/- 13th January 1932, in Appeal No. 1202 of 1929.

(a) Patni Regulation (1819), S. 11—Sale of Patni taluq for arrears of rent—Under lease is not ipso facto void but only voidable.

On the sale of a patni taluk for arrears of rent an under-lease is not void ipso facto by the sale, but is only voidable: *Case law discussed.* [P 48 C 1 2]

(b) Patni Regulation (1819), S. 11—Sale of Patni taluq for arrears of rent—Suit by purchaser for rent—Howladar made defendant—Suit is effective election by purchaser to annul howla.

In a suit for rent by the purchaser of a patni taluq in sale for arrears of rent, the howladars were made defendants and a decree was prayed against the tenants on the allegation that the howla was void.

Held: that the suit was an effective election on the part of the purchaser to annul the howla and the annulment could only take effect from date of institution of suit: 37 *Cal* 559 and 20 *I C* 654, *Ref.* [P 48 C 1]

Panchanan Ghose and *Durgadas Roy*—for Appellants.

Bejoy Kumar Bhattacharjee, *Bireswar Bagchi*, *Jatindra Mohan Choudhury*, *Jatindra Nath Sanyal* and *Profulla Chandra Nag*—for Respondents.

Judgment.—This is a Letters Patent appeal from the decision of our learned brother Patterson, J., in a suit for recovery of arrears of rent which was brought under the following circumstances: A putni tenure called putni taluk Lakshmi Narayan Bakshi was sold in auction for arrears of rent under Regn. 8 of 1819 on the 1st of Agrahayan 1330 B. S., the auction-purchasers being the plaintiffs who are themselves the zamindars. Under this putni there is an under tenure called a howla which was held by one Rajkumar Sen, the predecessor-in-interest of defendants 3 to 8 and under them defendants 1 and 2 are the tenants in possession as raiyats. It has been found that the greater part of the land of the howla has been diluviated and that only the land comprising the holding of the tenants defendants has remained intact. The plaintiffs brought the present suit for recovery of arrears of rent in respect of the raiyati holding for the period 1328—1331 B. S. They contend that the howla of defendants 3 to 8 has been annulled by the sale of the putni taluk held under Regn. 8 of 1819. The suit was contested by one of the howladar, namely, defendant 5. His defence was that there had been no annulment of the howla by the aforesaid putni sale and that on the other hand the plaintiffs elected after the auction-purchase to treat the howla as subsisting. On these pleadings the point that arose for determination at the trial was:

"Has the intermediate howla tenure of the proforma defendants been annulled? Are the plaintiffs entitled to recover rent from the tenants defendants?"

The learned Munsif did not go into the question whether the howla was void by reason of the aforesaid putni sale or whether it was only voidable by reason of that sale. He apparently took the view that the howla was only voidable and he held upon the evidence that the plaintiffs had failed to prove that they had taken any steps to avoid it. In that view he held that the plaintiffs were not entitled to recover rent directly from the tenants defendants and so he dismissed the suit. On appeal the learned Judge also did not go into the question whether the effect of the putni sale was to render the howla ipso facto void, but he took the view that the suit itself was sufficient evidence of the intention on the part of the auction-purchasers zamindars to annul the under-tenure and he held that the under-tenure had been annulled on the basis of the present suit. In that view he allowed the appeal of the plaintiffs and decreed the suit as against defendants 1 and 2. Therefrom the defendant 5 preferred a second appeal and it was heard by Patterson, J. The main question that was argued before Patterson, J., was whether the effect of the putni sale was to render the howla ipso facto void as from the date of the sale or whether the effect was only to render the howla voidable at the option of the auction-pur-

chasers. The learned Judge upon a consideration of the case law on the point has held that the effect of the putni sale was to render the howla voidable; but not ipso facto void, and that having regard to the findings of the Courts below the howla was still subsisting, at any rate up to the date of the institution of the suit. As to the view taken by the lower appellate Court namely, that the howla should be treated as having been annulled by the institution of the suit, Patterson, J., held that such annulment could not possibly have retrospective effect as regards the liability of the tenants to pay rent to the zamindars for the period anterior to the suit.

In this Letters Patent appeal it is contended, first, that the view of law taken by Patterson, J., is not correct and that the effect of the putni sale was to render the howla ipso facto void and not merely voidable; and, secondly, that conceding that the effect was to render the howla only voidable it must be treated as annulled by reason of the institution of the suit as from the date of the putni sale. The effect of a sale of a putni taluk for arrears of rent held under Regn. 8 of 1819 is described in S. 2 of that Regulation. In this appeal the argument at the Bar has proceeded on the assumption that the howla in question is covered by Cl. 2, S. 2 and the argument in support of the appeal is that the terms of Cl. 2 bear out the contention that the legal effect of the putni sale is to make the under-tenure void without any further action on the part of the auction-purchasers. In order to consider this argument properly it will be necessary to look to other parts of the Regulation. The preamble explains the intent of the Regulation and among other things it recites as follows:

"It has accordingly been deemed necessary to regulate and define the value of the property given and acquired on the creation of a putni taluq as above described, also to declare the legality of the practice of under letting in the manner in which it was been exercised by patnidars and others, establishing at the same time such provisions as have appeared calculated to protect the under lessee from any collusion of his immediate superior with the zamindar, or other, for his ruin as well as to secure the just rights of the zamindar on the sale of any tenure under the stipulations of the original engagements entered into with him."

Section 3 is divided into three clauses; by Cl. 1 patni tenures are declared valid, transferable and answerable for debt, by Cl. 2 the patnidars are declared to have a right of under letting and by Cl. 3 putni tenures are declared to be not voidable for arrears of rent but it is prescribed 'that the tenures shall be brought to sale by public auction. To Cl. 2 which is material for our purpose there is the following proviso:

"Provided, however, that no such engagements shall operate to the prejudice of the right of the zamindar to hold the superior tenure, answerable for any arrear of his rent in the state in which he granted it, and free of all incumbrances resulting from the act of his tenant."

This proviso states in effect that so far as engagements are concerned they are not to operate to the prejudice of the zamindars and that so far as incumbrances are concerned the zamindars have the right to hold the superior tenure free of all incumbrances. There is thus a differentiation as between engagements and incumbrances. As regards inferior tenures further provisions are made in their favour by S. 4, while by Ss. 5, 6 and 7 the interests of zamindars are safeguarded. By S. 8 zamindars are given the right to apply for periodical sales and this and the following S. 9 and 10 also provide for the procedure. What will be the effect of the sale on the engagements, incumbrances, and under-tenures is laid down in S 2. By Cl. 1 of this section it is provided that the tenure is to be sold "free of all incumbrances" by the act of the defaulting proprietor. As a corollary it is further laid down that no transfer or mortgage or other limited assignment shall be permitted to bar the indefeasible right of the zamindar to hold the tenure in the state in which he created it. By Cl. 2 it is provided that no under leases shall stand after sale and the provisions are in these terms:

"On sale of a taluk for arrears, all leases originating with the holder of the former tenure, if creative of a middle interest between the resident cultivators and the late proprietor, must be considered to be cancelled, except the authority to grant them should have been specially transferred; the possessors of such interests must consequently lose the right to hold possession of the land, and to collect the rents of the raiyats; this having been enjoyed merely in consequence of the defaulter's 'assignment of a certain portion of his own interest the whole of which was liable for the rent."

By Cl. 3 there is an exception made in favour of bona fide engagements with raiyats. It is noteworthy that that S. 13 makes a further provision in favour of taluqdars of the second degree, inasmuch as they are given an opportunity to save the tenures from sale by making a deposit, and certain further provisions are made so that the amount so deposited may be accounted for to their benefit. S. 15 prescribes the procedure for delivery of possession to the purchaser. There is no mention among other things of notice to the raiyats and others to attend and pay their rents to him. In case of opposition from holders of tenures and others the new purchaser may take the aid of the Court and the police in obtaining possession and a proclamation is to issue.

In the present case the finding of fact is that the plaintiffs did not take any steps to assert their right to possession after the purchase of the taluq, that they failed to prove their allegation that proclamation was issued intimating that all intermediate tenures were annulled, that on the contrary they allowed the defendants' howla to be recorded in the Record of Rights which was finally published subsequent to their auction purchase, that they allowed the rents of the holding for full eight years to get barred by limitation, and that they only brought the present suit about seven months before the expiry of 12 years from the date of the auction purchase. It is however the argument in support of this appeal that by reason of the wording of Cl. 2, S. 2 the defendants' howla is void in spite of this inaction on the part of the plaintiffs. S. 2 in its terms deals separately with incumbrances and under leases. As regards incumbrances the provision is that the tenure is to be sold "free of incumbrances." As regards under leases the provision is that the under leases "must be considered to be cancelled." The whole argument in support of the appeal is that the sense of the latter provision is that in the case of an under-lease also the tenure is to be sold free of the under-lease. If that were so, it is difficult to see why there is a differentiation made between incumbrances and under-leases. If the effect of the sale were to be the same in each case the differentiation would be unnecessary and meaningless. On the other hand, reading the regulation as a whole and untrammelled by case law, one may say that it is within the policy of the regulation to make some provision for the protection of the putnidar and also of those to whom he has underlet, the right to underlet being expressly declared, provided always that the interests of the zamindar are not jeopardised. Incumbrances may be improvident and, more often than not, may be derogatory to the value of the tenure. Under-leases, on the other hand, may be perfectly prudent and reasonable investments. That may explain why incumbrances should be absolutely void and under-leases only voidable on the sale of a tenure.

A relevant authority is furnished by the case of *Ranee Sarno Moyee* v. *Maharaja Sattees Chunder* (1). In that case the decision was based upon Reg. 44 of 1793 and on that ground it is sought to be distinguished from the present case. But S. 5 of that regulation, upon which in particular the decision of that case turned has some bearing on the present case, and also the general principles which were laid down by their Lordships must apply and have been applied in other cases. In S. 5 the words are no less emphatic, inasmuch as it provides that when a zamindari is sold at a public sale for discharge of arrears due from the proprietors to the Government

> "all engagements which such proprietors shall have contracted with dependent Talukdars whose 'taluks may be situated in the lands sold, as also all leases to under farmers and pottahs to raiyats (with the exception of the engagements, pottahs and leases spceified in Ss. 7 and 8 shall stand cancelled from the day of sale, and the purchaser or purchasers of the lands shall be at liberty to collect from such dependent Talukdars, and from the raiyats or cultivators of the lands let in farm, and the lands not farmed, whatever the former proprietor would have been entitled to demand according to the established usages and rates of the parganna or district in which such lands may be situated had the engagements so cancelled never existed."

Inspite of the aforesaid provision that the engagements were to stand cancelled from the day of sale, their Lordships proceeded to construe its meaning from the policy and intent of the Regulation, from the language used in other parts of the same section, and from S. 7 which created an exception out of the provi-

1. (1863-66) 10 M I A 123 (PC).

sions of that section. It is true that in the Patni Regulation there is no provision corresponding to this S. 7 or to the concluding part of S. 5, but these differences to our mind do not make the principles upon which their Lordships proceeded inapplicable to the present case. In that case, as in the present, reliance was placed on the words:

"stand cancelled from the day of sale," but their Lordships remarked that" in this hard and literal construction of the words cited above, their Lordships did not concur."

They pointed out that

"in the present case the object of the Government was that the jumma should be duly paid and that the means of paying it should not be withdrawn by the improvident grants of the zamindars who had made default; but cases of default might often arise where no improvident grant had been made, where the Talukdars and the raiyats held at proper rents, and the default was owing to extravagance, mismanagement or other causes—in such cases the Government cannot be supposed to have intended a wanton and unjust disturbance of vested interests."

Ultimately their Lordships concluded that the construction of the section was that a power was given to the purchaser to avoid the subsisting engagements as to rent, &c., and they proceeded to remark that this construction gave it a just and reasonable operation, and later on they remarked that they were glad to find that it was not their duty to support a claim which appeared to them to be unjust. Reg. 44 of 1793 has since been replaced, but the authority of this decision has been applied to various cases and in particular by Markby, J., in the case of *Modhoo Soodun Koondoo* v. *Ramdhon Gangolee* (2) where it has been held that no sales for arrears of rent, not even sales under Reg. 8 of 1819, have ipso facto the effect of cancelling tenures created by defaulting owners. A contrary view however was taken in the case of *Annada Churn Dass* v. *Mathura Nath* (3) and in the case of *Mohini Chunder* v. *Jotirmoy Ghose* (4); but the authority of these decisions was a good deal weakened by the fact that Garth, C. J., who was a party to them, resiled from that position when he decided the Full Bench case of *Titu Bibi* v. *Mohesh Chunder Bagchi* (5). In that case it was held that whether under the Rent Law of 1869 or under Reg. 8 of 1819 the under tenures were not ipso facto void upon the sales, but were voidable only at the option of the purchasers. So far the trend of the decisions is against the appellants in this appeal, but they rely strongly on the subsequent decision in the case of *Krishna Promoda Dassi* v. *Dwarkanath Sen* (6). In that case the facts are similar to those of the present and Coxe, J., who first heard the appeal held that it was settled by the cases in *Modhoo Soodun Koondoo* v. *Ramdhone Gangolee* (2) and *Titu Bibi* v. *Mohesh Chunder Bagchi* (5) that under tenures are not ipso facto void on sale under the Putni Regulation. On certain other points he made an order of remand. Then there was a Letters Patent appeal which was disposed of by the judgment of Jenkins, C. J. He reversed the judgment of Coxe, J., and it is on this that reliance is placed by the learned advocate in support of this appeal. Jenkins, C. J., in his judgment first refers to the different sections of the Putni Regulation and remarks:

"These provisions appear to me to point to the purchaser's right to take possession immediately and also to establish the conclusion that one who has a tenure or a middle interest between the resident cultivator and the late proprietor cannot bar or in any way prejudice the purchaser's right. That seems to me to be a fair reading of the sections."

This, however, is not tantamount to saying that the provisions mean that an under-tenure is void without any further action on the part of an auction purchaser; nor does Jenkins, C. J., say so. In discussing the case law Jenkins, C. J., seemed to doubt the soundness of the decision in *Ranee Surno Moyee* v. *Maharaja Suttees Chunder Roy* (1) and the opinion which he gave was "for what it might be worth." As we shall presently point out this criticism cannot stand. On the other hand Jenkins, C. J., preferred to follow the authority of two other decisions of the Judicial Committee, namely, decisions in the cases of *Watson* v. *Collector of Rajshahi* (7) and *Brindaban Chunder* v. *Brindaban Chunder Dey* (8); but in both these cases the decision was with reference to Cl. 1, S. 11 and there was no question of a distinction being made as between incumbrances and under-leases, a distinc-

2. (1869) 12 W R 383=3 Beng L R 431.
3. (1879) 4 Cal 860=4 C L R 6.
4. (1879) 4 C L R 422.
5. (1883) 9 Cal 683 (FB).
6. (1913) 20 I C 654.
7. (1869) 13 M I A 160 (PC).
8. (1874) 1 I A 178.

tion which was brought out in the subsequent case of *Turner Morrison & Co.* v. *Monmohan Chowdhury* (9) to which we shall presently refer. It would seem, however, that the learned Chief Justice really based his decision on the facts. He says:

"In this case it is difficult to see what more could have been done by the plaintiff than in fact has been done by her. She asserted her full right as purchaser on the earliest possible occasion; she took possession; she obtained a proclamation and then she instituted this suit in which she obtained a decree against defendant 1 a decree from which no appeal was preferred by him. In my opinion, the lease in favour of defendant 2 'must' in the words of the section be considered to be cancelled."

As I have mentioned already, the facts are different in the present case—the plaintiffs having taken no steps to assert their right to immediate possession. The matter, however, seems to us to be concluded by the recent decision of the Judicial Committee in the case of *Turner Morrison & Co.* v. *Monmohan Chowdhury* (9). That was no doubt not a case under the Patni Regulation, but it was a case under the Bengal Land Revenue Sales Act (Act 2 of 1859) and S. 37 of the Act came in for consideration. Para. 1 of that section is in the following terms:

"Rights of a purchaser of a permanently settled estate sold for its own arrears.—The purchase of an entire estate in the permanently settled districts of Bengal, Bihar and Orissa, sold under this Act for the recovery of arrears due on account of the same, shall acquire the estate free from all incumbrances which may have been imposed upon it after the time of settlement; and shall be entitled to avoid and annul all under-tenures and forthwith to eject all under-tenants with the following exceptions * * *."

Their Lordships in construing this section held "that it draws a clear distinction between incumbrances" and 'under-tenures':

"Incumbrances are wiped by the sale; in the case of under-tenures the purchaser is only entitled to avoid and annul them, and on doing so, that is upon exercising his option to annul, he can eject all under tenants."

Then they go to remark.

"The taluk in the present case, therefore, is, their Lordships think, an under tenure within the meaning of the section, and the purchaser's right in respect of it is only a right to annul. It is clearly something different from an incumbrance, whatever that term may be intended to include. A similar differentiation appears in S. 11, Patni Regulation (8 of 1819), though it apparently finds no place in the Tenancy Act."

The last sentence is material authority in this appeal and we cannot say that by the words "a similar differentiation" their Lordships did not intend to mean a differentiation in "the effect of the sale." We may point out that their Lordships made a reference to the Full Bench case of *Titu Bibi* v. *Mohesh Chunder Bagchi* (5) which was cited before them; and this reference did not seem to derogate from the authority of the Full Bench case as regards the particular question decided by that case. It is also important to observe that their Lordships referred to the case of *Ranee Surnomoyee* v. *Maharaja Suttees Chunder* (1) in terms which re-assert the authority of that decision. Our conclusion, therefore, is upon a reading of Regn. 8 of 1819 and the authorities, that on the sale of a patni taluk for arrears of rent an under-lease is not void ipso facto by the sale, but is only voidable. In the present case, therefore, the effect of the patni sale was to render the howla of the pro forma defendants voidable, but not ipso facto void, and Patterson, J., was right in holding that, having regard to the findings of the Court below, the howla was still subsisting at any rate up to the date of the institution of the suit. The next point is whether the suit itself must be regarded as giving notice to the defendants to avoid the howla. The learned advocate for the defendant-respondent has contended that in order to constitute such notice the suit must be one for possession and in support of his contention he has relied on the remarks of the Judicial Committee in the aforesaid case of *Turner Morrison & Co.* v. *Monmohan Chowdhury* (9) (at p. 447 of 58 *I A*) which are in the following terms:

"Unless and until the taluk is annulled it continues; the talukdar becomes the under-tenant of the purchaser and the tenants holding under him are not affected by the change of proprietorship. There is no privity of contract between them and the purchaser, and the latter cannot either claim rent from them or eject them so long as he allows the taluk to continue. The purchaser could, no doubt, sue for possession of the holdings joining both the talukdar and the talukdar's tenants. The institution of such a suit would be an effective election to annul the taluk, and the joinder of the persons in actual possession would be in accordance with the ordinary procedure. But their Lordships are unable to see what cause of action the purchaser can have against the tenants of the talukdar as long as the taluk subsists. Their contract is

9. A I R 1931 P C 314=135 I C 765=58 I A 440 (PC).

with him and their liability is to him and not with or to his superior landlord."

We do not understand this passage to mean that nothing short of a suit for possession can be an effective election to annul the taluk. These remarks were made in a suit to eject defendants from plots of land forming part of a revenue paying estate. The present suit is one for rent. The howladars have been made defendants and the plaintiffs want a decree for rent as against the tenants defendants on the allegation that the howla is void. There is no reason why such a suit should not be an effective election to annul the howla. See the remarks of Jenkins, C. J., in the aforesaid case of *Srimati Krishna Promoda Dassi* v. *Dwarka Nath Sen* (6). It is contended further by the learned Advocate for the appellants in this Court that, if the effect of the suit is to annul the howla, the annulment must take effect from the date of the putni sale. This would be inconsistent with the theory that the plaintiffs have the option to allow the howla to remain until the election is made and is not borne out by the remarks of the Judicial Committee in the passage quoted above. See also the case of *Ramratan Kapali* v. *Aswini Kumar Dutt* (10). The result is that we hold that the present suit must be considered as an effective election on the part of the plaintiffs to annul the howla in question, but that the annulment can only take effect from the date of the institution of the suit.

The consequence is that so far as the period in suit is concerned the howla must be held to be subsisting and there is no relationship of landlord and tenant as between the plaintiffs on the one hand and the tenants defendants 1 and 2 on the other. The plaintiffs, therefore, cannot get a decree for rent as claimed. In the result the decree made by Patterson, J., will stand and this appeal will be dismissed with costs.

K.S. *Appeal dismissed.*

10. (1910) 37 Cal 559=6 I C 69.

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* A. I. R. 1934 Calcutta 49

MITTER AND M. C. GHOSE, JJ.

Nirmala Sundari Debi—Appellant.

v.

Golap Bashini Debi—Respondent.

Appeal No. 205 of 1932, Decided on 9th February 1933

1934 C/7 & 8

*** Civil P. C. (1908), O. 41, R. 23—Preliminary point — It must be independent of merits—Decision of other issues must be prevented—Order of remand, being not a decision on preliminary point, held bad.**

The true test of deciding as to whether a decision of an issue was a decision of a preliminary point or not is to see whether the decision of that issue prevented the decision on the other issues. The words "preliminary point" are not confined to such legal points only as will be applied as a bar in suit but comprehend all such points as may have prevented the Court from disposing of the case on the merits, whether such points are pure questions of law or pure questions of fact. [P 50 C 2]

In a suit for setting aside a previous award an issue was raised challenging the validity of the previous award and decree on the ground of want of jurisdiction. The trial Court held that the award was without jurisdiction and decreed the suit. The appellate Court held that the award was not a nullity and he sent back the case for trial of the other issues in the case:

Held: that as it could hardly be said that a decision of issue regarding jurisdiction was not a decision on the merits, the order of remand was hence bad. [P 50 C 2]

Brojolal Sastri and *Sachindra Kumar Ray*—for Appellant.

Gunada Charan Sen and *Satindra Nath Ray Chaudhury*—for Respondent.

Mitter, J.—This is an appeal against an order of remand made by the District Judge of Dacca on 24th March 1932. The learned District Judge evidently purported to act under the provisions of O. 41, R. 23, Civil P. C. The point in this appeal raises a question as to whether the remand was justified by the provisions of the said order and the said rule. It appears that the plaintiff who is the appellant before us instituted the present suit for setting aside a previous award and decree on various grounds. Her case is that the defendant brought a suit based on a right of easement against her in the Munsif's Court at Dacca and that after several adjournments in that suit the plaintiff's husband without her consent and knowledge referred the matters in dispute in that suit in addition to other matters which were outside the suit to arbitration; that the arbitrators submitted an award and a decree followed on the award, that the plaintiff knew nothing of these proceedings and that she came to know about the award later and commenced the present suit in which this appeal arises. Her contention is based on various grounds. She submitted in the first instance that the reference to arbitration was without her consent and knowledge and autho-

rity, that she took no part in the arbitration proceedings, that the award was vitiated by fraud and misconduct, and further that the award and the decree following on it were without jurisdiction, fraudulent, null and void and liable to be set aside.

These facts were challenged by the defendant in the suit and several issues were framed of which it is necessary to refer to issue 5 which challenged the validity of the previous award and decree on the ground of want of jurisdiction and raised the contention that the award and decree were nullities. The Munsif took up this issue first and he was of opinion that the award was without jurisdiction. He accordingly decreed the plaintiff's suit. He held that the decree in a previous Title Suit No. 1087 of 1929 passed by the sixth Court of the Munsif was null and void and was without jurisdiction and ought to be set aside. With regard to the prayer for permanent injunction the Munsif was of opinion that the question of the permanent injunction against the execution of the decree did not arise as the decree was set aside by him.

Against this decision an appeal was taken to the Court of the District Judge of Dacca. The learned District Judge was of opinion on this issue—issue 5—that the award was not a nullity and he sent back the case to the Munsif's Court for trial of the other issues in the case. Against this decision the present appeal has been preferred and it has been contended by Mr. Brojolal Sastri who appears for the appellant that the order of remand is bad seeing that the provisions of O. 41, R. 23 do not apply to the present case, as the decision of the first Court was not on a preliminary point within the meaning of that rule but was a decision on the merits of the case. A question arises as to whether this contention is right or not. It is to be noticed that the decision on issue 5 was really a decision affecting the merits of the case. The plaintiff challenged the previous decree and award on various grounds and various allegations of fact and those facts were challenged by the defendant in the course of the suit and upon which several issues were joined.

The Munsif thought that after having decided issue 5 which affected the merits of the case it was not necessary to decide the other issues, more particularly issues 2 and 3, as to whether the plaintiff assented to a reference to arbitration or not. It is argued for the respondent by Mr. Sen that as the Munsif did not decide all the issues in the case the decision must be taken to be a decision on a preliminary point. His contention really is that the entire suit has not been decided. That contention cannot be given effect to. The suit was decreed although it was not necessary for the Munsif to decide all the issues in the view that he took of issue 5. The true test of deciding as to whether a decision of issue 5 was a decision of a preliminary point or not is to see whether the decision of this issue prevented the decision on the other issues. It could not be said that the decision of other issues was prevented by a decision of issue 5 as the Munsif distinctly said that as the plaintiff succeeded on one of the grounds of attack of the arbitration and the proceedings following the arbitration it was not necessary to deal with the other grounds of attack of the arbitration proceedings and the award and the decree following the same.

We are of opinion that the meaning of the words "preliminary point" has been correctly laid down by the decision of a Full Bench of the Madras High Court in the case of *Malayath Veetil Raman Nayar* v. *Krishnan Nambudripad* (1). Schwabe, C. J., pointed out in that case that the true test in cases of this kind is that laid down by the very learned Judge Mahmud, J., in an early Allahabad case, viz., the case of *Ramnarain* v. *Bhawanidin* (2), where the learned Judge points out that the words "preliminary point" are not confined to such legal points only as will be applied as a bar in suit but comprehended all such points as may have prevented the Court from disposing of the case on the merits whether such points are pure questions of law or pure questions of fact. Oldfield, J., pointed out in the same case that a preliminary point must be one which must be independent of the merits. It can hardly be said in this case that a decision of issue 5 was not a decision on the merits. The view we take also receives some support from the decision of

1. AIR 1922 Mad 505=45 Mad 900=69 I C 828 (F B).
2. (1882) 9 All 29=1882 A W N 104*n*.

this Court in a recent case—the case of *Banka Behari Deb* v. *Birendra Nath Dutta* (3) in which Page, J., as he then was, took the same view.

We are of opinion therefore that the order of the learned District Judge must be set aside and he is directed to rehear the appeal in accordance with law. It is to be noticed that there are certain mistakes in the original judgment of the appellate Court due perhaps to the mistake of the typist. It appears that the learned District Judge dictated this judgment and in four places of his judgment he has used the expression "the suit was dismissed" although as a matter of fact the suit was decreed by the Munsif. No order is made on the application. The costs of the appeal will abide the result, hearing-fee in this Court being assessed at two gold mohurs.

M. C. Ghose, J.—I agree.

R.K. *Order set aside.*

3. AIR 1927 Cal 850=55 Cal 219=103 I C 864.

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GUHA AND BARTLEY, JJ.

Annanda Charan Naiya and *others* — Defendants—Appellants.

v.

Manmatha Nath Mitra — Plaintiff — Respondent.

Appeal No. 2457 of 1930, Decided on 10th April 1933, from appellate decree of 2nd Sub-Judge, 24-Parganas, D/- 27th June 1930.

(a) Record of Rights — Entry in favour of tenant raises statutory presumption as to permanency of tenure and transferability — Landlord and Tenant.

Though ordinarily the tenant has to prove the transferability of the tenure, where the entry in the settlement records is in his favour, it raises a statutory presumption as to permanency of the tenure and transferability of the same. [P 52 C 1]

(b) Civil P. C. (1908), S. 100 — Question whether tenancy is permanent is one of law— Landlord and Tenant.

The question whether a tenancy is permanent is a question of law and not of fact. The question is one of proper inference in law from the facts as found: *A I R* 1927 *P C* 102, *Ref* [P 53 C 1]

(c) Landlord and Tenant — Purchaser of tenant's right can be evicted by landlord unless both tenant and purchaser act in good faith.

A grantor is not competent to confer upon the grantee a better title than he himself possesses. Hence where a tenant who has no permanent tenure sells it to another, the purchaser can be evicted by the landlord, unless the tenant and the purchaser act in good faith that the tenant has permanent tenure and right of transferability: 51 *I C* 789 & 20 *Cal* 708, *Ref.* [P 54 C 1]

Panchanon Ghose, Radhika Ranjan Guha and *Durgadas Roy* — for Appellants.

Amarendra Nath Bose and *Hemanta Kumar Bose*—for Respondent.

Judgment.—The plaintiff in the suit in which this appeal has arisen prayed for recovery of possession of the lands described in his plaint on declaration of his title. It appears that the lands in suit, 22 bighas 8½ cottas in area, was comprised in a tenancy of 25 bighas 8½ cottas held by one Durga Ram Ghose. The lands were purchased by one Jadu Nath Bairagi in the year 1907, and were constituted into a separate tenancy on payment of substantial selami to the landlord. It is in evidence that for a portion of the selami Jadu Nath Bairagi executed an instalment bond, which sets forth that kharij was granted on payment of selami (nazar). In the year 1913 defendant 1 in the suit purchased the lands from Jadu Nath Bairagi, and defendants 2 to 4 were settled as tenants under defendant 1 in the year 1925. So far as the transfer in favour of defendant 1 was concerned it is to be noticed that the landlord continued to grant rent receipts in the name of the tenant Jadu Nath Bairagi. It was in evidence that so far as defendant 1 was concerned the landlord's naib asked for kharij fees, and that the defendant was willing to make some payment for mutation of his name in the landlord's sherista, but that at the end there was no payment made as the amount demanded was large. The next stage of the case is the one appearing from the settlement records. In the settlement records as finally published, defendant 1 was recorded as a permanent tenure-holder, the rent payable by whom in respect of the tenancy was liable to enhancement. As the learned Subordinate Judge in the Court of appeal below has remarked, "immediately after such records the plaintiff brought the present suit almost as a protest." The protest on the part of the landlord plaintiff being in regard to the entry in the settlement records that defendant 1's status was that of a permanent tenure-holder with the incident of transferability attached to it.

The plaintiff's suit was for ejectment on the ground that the tenant Jadu Nath

Bairagi had no saleable interest in the tenancy, that the said tenant had abandoned the holding and that defendant 1 had obtained no title by his purchase of the lands in suit from Jadu Nath Bairagi. The plaintiff's claim in suit was resisted by the defendants. It was pleaded by defendant 1 that Jadu Nath Bairagi's tenancy purchased by him was a permanent tenure, and he had therefore a valid title in him by virtue of his purchase. Defendant 1 also claimed title acquired by him by adverse possession as against the plaintiff landlord. The other three defendants in the suit, defendants 2 to 4, asserted that they were in possession of the lands in suit as bona fide tenants and were not liable to be evicted by the plaintiff. A number of issues were raised for trial in the suit, and the most important of them was issue 1: "Was the tenancy of Jadu Nath Bairagi an occupancy raiyati holding or a permanent tenure." The other issues related to the question whether permanent interest was asserted to the knowledge of the plaintiff, whether the plaintiff had recognized defendant 1 as tenant, and could defendants 2 to 4 claim to be bona fide raiyats, not liable to eviction. There was also an issue raised on the question of mesne profits claimed by the plaintiff in the suit. The trial Court dismissed the suit, holding that

"the jote of Jadu Nath was a permanent tenure, transferable at law under S. 11, Ben. Ten. Act. Defendant 1, his transferee, is entitled to hold it as a tenant under the plaintiff and the plaintiff cannot enter."

On appeal by the plaintiff, the Court of appeal below reversed the decision of the trial Court, and passed a decree in favour of the plaintiff:

"The plaintiff was to get khas possession of the property in suit after evicting the defendants and the mesne profits on the basis of rent."

The defendants have appealed to this Court. The entry in the Record of Rights being in favour of defendant 1 the general proposition now well established that the defendant had to prove the transferability of the tenure loses much of its force, in view of the statutory presumption arising in favour of the defendant as to permanency of the tenure and the transferability of the same as such. It is however to be noticed that the entry in the settlement record shows that the defendant's tenure was not one of which the rent was fixed in perpetuity. Keeping the above position in view the findings of fact and the conclusions arrived at by the Court of appeal below have to be examined. Some argument was advanced on the question of admissibility of a kabuliyat of 1269 B. S. alleged to have been filed on behalf of the plaintiff in the settlement proceedings and as to the propriety of the lower appellate Court in the matter of reception of that document as evidence at the appellate stage. On behalf of the plaintiff-respondent no particular stress was laid on the kabuliyat of 1269 B. S. and in our opinion no importance could be attached to this document which was on the record and had been marked for identification in the Court of first instance. Its custody was not proved, and we do not place any reliance upon the document; nor does it appear to us that the Court of appeal below attached any importance to the same, inasmuch as the only observation made with reference to the document was that:

"the kabuliyat shows that Durgaram took lease for the purpose of cultivation and also for habitation."

The observation so made does not prejudice the rights of the defendants in the suit in any way, nor does the observation help the plaintiff in his case before the Court. Apart from the kabuliyat of 1269 B. S. which might be discarded for the purpose of this litigation, the Court below has, upon the materials before it, come to the findings and conclusions based on documentary evidence adduced by the parties that Jadu Nath Bairagi was recognized by the landlord as a tenant in respect of the lands in suit on receipt of selami (nazar), and mutation was allowed only after receipt of mutation fees in respect of the transfer by Durga Ram Ghose. The Court below took into consideration the very significant fact that the parcel of the original jama left after the purchase of the big slice by Jadu Nath is still recorded in the names of Durga Ram's heirs, and they have been recorded as occupancy raiyats with regard to this parcel. As the Court below has noticed, if the original jama was a tenure, a part of it left to Durga Ram's heirs would also have continued to be a tenure. The fact has also been noticed that it was

when difficulty arose in effecting a mortgage of the lands purchased by Jadu Nath Bairagi that an attempt was made by him to obtain recognition from the landlord. The kistibandi for payment of selami fixed for mutation of names was subsequent to the mortgage transaction. Relating to the transfers of the tenancy in question to which reference has been made above, the Court below has concluded by saying that

"the first transfer was recognized by the maliks on receipt of nazar; for the second there was demand of nazar and the dakhilas have been granted in the name of Jadu Nath and not in the name of the defendants."

The facts proved on the materials before the Court, so far as they bear upon the question of permanency of the tenancy and the transferability of the same have been carefully set out in the judgment of the learned Subordinate Judge in the Court of appeal below. The question whether a tenancy is permanent is a question of law and not of fact. It is not right to say, as has been contended for on behalf of the defendants appellants, that the conclusious arrived at by the Court below are binding on us in second appeal as findings of fact; the correct view being that the question was one of proper inference in law from the facts as found: see *Dhanna Mal* v. *Moti Sagar* (1). The facts as found by the Court below have to be considered in drawing the inference of law as to whether the tenancy in a particular case was permanent. In the case before us, on the facts found, we have no hesitation in coming to the decision that the Court below has drawn the inference of law correctly, when he held that that the lands appertaining to Durga Ram Ghose's jama which were purchased by Jadunath Bairagi, could not have appertained to a permanent tenure with the incident of transferability attached to the same. The learned Judge in the Court below was also in our judgment right in coming to the decision that the settlement record showing that the lands held by defendant 1 appertained to a permanent tenure, has been sufficiently rebutted by the plaintiff in the suit.

The question that arises for consideration next, is whether defendant 1 could possibly succeed in defeating the plaintiff's claim in the suit for khas possession on the ground that he had, as the trial Court put it, "been prescribing for a permanent tenancy since 1269." The question has to be decided on the finding arrived at by the Court of appeal below upon evidence in the case, that there was no assertion of the permanent and transferable nature of the tenure, to the knowledge of the landlord. As found by the Court below, there was no assertion of any transferable interest before the sale in the year 1919 to defendant 1, and twelve years did not elapse from that time when this suit was instituted by the plaintiff in 1929. The assertion of any transferable right before 1919 was not "brought home to the plaintiff." The contention advanced on behalf of defendant 1 appellant as to the acquisition by adverse possession of the rights of a permanent tenure-holder transferable at law, cannot upon the findings arrived at by the final Court of fact, be given effect to.

The defence of defendants 2 to 4 in the suit who have also appealed from the decision of the Court of appeal below remains to be considered. There is no doubt that the defence was raised in the suit that these three defendants could not be evicted, as they were bona fide tenants on the lands in suit; and an issue was specially directed to this question. It was not necessary for the trial Court to consider this part of the case, in view of the conclusions arrived at on the question of the rights of defendant 1 who had settled the lands with defendants 2 to 4. In the Court of appeal below the position of defendants 2 to 4 was not separately considered, apparently for the reason that it was thought that these defendants could not resist the plaintiff's claim for khas possession if defendant 1 had no title to remain on the lands in suit as a permanent tenure-holder, with the incident of transferability attached to it. As argument was advanced before us on both sides on the question whether defendants 2 to 4 could be evicted by the plaintiff in the suit, we have thought it proper to give our decision on the same. It is to be observed at the outset that cases like that of *Binode Lal Pakrashi* v. *Kalu Pramanik* (2), upon

1. AIR 1927 P C 102=101 I C 355=54 I A 178=8 Lah 573 (P C).

2. (1893) 20 Cal 708.

which the argument on behalf of defendants Nos. 2 to 4 appellants, is founded, are to be treated as exceptions, and as it has been observed in recent decisions of this Court, the principle in the case of *Binode Lal Pakrasi* (2) is an encroachment upon the ordinary rule of law and a rule of general application, that a grantor is not competent to confer upon the grantee a better title than he himself possesses; and the principle laid down in that case must therefore be cautiously applied, and is not to be extended: see *Krishna Nath* v. *Muhammad Wafiz* (3). It may be mentioned that want of good faith either on the part of the lessor or the lessee makes the rule in *Binode Lal Pakrasi's* case (2) inapplicable. In the case before us there could not be any assumption or any presumption of good faith on the part of defendant 1 in this case, on the facts found by the Court below. There could also be no presumption of good faith on the part of defendants 2 to 4, seeing that they could not lay claim to a better position than that of persons entering into a transaction of lease without any inquiry as to the lessor's title—the facts found in this case pointing clearly to the situation that defendant 1 had failed to obtain recognition of his purchase of the lands in suit from Jadunath Bairagi, and that rent receipts were never granted by the landlord to defendent 1 in his own name. In our judgment the case set up by defendants 2 to 4 that they were bona fide tenants on the lands in suit was not, and could not possibly be, established.

If the plaintiff landlord, the respondent in this Court, is entitled to khas possession of the lands on eviction of the defendants, as he is, according to our decision, the plaintiff-respondent is also entitled to get mesne profits from defendant 1, as claimed in the suit, on rental basis, as held by the Court of appeal below. The result of the conclusions arrived at by us as indicated above is that the appeal is dismissed with costs.

K.S. *Appeal dismissed.*

3. (1917) 31 I C 789.

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C. C. GHOSE, AG. C.J. AND COSTELLO, J.

Official Assignee, Calcutta—Appellant.

v.

Ramchandra Kashera – Respondent.

Appeal No. 39 of 1933, Decided on 23rd May 1933, from original order of Lort-Williams, J., D/- 21st March 1933.

(a) Presidency Towns Insolvency Act (1909), S. 55—Onus is on Official Assignee.

Even as regards proceedings under S. 55 the onus lies on the person who seeks to impugn the validity of the transfer, that is upon the Official Assignee : *A I R* 1931 *P C* 75, *Rel on.* [P 55 C 2]

(b) Presidency Towns Insolvency Act (1909), S. 56 — Not only preference but that intention to give preference is necessary — Onus lies on Official Assignee—Transaction held not bona fide.

Under the provisions of S. 56 it is not sufficient merely for the person impugning a transaction to show that in fact there was a preference, he has also to show that the transaction was made with a view to giving that preference. A very serious and almost insurmountable task lies in the way of the Official Assignee, in seeking to challenge the transfer:

Held: on all the facts and circumstances of the case, that the matter was one beyond the region of mere suspicion and that the Official Assignee had sufficiently discharged the onus which lay upon him and the transaction was not a bona fide one. [P 56 C 1 ; P 57 C 2]

A. K. Roy and *P. N. Banerjee* — for Appellant.

N. C. Chatterjee and *B. C. Mitra*—for Respondent.

Costello, J.—This is an appeal from a judgment of Lort-Williams, J., dated 21st March 1933. That judgment was given in an insolvency proceeding, in which the Official Assignee was asking that a certain transaction between the insolvents and a man named Ramchandra Kashera should be set aside as being fraudulent and void. The notice of the application is dated 10th March 1933, and the transaction in question was described thus:

"The transfer of 35 bags of brass and bell-metal articles and ten bundles of brass and copper sheets by the insolvents in your favour be declared fraudulent and void as against the applicant."

Lort-Williams, J., took the view that he was bound by the decision in the case of *Official Receiver* v. *Chettyar Firm* (1), which decided that the onus under S. 55, Presidency Towns Insolvency Act, of proving that the transfer was not made in good faith or for valuable consideration lay on the Official Assignee. The

1. A I R 1931 P C 75=131 I C 767=58 I A 115 =9 Rang 170 (PC).

learned Judge upon that came to the conclusion that the petition of the Official Assignee failed, because he had not succeeded in discharging the onus that lay upon him. It seems that the learned Judge did not have his attention called to the fact that that case was decided on S. 53, Provincial Insolvency Act and not on S. 55, Presidency Towns Insolvency Act. It is to be observed that there is a slight difference in the language of those two sections. S. 55, Presidency Towns Insolvency Act, says :

"Any transfer of property, not being a transfer made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, shall if the transferor is adjudged insolvent within two years after the date of the transfer, be void against the Official Assignee."

Whereas, on the other hand, S. 53, Provincial Insolvency Act says :

"Any transfer of property not being a transfer made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration shall, if the transferor is adjudged insolvent within two years after the date of the transfer, be voidable as against the receiver and may be annulled by the Court."

At first sight it might seem as if the difference in language between those two sections might enable us to say that the judgment of the Privy Council in the case of *Official Receiver* v. *Chettyar Firm* (1) was not necessarily applicable to proceedings under S. 55, Presidency Towns Insolvency Act; but an examination of the judgment in that case reveals the fact that it was based on a previous decision of the Judicial Committee of the Privy Council — in the case of *Official Assignee* v. *Khoo Saw Cheow* (2) —which was an appeal to the Judicial Committee of the Privy Council from a judgment of the Court of appeal of the Straits Settlements in an application under S. 50, sub-S. (1) of the Bankruptcy Ordinance of the Straits Settlements. That section, so far as is material, runs thus:

"Any settlement of property, not being * * * a settlement made in favour of a purchaser * * * in good faith and for valuable consideration * * shall, if the settlor becomes bankrupt within two years after the date of this settlement, be absolutely void as against the Official Assignee."

It appears therefore that the operative part of that S. 50 is similar to the operative part of S. 55, Presidency Towns Insolvency Act. It must therefore be taken, I think, that the decision in *Official Receiver* v. *Chettyar Firm* (1) means that, even as regards proceedings under S. 55, Presidency Towns Insolvency Act, the onus lies on the person who seeks to impugn the validity of the transfer, that is to say, in the majority of cases, upon the Official Assignee. The present proceedings were not in terms brought under S. 55. The learned Advocate-General, who appears for the appellant in this case, has put the matter on the basis that the transaction which is challenged falls either within the mischief aimed at by S. 55 or within the provisions of S. 56, Presidency-towns Insolvency Act. He has invited us to take the view that, even upon the assumption that the onus was upon the Official Assignee, on the facts and circumstances of the present case, that onus has been discharged. It is necessary therefore that I should state the facts.

There was a firm named Ramprasad Durgaprasad. That firm consisted of a man named Durgaprasad himself and his three sons, named respectively, Subhanlal, Mohanlal and Killiram. Those four persons carried on a Mitakshara joint family business under the name and style of Ramprasad Durgaprasad at premises situated at No. 161/1, Harrison Road, in this city, and apparently at various other places. That firm or rather the persons composing the firm were, on 12th April 1932, adjudicated insolvent. Some ten days before, that is to say, on 4th April 1932, the Official Assignee had been appointed interim receiver, on the application of two creditors of the firm. The adjudication was based upon an act of insolvency, which was said to have occurred on 28th March 1932. On that date, Killiram—one of the partners of the firm—gave notice to the creditors of the firm that they had suspended payment and were no longer able to pay their debts. The transaction impeached by the Official Assignee is said to have taken place two days before, that is to say, on 26th March 1932. In substance, it amounted to this that : a man named Ramchandra Kashera had on that date received from the firm of Ramprasad Durgaprasad some 35 bags of brass and bell-metal utensils and had consigned those bags to his brother—but in his

2. A I R 1930 P C 265 = 128 I C 662 = (1931) A C 67=100 L J P C 45=144 L T 130.

own name—the brother being at a place called Geonkhali. The allegation of the Official Assignee was that the transfer of those bags by the firm, which became insolvent so shortly afterwards, was either a transfer of property of the description referred to in S. 55 or of the description referred to in S. 56. In order to have that transaction set aside under S. 55, the Official Assignee was in the position of having to prove in a sense a double negative, namely, that the transfer was not made in good faith and/or that it was not made for valuable consideration.

On the other hand, in order to succeed under S. 56, the Official Assignee had to prove that the transfer not only constituted a preference given by the firm of Ramprasad Durgaprasad to one creditor—to the man Ramchandra Kashera—over other creditors, but that, in addition, the transfer had been made with a view to giving such preference. Under the provisions of S. 56, it is not sufficient merely for the person impugning a transaction to show that in fact there was a preference, he has also to show that the transaction was made with a view to giving that preference. It thus appears that in all these classes of casses, a very serious and almost insurmountable task lies in the way of the Official Assignee, in seeking to challenge the transfer. The learned Advocate-General however contends that, in this particular case, the task of the Official Assignee, heavy as it was, has been adequately accomplished. The facts with regard to the 35 bags of brass and bell-metal articles, relied upon by the Official Assignee, was that there never was any genuine transaction between the man Ramchandra Kashera and the firm of Ramprasad Durgaprasad. The learned Advocate-General has said that the story set up by Kashera himself, namely, that there was an antecedent debt in respect of a loan of Rs. 1,100 and a debt of Rs. 950 made by him as late as 25th March 1932, is entirely untrue. Ramchandra Kashera's account of the matter comes to this : that some 12 months before, that is to say on 3rd May 1931, he had lent Rs. 1,100 to the firm of Ramprasad Durgaprasad, which had never been repaid. Then on 25th March 1932, according to his account of the matter, the partner Killiram came to him and asked for a loan of Rs. 950 for 12 hours and no longer.

The story set up is that Killiram asked for the second loan and it was made solely upon the footing that it would be promptly repaid, and, as the repayment was not made, he (Kashera) took from his debtors Ramprasad Durgaprasad these bags of metal, which he was to receive in satisfaction of the debt due to him. It is to be observed that, on the footing that there was a loan of Rs. 1,100 in May 1931, and another of Rs. 950 in March 1932, the matter might still fall within the ambit of S. 56, for it is beyond controversy that this firm became insolvent not only within three months of the second transaction, but actually within something like a fortnight of that transaction. It follows therefore that, as regards S. 56, if, in fact, Ramchandra Kashera was a creditor of the firm, all that the Official Assignee had to show was that the perference, which the transfer of the goods obviously constituted, had in fact been made with a view of preferring this man Kashera to all the other creditors of the insolvent firm. As regards S. 55, it would be sufficient for the Official Assignee to satisfy the Court that the whole transaction was malafide and that the transfer of a substantial amount of metal said to be worth Rs. 1,925 was not a genuine one or was not a real discharge of a debt.

Now, Ramchandra Kashera was examined under the provisions of S. 36, Presidency Towns Insolveney Act, and, in the course of that examination, he admitted that he took delivery of the goods and that that delivery was on 26th March 1932. He said that he took delivery of the goods from Ramprasad Durgaprasad on his own behalf and that he had paid them a sum of Rs. 1,900. He admitted however that the goods had been sent away by him. He further stated that he had no account bocks ; that there was nothing from which he could show that he had paid that amount of Rs. 1,900 and that there was no record, as far as he was concerned, of the alleged antecedent loan. He further said that he was not trading in this class of goods and he set up the story which I have already outlined that he was taking payment in kind for the two loans which he had previously made to the firm of Ramprasad Durgaprasad. He admitted

that the making of these two loans, (if they were made) were the only transactions he had with that firm. It seems quite clear that this man Ramchandra Kashera was in no sense a dealer at that time. He was in fact, as is stated in the beginning of his evidence, an employee in a firm named Tarachand Ghanshyamdas in Calcutta. It transpired in the course of the evidence that Ramchandra Kashera came from the same village as the insolvents and that he lived in the same house—161/1, Harrison Road. It also seems tolerably clear from the evidence, that he was on intimate terms with the insolvents and must have known a great deal about their doings and their financial position.

The Official Assignee in support of the case he was making relied upon the petition presented by him and the facts therein stated and the evidence given by Ramchandra Kashera himself in his examination under S. 36. Ramchandra Kashera put in an affidavit in answer to the petition presented by the Official Assignee, in which he referred to the fact that he alone with Killiram, had been proceeded against in the Police Court in Calcutta at the instance of a person named Panchkarhi Nath. In those proceedings, it was alleged that Ramchandra Kashera and Killiram had obtained a quantity of metal from Panchkoshi Nath by cheating, in that they had gone to the place of business of Panchkarhi Nath and there ordered the goods, declaring that they would be paid for on the same night or the next morning, whereas, although the goods were delivered on 26th March, on the faith of the promise to pay in cash, they were not paid for either the same night or on the next morning when bills were presented. On that morning, i. e., on 27th March, it was found that the gadi occupied by Ramprasad Durgaprasad was closed and no one was to be found there. For some reason or other, the proceedings instituted by Panchkarhi Nath were rather abruptly terminated and Ramchandra Kashera was discharged under S. 253, Criminal P. C., for want of prosecution. The Additional Chief Presidency Magistrate made an order with regard to the goods in question. It appears, that of the 35 bags 18 had already been taken delivery of by Ramchandra Kashera, when they reached the end of the journey, on which they had been sent, but the remaining 17 bags were stopped at Geonkhali in pursuance of the Magistrate's order.

Later on, they were delivered to Ramchandra Kashera on his executing a bond for Rs. 1,200. On 6th August 1922, the learned Additional Chief Presidency Magistrate made an order directing these 17 bags to be handed over to the Official Assignee. Some revisional proceedings were taken in this Court, as the result of which that order was set aside upon Ramchandra Kashera giving an undertaking not to dispose of or otherwise deal with the said goods. At the same time, an order was made giving the Official Assignee liberty to institute such proceedings as he thought fit and it was as the outcome of that order that the present proceedings were started.

We have carefully considered the evidence given in these proceedings and we take the view, looking at the matter broadly, that on all the facts and circumstances of the case the matter was one beyond the region of mere suspicion and that we ought to hold that the Official Assignee sufficiently discharged the onus which appears to lie upon him. Taking all the facts into consideration and bearing in mind the points urged before us by the learned advocates, we come to the conclusion that we ought to allow this appeal upon the facts of the case and to hold that the matter certainly falls within the purview of S. 56, if not within S. 55. It seems sufficiently clear that the transaction, between Ramchandra Kashera and the insolvent firm was not a bona fide one. For the reasons which I have already given it does not really matter whether or not there was any antecedent debt as alleged by Kashera. If there was no debt, that means that the whole transaction was fraudulent from start to finish, but even upon the assumption that there was a debt some 12 months before, we still take the view that the handing over of these goods was not done with a bona fide intention of discharging this debt, but with a view of preferring Ramchandra Kashera (who was obviously a friend of the insolvents) as against the other creditors. It may well be that the idea was to put these goods beyond the reach of the creditors with the object of pre-

serving them for the benefit of the insolvents themselves.

The appeal is therefore allowed with costs. The respondent must forthwith pay the sum of Rs. 2,253 representing the value of the goods. The Official Assignee is allowed to retain his costs out of the funds in his hands.

C. C. Ghose, Ag. C. J.—I agree.

R.K. *Appeal allowed.*

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C. C. GHOSE, AG. C. J. AND COSTELLO, J.

Pankajkumar Ghose—Appellant.

v.

Sudheerkumar Shikdar—Respondent.

Appeal No. 9 of 1932, Decided on 22nd May 1933, from order of Lort-Williams, J., D/- 18th November 1932, in Suit No. 1528 of 1926.

(a) Letters Patent (Cal), Cl. 15—Order granting leave to change attorney without payment of attorney's costs is appealable.

An order granting leave to a suitor to a change of attorney without providing for the payment of the attorney's costs, the attorney not having discharged himself, is an appealable order under Cl. 15. [P 58 C 2]

(b) Civil P. C. (1908), O. 3, R. 4—Change of attorney—No discharge by himself—Provision for payment must be made—Practice.

The practice of the Calcutta High Court has always been that no order for change of attorney is made unless provision is made for payment of the attorney except where the attorney has by his own conduct or misconduct discharged himself: 4 *C W N* 767, *Rel on.* [P 59 C 1]

S. N. Banerjee and *H. C. Majumdar*—for Appellant.

P. C. Ghose—for Respondent.

C. C. Ghose, Ag. C. J.—This appeal is by an attorney named Pankajkumar Ghosh against an order of Lort-Williams, J., dated 18th November 1932, directing a change of attorney without payment of his costs. The circumstances under which that order came to be made, shortly stated, are as follows: It appears that this attorney was retained by one Sudheerkumar Shikdar, who is one of the defendants in suit No. 1528 of 1926. The suit had gone on for some time, in this sense that the suit had been pending for some time and had not been brought to a hearing, when an application was filed on 8th March 1932, for an order that:

"Babu Pankajkumar Ghosh, attorney for the applicant Sudheerkumar Shikdar, be discharged from further acting as his attorney and that Babu P. L. Mitter, an attorney of this Court, be appointed in his place as attorney for the applicant in the suit and that the applicant be at liberty to file a warrant of attorney in favour of Babu P. L. Mitter to act for him in this suit."

Lort-Williams, J., made the order referred to above on 18th November 1932, but he did not provide in the said order for payment of the costs of the attorney up to the date of the order itself. The order, as made by Lort-Williams, J., appears on pp. 28 and 29 of the paper-book and it runs thus:

"It is ordered that the said defendant, Sudheerkumar Shikdar, be at liberty to discharge the said Mr. P. K. Ghosh from further acting as the attorney for the former in this suit and to appoint Mr. P. L. Mitter as his attorney in this suit. And it is further ordered that the said Mr. P. K. Ghosh shall have lien on the cause papers for the costs due to him in this suit from the said defendant Sudheerkumar Shikdar: And it is further ordered that the said defendant Sudheerkumar Shikdar do pay to the said Mr. P. K. Ghosh his costs of and incidental to this application including the fee to counsel to be taxed by the Taxing Officer of this Court."

The attorney, feeling himself aggrieved by this order, has preferred this appeal and he urges that the practice of this Court has always been, where the attorney has not discharged himself by his own misconduct, not to order a change of attorney until and unless the costs incurred by the attorney up to the date of the order for change are paid by the client or by the new attorney proposed to be engaged. On the other hand, the respondent contends, first, that this is not an appealable order and, secondly, that the order as made by Lort-Williams, J., is quite correct and that no case has been made out for our interference with the same. As regards the question whether this is an appealable order or not, both my learned brother and myself are satisfied that this is an appealable order. The rights of the attorneys have been determined by this order. The attorney's rights having been determined by this order, that in itself is quite sufficient to entitle us to hold that this is an appealable order. Therefore having regard to the terms of S. 15, Letters Patent, nothing need further be said.

The respondent has invited us to consider the terms of O. 3, R. 4, Civil P. C. O. 3, R. 4, Civil P. C., may have application so far as the engagement of an attorney in a particular suit is concerned: but O. 3, R. 4 does not make any reference whatever to what really happens when an application is made for a change of attorney. So far as that question is

concerned, speaking for myself, during the whole time that I have been in this Court as a member of the bar and now for nearly 15 years as a Judge of this Court, I have never known of any case where the attorney's costs have not been provided for in the order for change unless it be a case where the attorney by his own misconduct has discharged himself from further acting as attorney. But it is unnecessary to refer to my own experience here in this Court, because I am fortified in the view I take by authorities which are sufficiently well known to deserve recognition at the hands of the Judges of this Court. The rule which used to obtain in the old Supreme Court, with the establishment of which the institution of solicitors and attorneys came into existence in this country, is concisely stated in the late Mr. Belchamber's book on Practice of the Civil Courts at p. 22. Reference is made therein to the case of *Nogenderchunder Ghose* v. *Greenderchunder Ghose* decided by three Judges of the Old Supreme Court in 1858 (1). The statement of the law as is to be found in Mr. Belchamber's book runs as follows:

"The rule laid down by the late Supreme Court of Calcutta, namely that where a proposed change of attorney was for no solid reason, and the attorney did not discharge the client, the payment of costs should be a condition precedent to the granting of the orders, has been followed by the Calcutta High Court."

Be that as it may, Sale, J., who was a member of the Calcutta bar before his elevation to the Bench and who during the whole time that he was a member of this Court sat on the Original Side and who, it is not disputed, had unrivalled opportunities of acquainting himself with the practice of this Court, was of opinion, *Basanta Kumar Mitter* v. *Kusum Kumar Mitter* (2), that no change of attorney was to be made without making provision for the payment of costs, and I am content to follow what Sale, J., laid down as being the practice of this Court. The practice has always been, as far as I have understood, that no order for change of attorney is made unless provision is made for payment of the attorney subject of course to this: that no such provision will be made where the attorney has by his own conduct or misconduct discharged himself.

1. (1858) 1 Boul. Rep. 340.
2. (1900) 4 C W N 767.

In that view of the matter we are constrained to hold that the order of Lort-William, J's., made in this case is not sustainable. The order therefore will be that the appeal will be allowed, Lort-William's, J., order will be set aside and the respondent Sudheerkumar Shikdar can obtain a change of attorney on payment of the appellant attorney's taxed costs. This order is being made upon the undertaking of the attorney Pankajkumar Ghosh to lodge his bills within ten days from date. If he carries out the undertaking there will be no order for costs of this appeal. In default, this appeal will stand dismissed with costs.

Costello, J.—I agree.

R.K. *Appeal allowed.*

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JACK AND NAG, JJ.

Haridas Sadhu Khan and *another*—Petitioners.

v.

Giridhari Sadhu Khan and *another*—Opposite Parties.

Civil Rule No. 265 of 1933, Decided on 26th April 1933, from order of Addl. Sub-Judge, Howrah, D/- 12th December 1932.

(a) Civil P. C. (1908), O. 23, R. 1—Some necessary parties not impleaded is not formal defect.

The defects that certain necessary parties were not impleaded and certain debuttar properties were not included in the claim, are not formal defects. [P 60 C 1]

(b) Civil P. C. (1908), O. 23, R. 1—No formal defect—No other reason for fresh suit—Order allowing withdrawal is not justified.

The order allowing withdrawal under O. 23, R. 1 is not justified where there is no reason why the suit should fail by reason of any formal defects nor is there any other sufficient reason for fresh suit. [P 60 C 1]

Basak and *Gopendra Nath Das*—for Petitioners.

Atul Chandra Gupta and *Mrigendra Nath Dutt*—for Opposite Parties.

Jack, J.—This rule has been issued on the opposite party to show cause why an order of the Additional Subordinate Judge, Howrah, permitting the plaintiff opposite party to withdraw a suit with liberty to bring a fresh suit should not be set aside. The learned Additional Subordinate Judge purports to have passed the order under O. 23, R. 1, Cl. 2 (a), Civil P. C., on the ground that the suit must fail by reason of formal defects. The formal defects he refers to are that some necessary parties have

not been impleaded and that some debuttar properties disposed of by defendant 3 have not been included in the claim. The necessary parties referred to are those to whom some of the debuttar properties were transferred. The suit was for declaration that certain properties were debutter properties, that the plaintiff was the sole shebait and that the defendants having acted in contravention of the term of the shebait-nama for an injunction restraining the defendants from obstructing the plaintiff in performing the seba and making repairs to the temple and also for recovery of possession of the debuttar properties by the plaintiff as shebait and for accounts. The suit was instituted in 1924 and this application for withdrawal was made in 1932. In the meantime the suit had been compromised between the plaintiff and the defendants, but on a reference to this Court the compromise was set aside, as against the petitioner, defendant 3 and it was ordered that the suit as against him should proceed.

The defects referred to namely, that certain necessary parties were not impleaded and certain debuttar properties were not included in the claim, do not appear to be formal defects. Moreover it is not clear that the transferees of some of the debuttar properties are necessary parties to the present suit. As regards the transfer of these properties the plaintiff was all along aware of this transfer as in para. 6 of the plaint he said that almost all the debuttar properties had been illegally transferred. The only other cause given for the withdrawal of the suit was that there were altered circumstances which affected the suit by reason of the compromise with defendants 1 and 2 making it necessary to bring a fresh suit; but it is not clear that the relationship between the plaintiff and defendant 3 is in any way affected by the compromise. There seems therefore to be no justification for the order passed by the learned Subordinate Judge under O. 23, R. (1) as there is no reason why the suit should fail by reason of any formal defects nor is there any other sufficient reason for fresh suit.

It is contended on behalf of the opposite party that the present application to this Court is not bona fide, inasmuch as there has been the delay of merely three months in making it and that the application has been made on account of a quarrel in connexion with the repair of the temple and owing to the demolition of a portion of it made by the plaintiff. The application is however within the time allowed by law. In the circumstances we think that we would be justified in interfering under S. 115, Civil P. C., inasmuch as there has been a material irregularity in the exercise of his jurisdiction by the Subordinate Judge.

The result is that this rule is made absolute, the order of the Subordinate Judge is set aside, the plaintiff's application for withdrawal of the suit is rejected and the suit will proceed. The petitioner is entitled to the costs of this rule, hearing-fee being assessed at one gold mohur.

Nag, J.—I agree.

R.K. *Rule made absolute.*

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GUHA AND BARTLEY, JJ.

Narendra Nath Samaddar and *others* —Defendants—Appellants.

v.

Anandachandra Shaha and *others*—Plaintiffs—Respondents.

Appeal No. 1773 of 1931, Decided on 25th May 1933, from appellate decree of Dist. Judge, Khulna, D/- 9th April 1931.

Civil P. C. (1908), S. 11—Previous rent suit—Decision in, does not operate as res judicata but should be considered and due weight given to it in subsequent title suit.

A judgment in a suit for rent should not generally be held to be conclusive in a suit for declaration of title to property consequent upon an adverse decision given in a suit for rent, in which final decision on questions of title should be avoided as far as practicable. In the case of rent suits proper, the subject is narrowed down to the function of rent Courts, to the decision of whether rent is due for a particular period for what lands, and at what rate. The decision on the question of genuineness of the kabuliyat in the previous rent suits cannot be treated as conclusive on the question of title raised in the subsequent litigation. The rule of res judicata or the rule of finality of previous judgments does not therefore apply to the decisions in the previous suits for rent. Such decision should however be taken into consideration, and weight should be attached to the same: 11 *Cal* 301 (*P C*), *Rel on.* [P 61 C 2; P 62 C 2]

Hira Lal Chakrabarti and *Ganeshchandra Bhattacharjya*—for Appellants.

Pramodekumar Ghosh and *Indupraksh Chatterji*—for Respondents.

Judgment.—The plaintiffs in the suit, in which this appeal has arisen, sought

to have their title as tenants under the defendants declared in regard to lands comprised in four plots, C. S. plots Nos. 111, 114, 117 and 136, on the allegation that they appertained to a tenancy held by them under the defendants. The plaintiffs' case was that they had been dispossessed by the defendants from plot No. 114, and accordingly they prayed for possession of the same. In regard to the other three plots, the plaintiffs' prayer in the suit was for confirmation of possession. The claim in suit was resisted by the defendants, who asserted that the lands in suit were outside the tenancy of the plaintiffs, held under a kabuliyat executed in the year 1269 B.S., which included only C. S. plots Nos. 112, 113, 115 and 116. The Court below has passed a decree in favour of the plaintiffs, negativing the defence of the defendants. The defendants have appealed to this Court.

In view of the main ground urged in support of this appeal, bearing upon the applicability of the rule of res judicata, it is necessary to mention at the outset that there were previous suits for rent instituted by the defendants in the present suit, in which the kabuliyat, on which the defence of the defendants is based, was held to be a genuine document and it was decided on the basis of that document that the lands now in suit comprised in C. S. plots Nos. 111, 114, 117 and 136 were included in the tenancy of the plaintiffs in this suit as claimed by them. In connexion with the question of res judicata, as raised in this case, the Court of first instance observed in its judgment that the suit was not over-valued so as to escape the bar of res judicata, that according to the evidence the valuation certainly does not err on the side of over-valuation. There is no indication in the judgment of the Court of appeal below, as was suggested before us during the course of argument, that the Courts of the Munsifs, which tried the suits for rent instituted previously, were competent at the time when the previous suits were brought to try the present suit for declaration of title and for possession, as subsequently to the institution of the suits for rent, by rise in the value of the property, those Courts ceased to be the proper Courts. No such case was made out, and the view expressed by the Court of first instance, to which reference has been made, affords sufficient reason for holding that the principle followed in the case of *Gopi Nath Chobey* v. *Bhugwat Pershad* (1) cannot be applied to the case before us. It cannot be held in this case that the Munsifs, who tried the previous suits for rent, were competent to try the present suit, if then brought, although on a subsequent date, by rise in the value of the property, the Courts of the Munsifs ceased to be the proper Courts, so far as pecuniary jurisdiction was concerned.

The case before us is not a case, in which the observation of Mitter, J., in *Gopi Nath's* case (1) that the reasonable construction of the words "in a Court of competent jurisdiction to try such subsequent suits," contained in S. 11, Civil P. C., was that it must refer to the jurisdiction of the Court at the time when the first suit was brought could be applied. In our judgment the learned District Judge, in the Court below, directed himself rightly in stating that the decision in the previous suits for rent, although not operating as res judicata, should be taken into consideration, and that weight should be attached to the same. This is the principle, which underlies the decision of their Lordships of the Judicial Committee of the Privy Council in the case of *Run Bahadur Singh* v. *Lucho Koer* (2). We are further of opinion that, adopting the rule laid down by the Judicial Committee in the case referred to above, a judgment in a suit for rent should not generally be held to be conclusive in a suit for declaration of title to property consequent upon an adverse decision given in a suit for rent, in which final decision on questions of title should be avoided as far as practicable. In the case of rent suits proper, the subject is narrowed down to the function of rent Courts—to the decision of whether rent is due for a particular period, for what lands, and at what rate. It appears to us that the learned Subordinate Judge, in the Court of first instance, approached the case before it from a correct standpoint, when he observed that

"there has been no finding as to the points involved in the present case, in any of the previous suits for rent, which might operate as res judicata. The question of genuineness or other-

1. (1884) 10 Cal 697.
2. (1884) 11 Cal 391=12 I A 23=4 Sar 602 (P C).

wise of the kabuliyat of 1269 was considered and it was undoubtedly decided adversly to the plaintiffs in the previous suit, (referring to Rent Suit No. 1300 of 1921, to which special reference has been made before us), but the finding on that question, arrived at in previous litigation, does not prevent a re-agitation of the same question in this suit."

As has been noticed already, the decision in the suit for rent brought in the year 1921, on which great reliance is placed on behalf of the plaintiffs-appellants, was on the basis of the genuineness of the kabuliyat of the year 1269 B.S. The question whether the decision in a rent suit on the question of genuineness of a document was conclusive between the parties in a suit for ejectment received the consideration of a Full Bench of this Court in the year 1873 in a case, which was referred to the Full Bench by Louis Jackson and Dwarkanath Mitter, JJ. In that case a tenant brought a suit against his landlord for recovery of possession of lands claiming to hold the land under a patta and the landlord impugned the document as spurious; upon trial the patta was found to be genuine in a subsequent suit by the landlord to eject the tenant from the lands. The question referred to the Full Bench, whether the previous decision as to the patta was conclusive between the parties, was answered in the negative: *Chunder Coomar Mundul* v. *Nunnee-Khanum* (3). The opinion expressed by Dwarkanath Mitter, J., in the order of reference, is worthy of special notice. The learned Judge observed:

"The patta is a mere matter of evidence, and it is beyond all question that a mere matter of evidence cannot be put in issue. A disputed state of facts might legitimately form the subject-matter of an issue. But it would be just as improper to put in issue documents which the parties have filed in support of their respective allegations, as it would be to put in issue the veracity of the witnesses who are summoned to depose to those allegations. The evidence of a witness as to the existence of a particular state of facts is just as much a matter of evidence as a corresponding document; and I do not therefore think that we ought to make any distinction between them in framing the issues."

The learned Judge then proceeded to state that

"the issue of tenancy was, no doubt, raised in the previous suit, and the patta might have been put in for the purpose of proving the affirmative of that issue But the opinion of the "trying Court" on the genuineness of the patta can no more be treated as the decision of an issue directly raised upon the point than the opinion of that officer upon the veracity of the witnesses examined."

The above opinion expressed by Dwarkanath Mitter, J. was accepted by Couch, C. J. in his judgment: the learned Chief Justice stated the point thus:

"It was necessary to find whether the alleged lease was genuine; but the real judgment in the suit was that the plaintiff was a tenant, the patta being the proof of it."

In consonance of the view expressed by Couch, C. J. and Dwarkanath Mitter, J., in the case mentioned above, we are of opinion that the decision on the question of genuineness of the kabuliyat of the year 1269 B. S. in the previous rent suits could not be treated as conclusive on the question of title as raised in the present litigation. For the reasons stated above the rule of res judicata or the rule of finality or previous judgments does not apply to the decisions in the previous suits for rent. The Court below has properly dealt with all the materials on the record, and its decree in favour of the plaintiffs in the suit, based as it is on findings of fact leading to the conclusion that the plaintiffs have title to the lands comprised in C. S. plots Nos. 111, 114, 117 and 136 as tenants, must be affirmed. A point was made in support of the appeal, that proper weight has not been attached to the decisions in the previous suits for rent, specially the decision in rent suit of 1921. The contention advanced in this behalf is not supportable, in view of the position that the learned Judge in the Court of appeal below has in his judgment clearly indicated that weight should be attached to the decisions in the previous litigations, and has rightly observed that,

"if it is to be postulated that, merely because those previous decisions exist, the evidence adduced by the plaintiffs is to be wholly rejected, then in effect the previous decisions have operated as res judicata."

The learned Judge has, in our opinion, given proper weight to the previous decisions in the suits for rent, and has arrived at his conclusion upon the entire evidence adduced in the present litigation by the parties concerned; and it cannot be said that there was any misdirection in the matter of weighing of evidence in the case, keeping in view the previous decisions, which were relied upon by the plaintiffs in support of their case on the footing that these decisions were conclusive as to the rights of parties

3. (1873) 11 B L R 434=19 W R 322 (F B).

in the present litigation—a case which must be negatived. In the result this appeal is dismissed with cots.

R.K. *Appeal dismissed.*

A. I. R. 1934 Calcutta 63

COSTELLO, J.

Ajit Kumar Chatterjee—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 372 of 1933, Decided on 13th June 1933.

(a) Company— Conviction of— Appeal by Managing Director is not competent.

When the conviction is not of the Managing Director but of a Company, an app al is not properly instituted unless the appeal is by the Company through some authorised agent. [P 63 C 1]

(b) Companies Act (1913),—Company registered under Act, carrying life insurance business—Company issubject to Companies Act, in addition to Life Insurance Companies Act (1912).

A company registered under the Companies Act (1913), is subject to all the provisions of the Act of 1913; and if it carries on life insurance business it is in addition subject to the further provisions contained in the Life Insurance Companies Act of 1912. [P 64 C 1]

(c) Companies Act (1913), Ss. 131 and 134 (4) —Failure to balance accounts, prepare balance sheet and make list of members- Conviction should be under S. 131 and not under S. 134 (4)—Accounts called by Courts is not sufficient defence.

When a company fails to get its accounts balanced and a balance sheet prepared and to make a list of its members, it should be convicted under S. 131 rather than under S. 134 (4). That the accounts had been called for by various criminal Courts is no defence. [P 63 C 2; P 64 C 2]

Bireswar Chatterjee—for Appellant.

Harideb Chatterjee—for the Crown.

Judgment.—This appeal is, in my opinion, not properly constituted. It is somewhat difficult to understand how it came to be admitted in its present form. The memoradum of appeal reads thus: In the matter of Ajit Kumar Chatterjee, Managing Director, Eastern National Insurance Co. Ltd., appellant against The King Emperor; and in the matter of convictions and sentence under S. 32 (4) and S. 134 (4) Companies Act (Act 7 of 1913); and in the matter of an appeal under S. 411, Criminal P. C. The convictions referred to were not of Ajit Kumar Chatterjee but of the Eastern National Insurance Co. Ltd. It is therefore obvious that the company should have been the appellant acting through a properly authorized agent. It is to be observed that in para. 6 of the memorandum of appeal it is stated: Being aggrieved by the said orders of the learned Chief Presidency Magistrate, your petitioner begs humbly to prefer this appeal in this Hon'ble Court, the petitioner as I have stated being Ajit Kumar Chatterjee. However, putting on one side this defect in the proceedings, one has to see whether there is any substance in this appeal. The Eastern National Insurance Company was convicted under S. 32 (4) and S. 134 (4), Companies Act, 1913, and under S. 134 (4) was sentenced to pay a fine of Rs. 500. No separate sentence had been passed under S. 32 (4) of the Act. It is clearly admitted and could not have been denied that this company has failed to comply with any of the requirements of the Companies Act in regard to the preparation and filing of the list of the members of the company and a balance-sheet.

The complainant in the matter was the Registrar of Joint Stock Companies, Bengal. He instituted proceedings not only against the company but against its directors, B. C. Roy, S. N. Banerjee, P. K. Banerjee and Abdur Rahim. These individuals were acquitted by the learned Chief Presidency Magistrate of the charges made against them on the ground that it was not established that they knowingly and wilfully authorized or permitted the default on which the company was clearly guilty. The company, as I have stated, failed to cause the accounts of the company to be balanced and the balance-sheet to be prepared, as well as failed to make a list of the members of the company as required by S. 32 of the Act. It would seem that it would have been more appropriate that the company should have been convicted under S. 131 rather than under S. 134, as the latter section provides that after the balance-sheet has been laid before the company at the general meeting, a copy of it shall be filed before the Registrar of the Joint Stock Companies. The conviction of the company under S. 134 (4) however in effect makes very little practical difference as under S. 131 the company is liable by reference to S. 32, to a fine not exceeding Rs. 50 for every day during which the default continues, and it is obvious that the default did continue for a period of at least ten days, so that the fine of Rs. 500 imposed by the learned Chief Presidency Magis-

trate was less than the fine which he might have imposed under the provisions of S. 131, the full penalty for not complying with the requirements of that section being Rs. 1,000. If it is necessary for the purpose of putting the record in a more satisfactory shape, I should be prepared to substitute in place of the conviction under S. 134 a conviction under S. 131. But I think in all the circumstances of this case the matter can reasonably remain where it is.

Mr. Bireswar Chatterjee, who has appeared on behalf of the company in this appeal, sought to argue that the conviction was wrong in law because the company concerned was carrying on life insurance business and so is subject to the provisions of the Life Insurance Companies Act (Act 6 of 1912). He referred to S. 287, Companies Act of 1913 in the course of his argument. It seems to me that there is no substance whatever in this contention. The Life Insurance Companies Act was passed in 1912 and the Companies Act was passed in the year 1913. This particular company is registered under the Companies Act of 1913 and therefore is subject to all the provisions of the Act of 1913; and as it carries on life insurance business it is in addition, subject to the further provisions contained in the Act of 1912. All the provisions of the Act, with which we are concerned are of course designed for the protection of the investing public and of persons who take out policies in companies dealings with life insurance business. It is therefore necessary in the public interest that the provisions of these Acts should be strictly complied with. Any company registered under the Companies Act, 1913, takes upon itself all the obligations imposed by that Act, and there is no escape from those obligations. It is to be observed that the provisions of S. 32, S. 131 and of S. 134 are mandatory as regards the company, the words of the section being: the company shall make a list of its members, shall cause accounts to be balanced and a balance-sheet to be prepared and shall file a copy of that balance-sheet. There are no qualifications to those provisions. Therefore any company which makes default in compliance with them ipso facto renders itself liable to the penalties imposed by those sections. The position of course is different as regards the officers of the company. I have already pointed out that so far as they are concerned, before a conviction can rightly be obtained, it is necessary for the complainant to show that the default on the part of the officers was authorized or permitted knowingly and wilfully. The observations I have just made, dispose of the second point taken by Mr. Bireswar Chatterjee.

On behalf of the company there has been a reiteration of the defence set up before the Chief Presidency Magistrate by Ajit Kumar Chatterjee, the present managing director who was representing the company. The plea was that the accounts had been called for by various criminal Courts and therefore the company was unable to comply with the requirements of the Act. I desire once more to emphasise that no such excuse is or can be of the slightest avail. The company must comply with the very salutary provisions of the Companies Act or become liable to the penalties provided. It follows from what I have said that the conviction of the company by the learned Chief Presidency Magistrate was right. This appeal must be dismissed. With regard to the application made by Ajit Kumar Chatterjee in connexion with this appeal, the matter can be disposed of by my expressing the opinion, that the right procedure is that the fine imposed upon the company should be realized by the methods laid down in S. 386, Criminal P. C.

R.K. *Appeal dismissed.*

A. I. R. 1934 Calcutta 64

MITTER AND HENDERSON, JJ.

Rajendrachandra Sarkar—Appellant.

v.

Bipinchandra Shaha Bhaumik—Respondents.

Appeal No. 118 of 1933, Decided on 24th May 1933, from original order of second Sub-Judge, Faridpur, D/- 4th February 1933.

(a) Presidency Towns Insolvency Act (1909), Ss. 17 and 46—Execution by secured-creditor — Judgment-debtor becoming insolvent—Offical Assignee is necessary party, but leave of Court is not necessary as his debt is not provable in insolvency.

The Official Assignee is a necessary party to the execution proceedings against a judgment-debtor who has subsequently become insolvent. But it is not necessary that leave of the Court

has to be obtained. The earlier part of S. 17 applies only to such debts as are provable in insolvency. A secured creditor therefore who wants to enforce his security need not take leave under S. 17 as his debt is not provable in insolvency: *A I R* 1927 *P C* 108 and *White* v. *Simmons*, (1871) 6 *Ch* 555, *Rel on*. [P 65 C 2]

(b) Civil P. C. (1908), Ss. 47 and 145 and O. 38, R. 5—Security under O. 38, R. 5—It can be enforced in execution—No suit is necessary under Transfer of Property Act, S. 67.

A security bond executed by a judgment-debtor for the purpose of removing an attachment before judgment can be enforced in the course of execution. A suit under S. 67, T. P. Act, to enforce the security is not necessary: *A I R* 1924 *Cal* 485 and *A I R* 1919 *P C* 55, *Rel on*. [P 67 C 1]

(c) Insolvency — On judgment-debtor's insolvency, only Official Assignee can contest execution and not judgment-debtor.

On insolvency of the judgment-debtor the only person who has got an interest to contest the execution is the Official Assignee and he and he alone is the person who has the right to contest the application or prefer an appeal against the order refusing the objection: *A I R* 1927 *P C* 108, *Rel on*. [P 67 C 2]

Bijaykumar Bhattacharjya and *Jatendra Mohan Chaudhuri*—for Appellant.

Surendranath Das Gupta and *Pareshlal Shome*—for Respondents.

Mitter, J.—This is an appeal on behalf of the judgment-debtor and arises out of certain proceedings taken in the course of execution of a decree for money obtained against him. In order to appreciate the points in controversy in the present appeal a few facts must be stated. It appears that a suit was brought against the appellant for a certain sum of money of about Rupees 12,000 by the decree-holders-respondents. In that suit, a rule was issued for attachment of the appellant's property before judgment. In pursuance of an order made in the course of the suit, under the provisions of O. 38, R. 5, Civil P. C., certain properties were furnished as securities, in the event of a decree being ultimately obtained by the decree-holders. The security bond is to be found in the appendix to the paper-book. The only portion which is material and needs to be quoted is this:

I, accordingly execute this security bond by hypothecating as security whatever right, title and interest I personally have in the properties stated in the schedule to the plaintiff's application and described in the schedule below, and I agree that, if the said suit be decreed, whatever title and interest I may have in the properties stated in the schedule below shall remain liable for the said decretal amount. If I do not amicably pay up the said decretal amount you shall be competent to realize the said decretal amount with costs by the auction-sale of the title and interest I have in the properties described in the schedule below.

On 7th August 1931 a decree for a sum of Rs. 8,065 was passed in favour of the respondents; and, on 3rd February 1932, the present execution case was started, which has led to the present appeal. On 13th February 1932 one of the creditors of the appellant applied in the Insolvency Jurisdiction of the High Court to have the appellant adjudicated an insolvent and, on 1st March 1932, the judgment-debtor was adjudicated an insolvent. On 9th March 1932 the solicitor for the petitioning creditor intimated to the Court, which was executing the decree of the respondents, that the judgment-debtor had been adjudicated an insolvent. On the 24th March 1932, execution was stayed. On 6th May 1932 the decree-holder respondent applied for cancellation of the stay order on the ground that by virtue of the security bond, which had just been referred to, they were secured creditors and were not bound by any orders that may be passed in course of the insolvency proceedings as they stand outside bankruptcy. On 7th May 1932, this order which was made ex parte, was withdrawn. On 14th May, 1932, a direction was given that notice do issue to the Official Assignee for settling the sale proclamation under the provisions of O. 21, R. 66, Civil P. C., and this notice was served on the Official Assignee in whom the appellant's estate had vested after the order of adjudication. On 24th November 1932, the Official Assignee wrote a letter in which he drew the attention of the Judge to the provisions of S. 17, Presidency-towns Insolvency Act—Act 3 of 1909. The contention which was raised before the lower Court was based on this letter and was to the effect that unless the leave of the insolvency Court was obtained, having regard to the provisions of S. 17, this execution could not proceed. This is one of the contentions which has been raised before us, as this was overruled by the Subordinate Judge. A further objection was taken before the lower Court to the execution, on the ground that the security bond cannot be enforced in execution, but can only be enforceable by a suit having regard to S. 67, T. P. Act. This contention was

also overruled by the Subordinate Judge, who has directed the execution to proceed and has held that the order of adjudication does not affect the right to execute the decree against the judgment-debtor by sale. He has accordingly withdrawn, as has already been stated, the stay order. Against this order the present appeal has been brought.

Mr. Bhattacharjya, who has addressed a very forcible argument to us, has raised substantially two contentions which deserve notice. In the first place, he contends that the question as to whether the respondents are secured creditors could not be decided in the absence of the Official Assignee in whom the appellant's estate has vested after the order of adjudication; and for that purpose it was necessary to obtain the leave of High Court in its original jurisdiction having regard to the first part of the provisions of S. 17, Presidency Towns Insolvency Act. We are of opinion that this contention cannot be accepted, for the proviso to S. 17 makes it clear that the earlier part of section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it as if the section had not been passed. The effect of this proviso came up for consideration before their Lordships of the Judicial Committee of the Privy Council in a recent case, where their Lordships were considering the corresponding provisions of the Provincial Insolvency Act; and in the case of *Kala Chand Banerjee* v. *Jagannath Marwari* (1), the remarks which were made by their Lordships are pertinent to the matter now in controversy and may be usefully quoted here. In the case of *Kala Chand Banerjee* v. *Jagannath Marwari* (1), their Lordships, after quoting the provisions of S. 16, sub-S. (5), Provincial Insolvency Act, which is the same as the proviso to S. 17, Presideney Towns Insolvency Act, proceeded to observe as follows:

"The learned Judges of the High Court interpret this clause as inferring that the secured creditor is entitled to deal with the security as though there had been no vesting in the Court or the receiver. Their Lordships are clearly of opinion that this construction of the clause cannot be supported. That the rights of the secured creditor over a property are not affected by the fact that the mortgagor or his heir has been adjudicated an insolvent is, of course, plain, but that does not in the least imply that an action against him may proceed in the absence of the person to whom the equity of redemption has been assigned by the operation of law. The latter alone is entitled to transact in regard to it, and he, and not the insolvent, has the sole interest in the subject-matter of the suit. To him therefore must be given the opportunity of redeeming the property. The contrary view would encourage collusive arrangements between the secured creditor and the insolvent and might involve the sacrifice of valuable equities of redemption which ought to be made available for the benefit of the unsecured creditors of the insolvent with whose interests the receiver is charged."

It appears therefore clear that the Official Assignee is a necessary party to the present proceedings and the decree-holders respondents have taken all the steps which lay in their power of making the Official Assignee a party to these proceedings. It is not necessary that leave of the Court has to be obtained and the earlier part of S. 17 applies only to such debts as are provable in insolvency. It has been strenuously argued on behalf of the appellant with reference to some of the provisions of the statute made in S. 46 and other sections that the debts of secured creditors respondents are also debts which are provable in insolvency. That is a position which cannot be sustained, for, as it has been said, and rightly said, that generally a secured creditor stands outside the bankruptcy. See the case of *White* v. *Simmons* (2). He may rely upon the security and need not prove for the whole debt. A secured creditor who comes in under the insolvency has only three courses open to him, namely, (1) that he may realize the security and then prove for the balance; (2) he may surrender the security and prove for the whole debt, and (3) he may state the whole valuation at which he has assessed the security and then prove for the balance after deducting the assessed value. The provisions of S. 46, to which reference has been made, really refer to a secured creditor who has taken any of the three courses to which we have just referred. It does not apply to a secured creditor who wants to enforce his security. We are of opinion therefore that the first ground which is based on the want of leave of the High Court in its original jurisdiction must therefore fail.

1. A I R 1927 P C 108=101 I C 442=54 I A 190=54 Cal 595 (P C).

2. (1871) 6 Ch 555=40 L J Ch 689=19 W R 939.

The next and the most substantial ground on which this appeal is rested is that, having regard to the form of the security, the proper remedy for the decree-holders was to proceed to enforce the security by a suit instituted under S. 67, T. P. Act. The Subordinate Judge has, in rejecting this contention, relied on two decisions; one of this Court and the other of their Lordships of the Judicial Committee of the Privy Council. In the first case of *Jyoti Prakash Nandi* v. *Mukti Prakash Nandi* (3), it was held, that in circumstances similar to the present, that the security bond, which is in the form which the present security bond takes, namely, (a bond in favour of the Court) could be enforced in execution. It is said that that case is distinguishable from the present case, seeing that, in that case, the security bond was executed after the decree and, in the present case, this bond was taken prior to any decree having been passed in the suit. It was taken as a security at the stage of the proceedings under O. 38, R. 5 of the Code. But to this a complete answer is furnished by the decision of their Lordships of the Judicial Committee in the case of *Raj Raghubar Singh* v. *Jai Indra Bahadur Singh* (4). There, as will appear from an examination of the passage in their Lordships' judgment, at p. 167, that the security bond was taken for mesne-profits during the pendency of an appeal and their Lordships of the Judicial Committee said that although the bond is not in favour of any particular person, but was in favour of the Court, there must be some mode of enforcement and that the only mode of enforcement must be by the Court making an order in the suit upon an application to which the sureties are parties, that the property charged be sold unless before a day named the sureties find the money. It is said that there must be an assignment by the Court in favour of the present respondents. That argument is not supported by any authority and it is said in this very case that:

"It is suggested that they are bound to the Court. But the Court is not a juridcial person. It cannot be sued. It cannot take property, and as it cannot take property, it cannot assign it. It remains therefore that there is an unquestioned liability, and there must be some mode of enforcing it and that the only mode of enforcing it must be by the Court making an order in the suit upon on application to which the sureties are parties."

It follows therefore that the Subordinate Judge was quite right in coming to the conclusion that this security bond could be enforced in the course of execution. It seems to us somewhat strange that the present appellant should contest the execution proceedings seeing that he has got absolutely no interest in the property and, as has been pointed out, in the passage to which I have already referred in the decision of their Lordships of the Judicial Committee in the case of *Kala Chand Banerjee* (1), that the only person who has got an interest to contest this execution is the Official Assignee and, as the Judicial Committee pointed out

"he and he alone is the person who has the right to contest the application or prefer an appeal against the order refusing the objection."

In these circumstances, the appeal should be dismissed. There will be no order as to costs. No order need be made on the application.

Henderson, J.—I agree. The respondents do not contend and never have contended that the Official Assignee was not a necessary party to their application. In fact, they took all the steps that lay within their power to bring him before the Court. It appears from a letter which he wrote to the learned Subordinate Judge that he stated that he was not in a position to take any steps in the matter without the leave of the insolvency Court; and that objection has now been taken on the part of the judgment-debtors. I entirely agree that that is not the meaning of S. 17, Presidency Towns Insolvency Act. It is quite clear that the learned Subordinate Judge had jurisdiction to determine what order was to be passed on the application for execution made by the respondents. Supposing that the insolvency Court refused leave to the Official Assignee to appear, clearly it would not have any effect on the rights of the respondents; the only effect would be that the equity of redemption would not be represented in the proceedings. On the other points, I have nothing to add to what has fallen from my learned brother.

R.K. *Appeal dismissed.*

3. A I R 1924 Cal 485=81 I C 734=51 Cal 150.
4. A I R 1919 P C 55=55 I C 550=46 I A 228=42 All 158=22 O C 212 (P C).

A. I. R. 1934 Calcutta 68

GUHA AND BARTLEY, JJ.

Hemchandra Ganguli—Appellant.

v.

Matilal Ganguli—Respondent.

Appeal No. 1039 of 1931, Decided on 15th May 1933, from appellate decree of Dist. Judge, Bakarganj, D/- 1-12-1930.

(a) Hindu Law—Joint family — Dayabhaga —Father and sons cannot form joint family—Brothers living joint cannot claim acquisition by affluent brother as joint property, unless they have contributed to its acquisition.

Under the Dayabhaga School of Hindu law prevalent in Bengal, there cannot be a joint family consisting of the father and the sons. So also brothers living in commensality are not members of joint Hindu family governed by the Dayabhaga so as to enable the brothers to claim the self-acquisition of a brother in more affluent circumstances as acquisition of a joint family, unless, these other brothers prove that they had also contributed to the acquisition of the property claimed by them as acquisition by the joint family: *A I R* 1927 *Cal* 776, *Ref.*

[P 69 C 2]

(b) Hindu Law — Joint family — Self-acquisition can become joint property if thrown in common stock—Clear intention to waive separate rights must be proved.

Property, which was originally self-acquired, may become joint property, if it has been voluntarily thrown into the joint stock with the intention of abandoning all separate claims upon it. A clear intention to waive separate rights must however be established and will not be inferred from acts attributable to various causes.

[P 69 C 2; P 70 C 1]

(c) Hindu Law—Joint family—No nucleus—Party asserting that property was thrown into common stock must prove it.

Where no nucleus of joint property is admitted or proved, the onus is upon the party asserting that property was not the self-acquired property of an individual member of the family but was thrown into common stock: 32 *I C* 12, *Rel. on.* [P 70 C 1]

(d) Evidence Act (1872), S. 101 — For making out title, negative proof necessary—Person asserting negative claim or defence is not relieved of onus of proving negative evidence—Practice, evidence.

The general rule of evidence is that, if, in order to make out a title, it is necessary to prove a negative, the party, who avers it, must prove the title. In some cases this allegation, negative in form, is made by the plaintiff in others by way of defence; the rule applicable to all such cases is that, where a claim or defence rests upon a negative allegation, the one asserting such claim or defence is not relieved of the onus probandi by reason of the form of the allegation or the inconvenience of proving a negative.

[P 70 C 2]

Ramesh Chandra Sen and *Pareshchandra Sen*—for Appellant.

Bhagirath Chandra Das, *Narendranath Guha* and *Ramendranath Ray Chaudhuri*—for Respondent.

Judgment.—The facts giving rise to the litigation, in which this appeal has arisen, as accepted by the Court of appeal below, may be briefly enumerated, in view of the matters in controversy between the parties. One Poornachandra Ganguli had three sons, Kunjabihari, Matilal and Biharilal. Poorna, it would appear, was not at all well off, so far as his pecuniary circumstances were concerned, and had to spend a part of his life in his father-in-law's house. Kunjabihari, the eldest son, served in the police department of the Government, and had a decent income; out of his own money he acquired property, which is the subject matter of the present litigation, in the name of his father Poorna, the name of the father having been used for the reason that Kunja's superior officers in the department would have raised objection, had it been known that he was acquiring property within the district in which he was serving. Kunjabihari predeceased his father: Kunja died in the year 1912, while his father Poorna's death took place in the year 1919. The father was dealing with the property as his own, in the sense that he was living in the same, which is a house, till the time of his death; there is lack of evidence to show that Kunjabihari treated the property as his own self-acquired property, and, in point of fact, after the death of Poorna, there was, in the year 1925, a deed of partition between the sons of Kunjabihari on one side and their uncles Matilal and Biharilal on the other, in which it was stated that the possession of the plaintiff, Hemchandra Ganguli, in the suit, out of which this appeal has arisen, and that of his brother was in respect of one-third share of the property. This suit as instituted by the plaintiff in 1928 for partition and possession of the property, to which reference has been made above, was on the footing that the partition deed, drawn up in 1925 mentioned above, was not registered, and the agreement between the parties was that it should not come into force before registration; the plaintiff averred that he subsequently came to realise his own legal position in respect of the property, and was suing in assertion of his and his brother's legal rights in respect of two-thirds share of the property, defendants 1 and 2 being

entitled to get the remaining one-third share. The learned District Judge in the Court of appeal below has quoted the plaintiff's own words, in which his case was put before the Court:

"The family was not a joint Hindu family under the Dayabhaga law, but was a family of persons, father and sons, living jointly, and governed by Dayabhaga law."

In other words, the family was not a Hindu family under the Dayabhaga school of Hindu law, but it was a community of persons living jointly and governed by the Dayabhaga. On the pleadings of the parties, defendants 1 and 2 in the suit—the paternal uncles of the family—having pleaded that the family was a Hindu joint family, that the property in suit was acquired from common fund of the joint family contributed by Poorna and his three sons, and that, on their father's death, they had inherited a one-third share each in the property, the plaintiff and his brother—the sons of Kunjabihari—being entitled to the remaining one-third share, the material issue raised for trial in the suit was issue 4:

"Is the disputed property ancestral property of the parties? Has it been acquired out of common fund?"

It would appear that the trial Court was of opinion, on the evidence in the case, that

"The property in dispute was acquired by Poorna, though in all probability the money was got by Poorna from his son Kunja. The evidence on the plaintiff's side shows that Kunja intended to make his property, property of the family and not his separate property."

The trial Court, on consideration of the evidence before it, held that

"The disputed land was ancestral property of the parties, and was acquired out of what is called by the defendants the common fund."

The shares of the parties were, accordingly, determined; the plaintiff and defendant 3 having a one-sixth share each in the property in suit. On appeal by the plaintiff, the learned District Judge has held, as has already been mentioned, that the property in suit was purchased by Kunjabihari in the name of Poorna. The learned Judge observed that, with regard to actual treatment of the property after its acquisition, there was a great dearth of evidence. He has stated definitely that evidence on the side of defendants 1 and 2 did not prove that the property was not joint family property. The learned Judge has then proceeded to observe that on the side of the plaintiff however there is lack of evidence to show that Kunja ever treated the property as his own self-acquired property. According to the learned District Judge there was a presumption in favour of defendants 1 and 2 that the property was acquired for the benefit of the family, although the money actually was subscribed by Kunja; the onus lay on the plaintiff's side to show that Kunja treated the property as his self-acquired property and that onus had not been discharged. In the above view of the case, the decree passed by the learned Subordinate Judge in the trial Court was upheld by the Court of appeal below, and the plaintiff's appeal was dismissed, so far as the question of determination of shares and partition as between the plaintiff and defendant 3 on one side and defendants 1 and 2 on the other was concerned. It requires notice, in the first place, that the learned District Judge's observation, regarding the distinction between a joint family under the Dayabhaga school of Hindu law and a community of persons governed by the Dayabhaga living jointly and his characterisation of the distinction between the two, as drawn before him, as a thing which savoured of "sophistry" does not commend itself to us.

It is now well recognized that, under the Dayabhaga school of Hindu law prevalent in Bengal, there cannot be a joint family consisting of the father and the sons. The sons may acquire separate property having no concern with the joint family property, if any property can be called joint family property during the lifetime of the father. It must also be taken to be well established that brothers living in commensality are not members of joint Hindu family governed by the Dayabhaga, so as to enable the brothers to claim the self-acquisition of a brother in more affluent circumstances as acquisition of a joint family, unless these other brothers proved that they had also contributed to the acquisition of the property claimed by them as acquisition by the joint family: see in this connexion the case of *Gouranga Sundar* v. *Mohendra Narayan* (1). It is to be noticed further that there cannot be any doubt that property, which was originally

1. AIR 1927 Cal 776=104 I C 694.

self-acquired, may become joint property, if it has been voluntarily thrown into the joint stock with the intention of abandoning all separate claims upon it. The question, whether there was abandonment of separate claim or not, is entirely one of fact, to be decided in the light of all the circumstances of the case; a clear intention to waive separate rights must however be established and will not be inferred from acts attributable to various causes: see Mayne on Hindu Law and Usage, 9th Edn., para. 278, pp. 360 to 361; *Lal Bahadur* v. *Kanhaiya Lal* (2), *Suraj Narain* v. *Ratan Lal* (3) and *Muddun Gopal Lal* v. *Khikhinda Koer* (4). It requires notice also that where no nucleus of joint property is admitted or proved, and there is, in the case before us, nothing to indicate that there was any nucleus of the joint family, to which the parties concerned belonged, the onus is upon the party asserting that property was not the self-acquired property of an individual member of the family: see Golapchandra Sarkar's Treatise on Hindu Law, 7th Edn., by Mr. Rishindranath Sarkar, p. 549, and the case referred to there. Reference may also be made to the decision of a Full Bench of the Madras High Court in the case of *C. Ethirajulu Naidu* v. *Govindarajulu Naidu* (5), in which it has been held that property acquired by a member of a joint Hindu family, when there is no nucleus of joint property, is presumed to be his separate property, and the burden of proving that he threw it into the common stock is upon those who assert it.

In the light of the above position in law, the decision of the Court of appeal below, which was arrived at after expressing disagreement with the findings arrived at by the trial Court that the property was acquired by Poorna, that Kunja, by whom the fund was supplied to Poorna, intended to make his property the property of the family and not his separate property, cannot be accepted as one sound in law. There was under the law no presumption in the case before us in favour of defendants 1 and 2 that the property was acquired for the benefit of the joint family, although money was actually subscribed by Kunja, there having been no joint family, in the strict sense of the expression applicable to persons governed by the Dayabhaga school of Hindu law, owning property. The Court below, in our judgment, is not right in law in laying down the proposition that the onus lay on the plaintiff's side to show that Kunja had not treated the property as his own self-acquired property. In view of the propositions of law, to which reference has been made, with which we are in entire agreement, the plaintiff had no burden on himself to discharge in the matter of proof of the fact that his father had no intention to treat the property acquired by him with his own funds, as his separate property. It was not for the plaintiff to prove a negative regard being had specially to the defence of defendants 1 and 2 in the suit, to which reference has been made already. The general rule of evidence is that, if, in order to make out a title, it is necessary to prove a negative, the party who avers it must prove the title.

In some cases this allegation, negative in form, is made by the plaintiff, in others by way of defence: the rule applicable to all such cases is that, where a claim or defence rests upon a negative allegation, the one asserting such claim or defence is not relieved of the onus probandi by reason of the form of the allegation or the inconvenience of proving a negative: see *Abrath* v. *N. E. Ry. Co.* (6). The plaintiff's claim before the Court, on the basis that the property in suit was the self-acquired property of his father, Kunjabihari, was resisted by defendants 1 and 2 on the ground that the property was acquired by Poorna, that it was the property of the joint family, having been acquired from the common funds of the joint family, and that it was ancestral property. The defence so raised was not accepted by the Court of appeal below. It was held that the evidence on the side of defendants 1 and 2 to which reference has been made by the Court below in detail, did not prove that the property was joint family property. In the case before us, therefore, regard being had to the cases set up by the res-

2. (1907) 29 All 244=34 I A 65=4 A L J 227 (P C).
3. AIR 1917 P C 12=40 I C 988=44 I A 201=40 All 159=20 O C 211 (P C).
4. (1890) 18 Cal 341=18 I A 9 (P C).
5. (1915) 32 I C 12.
6. (1883) 11 Q B D 440=52 L J Q B 620=49 L T 618=32 W R 50=47 J P 692.

pective parties, it was not for the plaintiff to prove a negative; but it was for defendants 1 and 2 to prove their defence before the Court, which they had failed to do so.

The conclusion of the learned Judge in the Court below based upon propositions laid down by him that there was a joint Hindu family comprising the father and the sons, that there was a presumption in favour of defendants 1 and 2 that the property was acquired for the benefit of the joint family, although the fund was actually supplied by Kunjabihari, and the onus was on the plaintiff to prove the negative; that the property was not treated as the separate self-acquired property of Kunjabihari, has not been discharged, is not supportable in law; and we are wholly unable to give effect to the conclusion so arrived at by him. We have no hesitation in coming to the decision that, upon the findings of fact arrived at by the learned Judge, the plaintiff was entitled to the share claimed by him so far as the property in suit was concerned and that defendants 1 and 2 have failed to establish the case, which would have entitled them to the shares claimed by them on the score of the property being ancestral, their defence having failed on the findings arrived at by the final Court of fact. According to our decision, the plaintiff and defendant 3 in the suit, the the sons of Kunjabihari, are entitled to get a one-third share each, in the property in suit, and are entitled also to get possession of the same on partition. This disposes of the case decided by the Court of appeal below on appeal by the plaintiff.

The question requring consideration next is this: The learned District Judge in the Court of appeal below allowed the cross-objection preferred by defendants 1 and 2 in regard to a chowchala tin-roofed hut in the outer house within the ambit of the property in suit, and in regard to a table mentioned in the plaint, as the plaintiff's self-acquired property. The trial Court, on the evidence in the case held that the two items of property mentioned above were the self-acquired separate properties of the plaintiff and were, therefore, to be kept outside partition. The learned Judge, in the Court of appeal below, has not assigned any reason whatsoever for reversing the decision of the trial Court, and no attempt was made before us to support the learned Judge's decision in this behalf. We accept the decision of the trial Court with reference to the chowchala tin-roofed hut and the table mentioned above, and they are to be kept outside the partition, as the self-acquired properties of the plaintiff in the suit. It may be mentioned that the chowchala tin-roofed hut mentioned in the plaint is to be treated as the plaintiff's separate property, irrespective of the ground on which the hut stands, which is to be partitioned in accordance with the shares of the parties concerned, in view of our decision, in supercession of the decision arrived at by the Courts below, on the question of shares.

In the result the decisions and decrees passed by the Courts below are set aside and the plaintiff's claim is allowed in full. A self-contained decree is to be drawn up in this Court incorporating our decision in favour of the plaintiff in the suit, entitling him to possession on partition, after a Commissioner for effecting partition has been appointed by the trial Court. On the facts and in the circumstances of the case, we direct that the parties do bear their own costs in the litigation up to the present stage including the costs of this appeal.

R.K. *Appeal allowed.*

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GUHA AND BARTLEY, JJ.

Moni Mohan Pal and *others*—Appellants.

v.

Gour Chandra Das and *others*—Respondents.

Appeal No. 589 of 1931, Decided on 9th May 1933, from appellate decree of Addl. Sub-Judge, Khulna, D/- 30th August 1930.

Adverse Possession--Co-owner—Different tenants by different leases by different co-owners—One in adverse possession for 12 years to knowledge of other—Former can resist suit for partition by other—Co-sharer.

Persons deriving the interest of tenants in the lands under superior holders who are co-owners of a zemindari in respect of different shares leased out to them separately do not stand in the category of co-owners. The fact that they are holders of separate and distinct interests as tenants in respect of two different shares of a joint property, prevent them from claiming that they stand in the relation of co-owners. Such tenants cannot therefore be considered to be persons who are in legal possession of the entire

shares of the tenants' interest in the lands. There is no unity of the right of possession to constitute a tenancy in common. The adverse possession asserted by one cannot therefore be adverse possession of a co-owner in regard to a property. The title gained by the tenant in adverse possession by his possession is tenure-holders' interest. Such a tenant is in a position to defeat the other tenure-holder's claim to partition made on the footing of his possessing a fractional interest of a tenure holder.

[P 73 C 1, 2]

Bijan Kumar Mukerji and *Sris Chandra Dutta*—for Appellants.

Atul Chandra Gupta, *Nirmal Chandra Mitter* and *Nerod Bandhu Ray*—for Respondents.

Judgment.—This is an appeal by the plaintiffs in a suit for declaration of their title to the lands in suit as tenure-holders, in respect of 8as 2gds 2ks share of the same, and for partition of the lands by metes and bounds. The plaintiffs' claim in suit was resisted by defendant 1 whose tenancy right under the zemindars concerned in respect of the remaining share of the lands in suit was not disputed, and it was not also disputed that the zemindars under whom defendant 1 held his tenancy were the cosharers of the zemindars under whom the plaintiffs held. The question in controversy in the case as between the plaintiffs and defendant 1 so far as the appeal to this Court is concerned, was whether the plaintiffs' title was extinguished by adverse possession on the part of defendant 1; whether the defendant has acquired a title to the 8as 2gds 2ks share of the lands in suit by adverse possession.

The Court of first instance came to be of the opinion that

"people who derive title, from cosharers and exercise possession on the strength of such title, stand on the same footing as the cosharers themselves, as they step into their shoes. Hence people who are entitled to possess undivided share in the land whether they claim to do so on the strength of co-ordinate interest of the same grade or not are in the same position as cosharers or co-tenants or co-proprietors."

The trial Court then proceeded to hold that there was no hostile possession by defendant 1 before 1326 B. S. and that the defendant's possession became adverse to the plaintiffs less than twelve years before the instituion of the suit, and the suit was not barred by limitation. On appeal by defendant 1 the learned Subordinate Judge in the Court of appeal below, agreed with the trial Court in view that the plaintiffs and defendant 1 stood in the relation of co-owners. It was held on the facts and in the circumstances of the case, that the plaintiffs could not be said to have been in constructive possession of the lands through the defendant; the defendant's possession was held to be adverse to the plaintiffs:

"circumstances of the case were such as to charge the plaintiffs with knowledge of the assertion of a hostile title by the defendant."

The appeal by defendant 1 was accordingly allowed by the lower appellate Court, and the plaintiffs' suit was dismissed. The first point that arises for consideration is, whether the view taken by the Court below that the plaintiffs and defendant 1 in the suit stand in the relation of co-owners is correct so far as the holders of the superior interests are concerned, the zamindars under whom the plaintiffs and defendant 1 hold the lands in question in respect of different undivided shares, they are undoubtedly co-owners; each in possession of the whole and of the different shares, which means that each co-owner has control or defacto possession of the whole; he exercises such control partly on behalf of himself and partly on behalf of his co-owner. In a case of joint tenancy the joint tenants have both single possession and a single joint right to possess: (see Littleton's Tenures, Ss. 288, 311, 314 and 315 Markby's Elements of Law, S. 399). As has been stated at p. 1034 of the very exhaustive and valuable commentary on the Law of Limitation in British India, by Dr. Radha Binode Pal, recently published, the meaning of the above rule adopted by English lawyers is that whereas each co-owner has access to and control over every part of the property, and so may be said to have possession in the sense of detention of the whole, yet he exercises that control not on behalf of himself alone, but partly on behalf of himself in respect of his own share and partly as representative of his co-owner. A co-owner in sole possession for a length of time can in this view of the matter maintain his exclusive possession even against his other co-owners till partition. Applying the above proposition to the facts and circumstances of the case before us, it cannot be said that the plaintiffs and defendant 1 deriving

the interest of tenants in the lands in suit under superior holders who are co-owners of a zemendari in respect of different shares leased out to the plaintiffs and defendant 1 separately by them, are persons who stand in the category of co-owners; and that the interests of the two different sets of tenants, the plaintiffs on the one hand and defendant 1 on the other, was co-ordinate. The fact that they were holders of separate and distinct interests as tenants in respect of two different shares of a joint property, prevent them from claiming that they stand in the relation of co-owners. The plaintiffs and defendant 1 as between themselves cannot be considered to be persons who are in legal possesion of the entire shares of the tenants' interest in the lands' in question and there is no such equal right to the possession of every part and parcel of the subject matter of the separate tenancies, created in favour of the plaintiffs on the one hand, and defendant 1 on the other: there was no unity of right of possession to constitute a tenancy in common: (see in this connection the case of *Biswanath Chakraburty* v. *Rabija Khatun* (1). In our judgment, the plaintiffs and defendant 1 in the suit out of which this appeal has arisen, could not under the law be considered to be co-owners in respect of the lands in suit and the adverse possession asserted by defendant 1 could not therefore be adverse possession of a co-owner in regard to a property.

On the findings arrived at by the Courts below, defendant 1 had been in possession of the lands in suit for more than twelve years before the date of the institution of the present suit by the plaintiffs. The trial Court came to the decision that the plaintiffs and defendant 1 being co-owners, the possession of defendant 1 could not be treated as adverse possession extinguishing the title of the plaintiffs. The Court of appeal below however, as has been mentioned already, held that the defendant's possession was in the assertion of a hostile title, and inasmuch as the plaintiffs could be charged with the knowledge of the same, the plaintiffs title to the lands in suit was extinguished. In view of the conclusions arrived at by us in disagreement with the view expressed by the Courts below that the plaintiffs and defendant 1 were co-owners, the question arises, what was the quantity of estate acquired by the possession proved by defendant 1. Defendant 1 has by his possession gained an indefeasible title as against those who had an estate in possession, and against whom the possession by the defendant was asserted; and the title gained is no longer than the interest which the rightful owners, the plaintiff who claimed title to the lands in suit as tenure-holders in regard to a specified undivided share of the lands in suit have lost by the operation of law. The title gained by defendant 1 by his possession, must therefore have the same legal character, and be tenure-holders' interest accordingly: (see *Walter* v. *Yalden* (2). Defendant 1, respondent in this appeal, had by his adverse possession, as proved in the case was in a position to defeat the claim of the plaintiffs in the suit as tenure-holders in respect of an 8as 2gds 2ks share of the lands in suit, and the suit has to be dismissed on that ground.

In the result the appeal is dismissed with costs, and the decree of the Court of appeal below, dismissing the plaintiff's suit is affirmed.

R.K. *Appeal dismissed.*

1. A I R 1929 Cal 250=117 I C 593=56 Cal 616.

2. (1902) 2 K B 304=71 L J K B 693=87 L T 97=51 W R 46=18 T L R 668.

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MUKERJI AND MALLIK, JJ.

Sukhadakanta Bhattacharjya—Defendant—Appellant.

v.

Jogineekanta Bhattacharjya—Plaintiff—Respondent.

Appeal No. 242 of 1929, Decided on 3rd May 1933, from original decree of Third Sub-Judge, Mymensingh, D/- 22nd May 1929.

Hindu Law—Alienation— Manager--Dayabhaga — Mortgage — Creditor cannot ask money decree against all members of joint family as primary relief before bringing mortgaged property to sale—Transfer of Property Act (1882), S. 68—Civil P. C. (1908), O. 34, R. 14.

An implied consent may be presumed in favour of the managing members of Dayabhaga family from the very fact that they were entrusted with the management of the family estate by the other members of the family; and hence when the debt is contracted by the managing member of a joint family for a joint family purpose, the joint family and not the managing member becomes liable for it. When

a mortgage has been executed by two such members, it is not open to the creditor to ask money decree against all : *Case law discussed.*

[P 75 C 2; P 76 C 1]

Radhabinode Pal and *Premranjan Ray Chaudhuri*—for Appellant.

Atulchandra Gupta, *Ishwarchandra Chakrabarti* and *Hemendranarayan Bhattacharjya*—for Respondent.

Judgment.—The common ancestor of the parties to this suit was one Kamalakanta. He left three sons, from whom three branches of the family originated. From Ramanikanta, the barha hishya; from Durgakanta, the madhyam hishya and from Anandakanta, the chhota hishya. The plaintiff Jogineekanta is the son the of eldest son of Durgakanta, whose other three sons are not parties to this suit. Defendants 1 and 2 are Udaykanta and Hridaykanta, two of the sons of Ramanikanta, whose other two sons Jamineekanta and Kumudakanta are defendants 3 and 4 respectively. Defendant 5 is the grandson of Anandakanta by his son Saradakanta. The plaintiff's case was as follows:—That, in 1313, madhyam hishya separated in mess from the other two branches, which remained joint; that Saradakanta, father of defendant 5, the then head of the chhota hishya was the karta of the joint family consisting of the said two hishyas, but in and from 1317, defendants 1 and 2, Udayakanta and Hridaykanta, managed its affairs; that, on the 20th Magh 1317 (=3rd February 1911), defendants 1 and 2, as kartas of the said joint family, executed a mortgage in favour of the plaintiff and his father for a sum of Rs. 12,000 on account of certain dues and liabilities of the family to that extent, for which the members of the family stood indebted to them; that since then, certain amounts were paid by the said two defendants from time to time on behalf of the family and a sum of Rupees ten thousand odd remained due and that, in the meantime, a part of the mortgaged properties has been sold away. The plaintiff's father having died, the properties left by him devolved on the plaintiff by inheritance. Treating the amount due as a joint debt of the defendants, the plaintiff instituted this suit praying, in the first instance, for a money decree against all the defendants. In default thereof, he prayed for a mortgage decree against the mortgaged properties with the exception of those that had been sold away.

The contesting defendant was defendant 5, who alleged that the two branches of the family were not joint at the time of the loan, nor were defendants 1 and 2 kartas of any such family; that the debt was not incurred by the said defendants as kartas or for purposes of the joint family or for legal necessity; and that his father Saradakanta or his branch was not benefited. He pleaded that the suit was the outcome of collusion between the plaintiff and defendants 1 to 4. It was also pleaded that the claim against defendant 5 was barred by limitation. The Subordinate Judge has made a decree in plaintiff's favour against all the defendants for the amount claimed together with interest at 6 per cent per annum till realization and has ordered that such decree should be a personal decree against defendants 1 and 2, and so far as it is against the other defendants their shares in the joint properties would be liable.

Defendant 5 has appealed. As regards the facts found by the Subordinate Judge, we think his findings are correct. He has found that the family was joint at the time when the mortgage was executed, that the madhyam hishya separated from the other two branches in 1313, but the properties of the three branches remained joint till 1334, that the debt was the debt of the joint family consisting of the said two branches, i.e., the barha hishya and the chhota hishya, that it was incurred for family purposes and for legal necessity and was ratified and acquiesced in by all the defendants that the mortgage was executed by defendants 1 and 2 at a time when they were in charge of the affairs of the said joint family and that the transaction benefited the entire family including defendant 5's father and his branch. The Subordinate Judge has arrived at the aforesaid conclusion upon a most elaborate and extensive discussion of the materials on the record. On an examination of those materials and for reasons which he has given and which we see no necessity to repeat, we think we must uphold those conclusions. The arguments addressed to us on behalf of the appellant have not shaken those conclusions in the least. If the findings stand

as in our judgment they must, the question of limitation also does not arise.

The question which, in our judgment requires serious consideration is whether it is competent for the plaintiff to obtain a decree of the character which has been made in his favour. For this a careful analysis of the mortgage bond is necessary. 1. Uday and Hriday purported to execute the bond in their individual and personal capacity and not as kartas, nor members of a joint family. 2. As regards consideration, (a) Rs. 5,000 was said to be on two heads, Rs. 1,250 being the consideration for the sale of the mortgagee's right in a certain decree and in the property described in Sch. 1; and Rs. 3,750 as nazar for a mirash settlement of their rights in the property described in Sch. 2; and (b) Rs. 8,000 being due as the price of certain decrees and bonds. It was said that out of the aforesaid amount of Rs. 5,000 and Rs. 8,000, i. e. Rs. 13,000, Rs. 1,000 was to go in discharge of a liability of the mortgagees under a decree. The balance Rs. 12,000 was the consideration for the mortgage bond.

3. The bond was executed on 20th Magh 1317 (=3rd Febuary 1911). As regards date of payment it was stipulated:

"We shall pay off the entire amount, including interest, within the month of Chaitra 1318."

4. As regards security, it was said:

"As security for payment of the principal and interest, we mortgage our absolute right in the 4 annas out of the 16 annas of the property of Sch. 1 below, and our mirash right under you Rebatikanta Bhattacharjya (plaintiff's father) in the 1 anna 6 gandas 2 karha 2 kranti share out of 16 annas of the properties of Sch. 2 below, and the absolute right of me Hridaykanta Bhattacharjya in the properties of Sch. 3 below."

5. It was also stipulated thus:

"If even by the sale of our interest in the properties of the schedules below the entire amount due to you be not realised, then you will be competent to recover the amount due to you by the attachment and auction sale of our other movable and immovable properties .... and by the the arrest of our person."

Now, it cannot be disputed that the general principle of Hindu law, in so far as it is based upon the principle of agency and is quite apart from any religious or moral duties, is that all members of a joint family, and therefore all their properties divided or undivided are liable for debts which may have been contracted on behalf of the family by one who was authorised to contract them: (see Manu, 8, S. 166 and Raghunandan 5, Ss. 33 to 36, referred to in Mayne's Hindu law, para. 333). It is true that the present family is not a joint Hindu family strictly so called, nor were the defendants 1 and 2 strictly speaking kartas thereof, nor again are the other defendants, who are sought to be made liable for the debt, persons in the position of sons in a Mitakshara family with reference to a debt contracted by a father in such a family. But, upon the findings of the Subordinate Judge, which we have affirmed, the said two defendants were managing members of a Dayabhaga family, in whose favour an implied consent may be presumed from the very fact that they were entrusted with the management of the family estate by the other members of the family. *Miller* v. *Runga Nath* (1). And the proposition is well settled that, when the debt is contracted by the managing member of a joint family for a joint family purpose, the joint family and not the managing member becomes liable for it. *Dwarka Nath* v. *Bungshi Chandra* (2). The findings in this case go much further and are to the effect that all the members have been benefited by the transaction. There can therefore be no question that upon all general principles, and under the Hindu law in particular, all of them are liable for the debt. The real question is what is the remedy of the creditor, the plaintiff?

The case has got some facts of its own. But before referring to them, I propose to deal with a general question, which is of some importance, namely, whether, when a mortgage of this character has been executed by two of the members, it is open to the creditor to ask for a money decree against all, as the plaintiff has asked for, as the primary relief in the case. It has been argued that, on principle, there is no distinction betwaen this case and that of a karta of a joint undivided Hindu family, who borrows money on a promissory note for the purposes of the family or for meeting family necessities, in which latter case it has seldom been doubted that the creditor can recover the money from all the members of the joint family, although they were not all parties to the notes [see e.g.,

1. (1885) 12 Cal. 389.
2. (1905) 9 C W N 879.

Baisnab Chandra De v. *Ramdhan Dhor* (3), *Hari Mohan Ghose* v. *Sourendra Nath Mitter* (4), *Krishna Ayyar* v. *Krishnasami Ayyar* (5)]. And it is said that between a creditor on a simple bond and a creditor on a mortgage-bond there is no appreciable difference, and yet, in the case of the former it is almost an ordinary incident for him to get relief against all the members of the family of the debtor. In the case of a simple bond or of a promissory note, the suit, if based upon the debt, can end in a decree against persons not parties to the bond or the promissory note, if their liability for the debt can be established. The distinction between a suit on the promissory note and a suit upon the debt has been clearly pointed out in *Vithalrao Sheshgirao* v. *Vithalrao Sondekar* (6). The question therefore plainly is whether a mortgagee is entitled to sue upon the debt ignoring the mortgage.

We have not been referred to any authority one way or the other directly bearing upon the question. But, giving it all the consideration it deserves, we have come to the conclusion that the question must be answered in the negative. It is true that a creditor, who takes a security in the shape of a mortgage, cannot be regarded as having forgone such rights as a creditor has under the general law. But it seems sufficiently clear, from the provisions of the Transfer of Property Act, that these general rights are to some extent abrogated by that Act. For instance, his right to ask for a money decree is very much restricted by the provisions of S. 68 of the Act, and it is perfectly clear therefrom that an action for debt is not the usual remedy of a mortgagee in India:

"A simple mortgage (such as the one we have before us) consists of two parts : a covenant on the part of the mortgagor to pay the debt, and an agreement empowering the mortgagee to realise his money out of the property pledged to him. The pledgee must ordinarily obtain a decree directing a sale in order to make his security available. In the case of a simple mortgage therefore the mortgagee has, generally speaking, on the default of the debtor, a twofold cause of action ; one arising out of the breach of the covenant to repay and the other arising out of the hypothecation ; and he can sue the mortgagor on both the causes of action in one suit: Sir Rashbehary Ghose on Mortgage, Edn. 4, Vol. 1, pp. 76 to 77.

But the mortgagee is not bound to sue for both the remedies simultaneously; as notwithstanding O. 2, R. 2, Civil P. C., he may bring his action on the covenant first and then sue for the sale of the mortgaged property (O. 34, R. 14, Civil P. C.). Cl. (a), S. 68 gives him the right ex contractu; Cl. (b) gives him the right which the Courts have long recognized on equitable grounds, because his security is lost or rendered insufficient, due to nobody's fault, in which case the loss must fall on the owner and Cls. (c) and (d) make the owner liable ex delicto. In the case of a simple mortgage it is not necessary that the mortgagor should promise to pay, and all that is required is that he must bind himself to pay, but it is not necessary that he should expressly do so. As observed by their Lordships of the Judicial Committee :

"A loan prima facie involves a personal liability; such liability is not displaced by the mere fact that security is given for the repayment of the loan with interest, but the nature and terms of the security may negative any personal liability on the part of the borrower : *Ram Narayan Singh* v. *Adhindra Nath* (7)."

And as held in the case of *Benoy Krishna Deb* v. *Debendra Kishore Nandy* (8), a stipulation such as we have in this mortgage, that if the debt be not paid off by the sale of the hypothecated properties the mortgagee would be able to sell other properties of the mortgagor, does not imply that the personal remedy is to be postponed to that against the mortgaged properties. But a mortgagee in respect of a simple mortgage, in view of the provisions of S. 68, T. P. Act, has in our opinion, no cause of action for a relief in the shape of a decree for money independently of the mortgage and apart from his rights as mortgagee. Where none of the Cls. (b), (c) or (d) of that section are satisfied, he can only sue on his rights ex contractu upon the covenant under Cl. (a) and it is not open to him to ignore the mortgage and fall back on the debt.

So far as the present case is concerned there is a further difficulty in the plaintiff's way. No cash money was advanced and the consideration money of Rs. 12,000 was made up of the items al-

3. (1906) 11 C W N 139.
4. AIR 1925 Cal 1153=88 I C 1025.
5. (1900) 23 Mad. 597.
6. AIR 1923 Bom 244=72 I C 242.
7. A I R 1916 P C 119=38 I C 932=44 I A 87 =44 Cal 388 (P C).
8. (1911) 9 I C 660.

ready stated. If the debt was to be sued upon, it was the different items in respect of which the liability was to be pleaded and proved, and the mortgage could only be pleaded as evidence of admission or acknowledgment of the said liability. The plaint has not been framed in that way. On the plaint, as framed, the suit could not possibly be treated as a suit for recovery of the said items. The plaintiff could undoubtedly sue upon the personal covenant in the mortgage bond. His case as to the security being impaired or lost has not been made out; but the covenant nevertheless is there. On that basis, he could get a money decree against defendants 1 and 2 only. That however is not the relief that he wants. On the facts found however there is nothing to prevent him from obtaining such reliefs as the law entitled him to as a mortgagee. The decree passed by the Court below will be set aside and the usual preliminary decree for sale in respect of the mortgaged properties will now be passed against defendants 1 and 2.

If eventually the proceeds of the sale are not sufficient for realization of the decretal amount, the plaintiff will have to apply for a decree for the balance and such a decree will also be available to him. The proper time for plaintiff to rely upon the findings of fact arrived at up to the present stage, to which reference has already been made, will be when the question of a personal decree under O. 34, R. 6 will have to be considered. The question will then arise whether, upon the footing of the unrealized balance being a partnership-debt, the plaintiff will not get a money decree for the same not only against defendants 1 and 2, but also against the other defendants upon the principles underlying the decisions in *Kishun Pershad Chowdhry* v. *Tipan Pershad Singh* (9) and *Kandasami Goundan* v. *Kuppu Mooppan* (10), and whether, upon the footing of the balance being a partnership-debt, a decree would not be available to the plaintiff against all the defendants, the joint property being primarily liable and the separate property only in case it proved insufficent. This, however is a matter on which we do not feel called upon to express any opinion at this stage.

The appeal is allowed the decree of the Court below is set aside and a decree as indicated above is ordered to be passed with costs in the Court below against defendants 1 and 2 and with no order for costs in respect of the other defendants. As regards the appeal, the appellant will get his costs from the plaintiff-respondent. Defendants 1 and 2 will have six months from 3rd May 1933, to make the payment of the decretal amount.

R.K. *Appeal allowed.*

9. (1907) 34 Cal 735=5 C L J 569=11 C W N 613.
10. A I R 1920 Mad 479=55 I C 320=43 Mad 421.

A. I. R. 1934 Calcutta 77

LORT-WILLIAMS AND MCNAIR, JJ.

Kamiraddi Sheik and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 952 of 1932, Decided on 8th June 1933.

(a) Criminal P. C. (1898), S. 297—Charge should be intelligible to jury—Some sequence should be followed—Judge can express opinion though strong but jury must be warned that they are sole judges of fact—Warning must be given not at the beginning or at the end but when opinion is expressed—Judge should not however express opinion where reasonable person will have reasonable doubt about the truth of evidence.

The Judge while charging the jury must use intelligible language and must follow some system or sequence or plan so that the jury can understand the charge when it is spoken to them. While so charging the Judge is entitled to express his own opinion, though strong, if the facts justified it. But he must tell the jury that they are the sole judges of the fact and that they must form their own opinion independently after a consideration of the facts and circumstances. A warning in a formal way either in the beginning or at the end of the charge is not sufficient; it must be given at the moment when the Judge expresses his opinion. The Judge however should not form nor should he express an opinion when the evidence is such that any reasonable person ought to be in reasonable doubt about which story they ought to believe.

[P 78 C 2; P 79 C 1]

(b) Criminal P. C. (1898), S. 297—What is actually said about law must be set out in charge.

The mere statement in a written charge that the sections were explained to the jury is not sufficient. The Judge must set down in a charge what, in fact, he said to the jury about the law.

[P 79 C 2]

(c) Criminal Trial—Jury—Inferences from facts must be left to jury alone—Judge should not express dogmatic opinion about reliability of witnesses—Expression of opinion, that

discrepancy between complaint and subsequent evidence does not affect prosecution case is misdirection — Defence witnesses should not be discounted by prosecution argument not based on evidence on record.

No doubt the Judge may express his own opinion about the questions of fact, but he must leave them to the jury alone. While expressing such opinion the Judge should not make dogmatic statements asserting that certain evidence given by defence cannot stand and that the jury should not place any faith in them specially when such opinion is expressed relying upon the arguments drawn from the speeches of the Public Prosecutor not based on any evidence before the Court. Such a statement clearly amounts to misdirection. So also an expression of opinion that a certain discrepancy between the complaint and the subsequent evidence does not affect a prosecution case, amounts to a misdirection. [P 79 C 2]

(d) Criminal Trial — Duty of Judge—Suggestions not founded on evidence on record should not be made.

The Judge while charging the jury has no right to make suggestions of bribery against the police when they are absolutely without foundation upon the record. [P 80 C 1]

Suresh Chandra Talukdar — for Appellants.

Nirmal Kumar Sen—for the Crown.

Lort-Williams, J.—In this case the three appellants were charged with abduction and sentenced to long terms of imprisonment. The woman abducted was aged about 22 and was the wife of a chaukidar. Her husband was away from time to time and she lived with her brother-in-law who was an invalid. The case for the prosecution was that on one night the accused with a number of others entered the hut, dragged her out and took her away. They moved her from place to place and eventually took her to a prostitute. There seems to be some suggestion that she was to be sold for purposes of prostitution. While with this woman, she came across a daffadar to whom she told her story and eventually she was brought home.

The case for the defence was that two of the accused were not there at all and that the first accused Kamiraddi had gone with her at her own wish, because she was not happy with her husband. The case for the defence is confirmed in rather a startling manner by the diary of a daroga to whom the daffadar took her. In that it is stated that she went away of her own free will, because she was unhappy in her husband's house. This evidence, if believed, obviously destroys the case for the prosecution. We have been handicapped in dealing with this appeal, because a considerable part of the copy of charge of the Assistant Sessions Judge of Faridpur is unintelligible. The time and energies of this Court cannot be wasted by having to interpret into English charges which, according to the rules, are supposed to be already in that language. Many of the charges which we have to deal with now-a-days are written in such imperfect English that it is only with great difficulty that an Englishman can understand them. This, in my opinion, is a particularly bad case. Literally I have not been able to understand either the case for the prosecution or the defence. Greater care must be taken to see that the copy of the Judge's charge is written in understandable English so that we may be able to ascertain without puzzling ourselves what was the meaning of the Judge which he intended to convey to the jury. Further, the copy must be split up into sentences and paragraphs and properly punctuated, to enable one to read it easily. This copy does not offend so much as many in that way, because some attempt has been made to divide it into paragraphs. But some of those paragraphs are of such inordinate length that it is almost impossible without a good deal of trouble to grasp what the paragraph is intended to convey. The charge itself suffers from various defects. In a sense it is better than some charges which come before us: in another sense it is worse.

The learned Judge has not followed any system or sequence or plan, which not only makes the charge difficult to understand when read, but must have made it still more difficult for a jury to understand when it was spoken to them, without the possibility of pausing to consider what had been said—pauses such as are possible for us to make when reading the record. Some sequence must be adopted by a Judge in charging a jury. As was said by one learned Judge, any sort of sequence will do, preferably chronological, but even alphabetical sequence is better than none at all. In this charge the learned Judge has gone forward with the story, and then broken off, and then retraced his steps in a way so confusing that his charge cannot have been of much assistance to the jury. However he has triumphed over these difficulties by summing up so strongly in favour of

the prosecution that the jury took only three minutes to consider their verdict. As I have said before, there is nothing wrong in the Judge expressing his own opinion to the jury. On the contrary, if he has got an opinion, he ought to express it. But he must tell the jury that they are the sole judges of fact, that they must form their own opinion independently, after a consideration of the facts and circumstances in the case, and that they need not accept or follow his opinion but must follow their own. It is not sufficient for the Judge to give them this warning in a formal way either at the beginning or at the end of the charge. The warning must be given at the moment when he has forcibly or otherwise expressed his own opinion to the jury. There is nothing wrong in a Judge forming a strong opinion of the case either of the prosecution or of the defence, and as strongly expressing it to the jury. But he ought not to form such a strong opinion, nor express it, when the evidence is such that any reasonable person ought to be in reasonable doubt about which story they ought to believe. In our opinion, this is such a case. On the evidence of the entry in the Daroga's diary, strongly corroborating and confirming the story for the defence, it was most dangerous for the Judge to express himself strongly one way or the other and whatever opinion he happened to form, he ought studiously to have left the decision to the jury and not to have tried to influence them in favour of a verdict of "guilty."

Beyond these imperfections in the charge there are many places where the Judge's treatment of the law and the evidence has not been at all happy. His statement about the burden of proof, if read carefully, is fairly accurate, but it is put in such a confused way that I am doubtful whether the jury realized that the onus of proof lies always upon the prosecution and cannot be shifted from the prosecution. He says that "the burden of proof is mainly on the prosecution" and that "the burden of proof is divided in this case." Strictly speaking, both, these statements are inaccurate, although what is really meant was that when the jury were considering the alibi set up by the defence, they must remember that the burden of proving that lay upon the defence, which, of course, was true. The learned Judge says that he has explained Ss. 362 and 366 to the jury. This is not sufficient. He must set down in his charge what, in fact, he said to the jury about the law. Otherwise, we are not placed in such a position as to be able to decide whether his statement of the law was correct or not. There is no necessity to draw the attention of the jury to the question what "proof" consists of, or to read to them sections from the Evidence Act. So long as he explains to the jury the law affecting the charges with which they have to deal, it is sufficient. In many places the learned Judge has sought to discount the evidence which went in favour of the accused. This he has done by considering arguments which seem to have been drawn from the speeches of the Public Prosecutor and which were not based on any evidence before the Court. Further, he has dogmatically asserted with regard to certain of the charges made by the defence that they cannot stand, and that the jury must not place any faith in them, and remarks of that description. This, again, is not the proper way to charge them. He must leave the matter to the jury though he may express his own opinion about it.

Again, when there was a question between the petition of complaint and the evidence given at the trial, it was pointed out by the learned Judge that in the latter certain witnesses said that lathis and then daos had been used, whereas they found no place in the petition of complaint, and he directed the jury that this did not affect the case at all. On the contrary, it was a most important piece of evidence. The petition of complaint having been put in evidence either to corroborate or to contradict the witness, the discrepancy between the subsequent evidence and the petition of complaint on this important point was obviously not to be brushed aside by the statement of the Judge, and he ought to have left it to the jury with a careful direction about how they ought to deal with a matter of that kind. Again in dealing with the evidence of Monoranjan for the prosecution and Siddique Ahmed for the defence, he says dogmatically that :

"neither of them can be relied on. It is safe to discard their evidence altogether. But in dis-

carding the evidence of Monoranjan there is nothing to affect the case for the prosecution."

All these are matters for the jury, and not for the Judge categorically to assert. On a further question arising as to whether certain witnesses ought to have been called or not, the learned Judge failed to direct the jury properly on the question of the presumption which may arise under S. 114. Instead of giving them a proper direction, he confused them by referring to a certain case decided by this Court, the facts of which he did not take the trouble to explain to the jury. Finally, the most important evidence was the diary of the Daroga, which is disposed of by the learned Judge suggesting to the jury that they may well get rid of it by applying certain "hints." What the "hints" were it is impossible to ascertain from the charge. We understand from the learned advocates appearing in this case that it is intended to refer to "bribes" given to the police. There is not a shred of evidence to support this suggestion. The learned Judge has no right to make suggestions of this kind which are absolutely without foundation upon the record. The charge, for the reasons which I have mentioned, is altogether unsatisfactory, and in face of the evidence given by the daroga, it is unsafe to allow the conviction to stand. We accordingly, set aside the conviction and direct a retrial of the case by the Sessions Judge. The appellant will continue on the same bail as he is on now, pending further orders by the Sessions Judge.

McNair, J.—I agree.

R.K. *Retrial ordered.*

A. I. R. 1934 Calcutta 80 (1)

C. C. GHOSE, AG. C. J. AND
S. K. GHOSE, J.

Nezamal Ashan and *others* — First Party.

v.

Golam Mahammad and *others*—Second Party.

Criminal Ref. No. 243 of 1932, Decided on 31st March 1933, from order of Sess. Judge, Dacca.

Criminal P. C. (1898), S. 148—Order as to costs can be passed simultaneously with final order in presence of aggrieved party—Fresh notice is not necessary.

An order as to costs under S. 148 can be passed simultaneously with the final order in the presence of the aggrieved party. And it is not necessary therefore that fresh notices should be given. [P 80 C 2]

Anil Chandra Ray Chaudhury — for First Party.

Order. — This is a reference by the learned Sessions Judge of Dacca in a proceeding under S. 145, Criminal P. C., which ended in favour of the first party. By his order declaring possession in favour of the first party the learned trial Magistrate directed Golam Mohammad, one of the second party, to pay Rs. 100 as costs to the first party. Thereupon Golam Mohammad came and filed a motion before the learned Judge with the result that the learned Judge has made this reference. He recommends that the order of the Magistrate directing payment of Rs. 100 as costs should be rescinded and that the Magistrate should be directed to consider the question of costs upon notice to both parties.

It appears however that the order complained against was passed simultaneously with the final order and in the presence of the aggrieved party. It was not necessary therefore that fresh notices should have been given. The learned Judge also considers that there is nothing to show on what materials the Magistrate fixed Rs. 100 as the amount of costs. But the explanation submitted by the Magistrate goes to show that the amount was fixed upon a consideration of the number of witnesses examined and the number of hearings. Under sub-S. (3), S. 148, Criminal P. C., the costs may include any expenses incurred in respect of witnesses and of pleaders' fees, which the Court may consider reasonable. In this case it appears that the learned Magistrate proceeded in accordance with these provisions and no useful purpose will be served by directing another enquiry. We therefore reject the reference.

K.S. *Reference rejected.*

A. I. R. 1934 Calcutta 80 (2)

GUHA AND BARTLEY, JJ.

Digambar Paul Ghosh and *others*—Plaintiffs—Appellants.

v.

Tufazuddi Ijaradar and *others*—Defendants—Respondents.

Appeal No. 2542 of 1931, Decided on 11th July 1933, from decree of Dist. Judge, Khulna, D/- 16th July 1931.

(a) Bengal Tenancy Act (as amended by Act 4 of 1928), S. 48—S. 48 is not retrospective.

Section 48 as enacted by the Act of 1928 has no retrospective effect. [P 81 C 2]

(b) Interpretation of Statutes—Statutes repealed—It is deemed to have not existed.

The effect of repeal of a statute, in the absence of saving clauses is, that it has to be considered as if the statute so repealed has never existed: *Watson* v. *Winch*, (1916) 1 *K B* 688, *Rel. on.* [P 82 C 1]

(c) Bengal Tenancy Act (as amended by Act 4 of 1928), S. 48—Rent for under-raiyati falling due before Act—Only rent as under old section can be recovered for period after coming into force of new section according to contracted rate.

For a period in respect of which the cause of action arose before the Amending Act came into force, the landlord of an under-raiyat is entitled to recover rent only as under the old section. But for any period in respect of which the cause of action arose after that date, he is entitled to recover rent according to the terms of contract between the parties. [P 82 C 1]

Bijan Kumar Mukerji and *Rajendra Nath Das*—for Appellants.

Nasim Ali and *Farhat Ali*—for Respondents.

Judgment.—This is an appeal by the plaintiffs in a suit for rent. The claim in suit was for recovery of arrears of rent for the period from 1332 to 1335 B. S., at the annual rate of Rs. 400, with damages. The defence of the tenant defendant was that the rent annually payable was Rs. 40. The case for the defendant before the Court was negatived by the trial Court, and a decree was passed in favour of the plaintiffs, with the exception of the claim for rent for the year 1332 B. S., the plaintiffs having realized the same; and as the case now stands, we are not concerned with the rent for the year 1332 B. S. On appeal by the defendant, the learned District Judge of Khulna reversed the decree of the trial Court, on a ground raised by the defendant in the suit for the first time in the Court of appeal below.

The learned Judge gave effect to the defendant's contention before him that the plaintiffs being occupancy raiyats, and the defendant an under-raiyat under the plaintiffs, who held at a rental of Rs. 21, the defendant by the operation of S. 48, Bengal Tenancy Act, as it stood before Act 4 of 1928 B. C., came into force, could not recover rent by suit any rate in excess of 50 per cent of the rent payable by the plaintiffs. The learned District Judge is, in our judgment, right in holding that S. 48 as enacted by the Act of 1928 cannot have retrospective effect, although the section as it stood before, was held to have such an effect, in accordance with the decisions of this Court in the case of *Sitanath Mida* v. *Bashudeb Midda* (1) and in *Gurudas Shet* v. *Nand Kishore Pal* (2). The new S. 48, as it stands after Act 4 of 1928 came into operation, viz., when an under-raiyat is admitted to occupation of land, he shall subject to the provisions of this Act, become liable to pay such rent as may be agreed on between himself and his landlord at the time of his admission, provided that the rent or rate of rent agreed upon shall not be less than the rent or the rate of rent payable by the raiyat to his landlord, cannot, in our opinion, be construed as having a retrospective effect. Under the ordinary canons of construction of statutes, something much more definite should be necessary in order to revive a right to recover rent irrespective of the previously existing restriction, or to affect the statutory disability of the raiyat, to recover more than a certain percentage, as this disability previously existed. The old S. 48 reads as follows:

"The landlord of an under-raiyat, holding at a money rent shall not be entitled to recover rent exceeding the rent which he himself pays, by more than the following percentage of the same, namely, (a) when the rent payable by the under-raiyat is payable by a registered agreement, 50 per cent; and (b) in any other case 25 per cent."

In the view of the clear words of the statute, the learned Judge in the Courts below is right in holding that the old S. 48, Bengal Tenancy Act, applied in the case before us, in so far as the cause of action for the claim in suit arose before February 1929, when Act 4 of 1928, substituting the new S. 48 for the old S. 48, came into operation. In the above view of the case, the claim for rent at the rate of Rs. 400 for the years 1333 and 1334 B. S. could not be allowed in the suit.

The rent for the year 1335 B. S. as claimed by the plaintiffs-appellants, stands on a different footing. At the date of the institution of the suit, and on the date on which the cause of action for the suit for the recovery of rent for the year 1335 B. S. arose, the old S. 48, Bengal Tenancy, Act was non-

1. (1905) 2 C L J 540.
2. (1899) 26 Cal 199.

existent. It was substituted by the new S. 48 in February 1929. The disability which was imposed by the previous law having been removed, there was nothing that stood in the way of the plaintiff's recovering rent at the contract rate, when the cause of action for the same arose. The effect of substitution of the new S. 48 for the old S. 48 by S. 31, Act 4 of 1928, was that the old section was repealed. The effect of repeal of a statute, in the absence of saving clauses is, that it has to be considered as if the statute so repealed had never existed. It ceases to be operative, unless there is any clause in the new statute preserving the old statute: the underlying principle being, that there cannot be two inconsistent codes in the same matter and if the previous statute has to be preserved that must be done expressly: see *Watson* v. *Winch* (3). Examining the facts of the case before us in the light of the above principles, and keeping in view the circumstance that at the date of the accrual of the cause of action for a suit for rent for the year 1335 B. S. which was the last date of that year, according to the terms the contract between the parties concerned, the plaintiffs were entitled to a decree for rent at the rate of Rs. 400 for the year 1335 B. S.

The plaintiffs suit so far as it related to the claim for rent at the rate of Rs. 400 for the years 1333 and 1334 B. S., the cause of action for the same having accrued at a time when the disability in the matter of recovery of rent by suit by persons in the position of the plaintiffs, was existing, cannot be allowed. The plaintiffs-appellants are entitled only to recover by suit, rent at the rate admissible under the old S. 48 before Act 4 of 1928 came into operation. In the result, the dismissal of the plaintiffs' suit by the lower appellate Court, so far as it related to a claim for rent for the years 1333 and 1334 B. S. is modified in the manner indicated above. The decision of the Court of appeal however so far as it relates to the claim for rent for the year 1335 B. S., is set aside. The plaintiffs-appellants are held entitled to recover rent for the year 1335 B. S. at the annual rate of Rs. 400 as claimed by them with damages as claimed in the suit. The appeal is allowed in part. The plaintiffs-appellants are to get their costs in the litigation, including the costs in this appeal, from the defendants-respondents.

R.K. *Appeal party allowed.*

3. (1916) 1 K B 688=85 L J K B 537=114 L T 1209=80 J P 149=14 L G R 486=32 T L R 244.

A. I. R. 1934 Calcutta 82

GUHA AND BARTLEY, JJ.

Deb Nath Moral—Plaintiff — Appellant.

v.

Sashi Bhusan Moral and *others* — Defendants—Respondents.

Appeal No. 3013 of 1931, Decided on 11th July 1933, against decree of Addl. Dist. Judge, Khulna, D/- 23rd July 1931.

Landlord and Tenant — Abandonment — Non-transferable occupancy holding—Mortgage of—Landlord settling land with stranger, treating it to be abandoned by raiyat's widow—Mortgagee suing stranger — Widow found not to have abandoned — Mortgagee subsequently obtaining possession after purchase in execution of his mortgage-decree—Widow of raiyat remaining in permissive possession of homestead—Abandonment held complete — Stranger's imperfect title held became perfect by S. 43, T. P. Act — Stranger' suit for possession held not barred by res judicata—Civil P. C. (1908), S. 11—T. P. Act (1882), S. 43.

The raiyat of a non-transferable occupancy holding mortgaged the holding with *S*. The landlord on the raiyat's death treated the holding as abandoned by the raiyat's widow and settled the holding with *D*. A kabuliyat was taken from *D*. Subsequently rent decrees were obtained and the landlord withdrew the decretal amounts deposited in Court. *S* after the settlement by the landlord with *D* obtained a decree on his mortgage and purchased the property in execution of his decree and obtained khas possession of the entire holding. *S* however permitted the raiyat's widow to possess the homestead on her entreaty. In previous suits by *S* against *D* and the raiyat's widow, prior to *S's* obtaining possession of lands, it was held that the raiyat's widow did not abandon the holding and as such the landlord was not competent to settle the lands with *D*. In a suit by *D* against *S* for recovery of possession:

Held: (1) that there was abandonment of the holding at the time when the holding was sold in auction in execution of the mortgage-decree and the landlord was then entitled to settle the lands with *D*: *A I R* 1928 *Cal* 848, *Rel. on.*

(2) That the principles underlying S. 43, T. P. Act, applied to the case, and the imperfect title created by the kabuliyat became perfect by the subsequent abandonment of the holding by the raiyat.

(3) That the cause of action and the fact of abandonment upon which *D's* suit was instituted having come into existence after the

decision of the previous suits, the bar of res judicata did not apply. [P 84 C 1]

Sarat Chandra Basu and *Hemendra Chandra Sen*—for Appellant.

Bijan Kumar Mukherjee and *Biswanath Naskar*—for Respondents.

Judgment.—The plaintiff in the suit out of which this appeal has arisen prayed for declaration of his title to the lands in suit, as a person who had obtained settlement of the same as a tenant from the landlords, on the allegation that he was dispossessed by defendant 1 who had, as the purchaser of the lands in suit in execution of his mortgage decree against the tenant—who had only non-transferable occupancy right in the lands—obtained possession of the same. The case of the plaintiff was that the lands in suit appertained to the non-transferable occupancy holding of one Bhagaban Moral. After Bhagaban's death the holding was abandoned by his widow Sita Sundari, and the lands comprised in the holding were settled with the plaintiff by the landlords on 12th Magh, 1321 B. S.; the settlement so made by the landlords was evidenced by a kabuliyat executed on the date aforesaid, which contained a statement to the effect that the tenant having abandoned the holding, the landlords had the right to settle the lands. As indicated above defendant 1 claimed to be in possession of the lands as the purchaser at a sale in execution of his mortgage decree against Bhagaban Moral, the tenant. The tenant having no transferable right in him, defendant 1 was, according to the plaintiff, a mere trespasser. The claim as made by the plaintiff in the suit, was resisted by defendant 1. The fact of abandonment as asserted by the plaintiff was denied by the defendant; the title of the plaintiff to the lands in suit by virtue of the kabuliyat of 1321 B. S. was also contested. It is to be noticed that the only contesting defendant in the suit was defendant 1, who according to the plaintiff had no title in him, being the purchaser of a non-transferable occupancy holding. The landlords who were made defendants in the suit, supported the plaintiff, a fact specifically noticed by the trial Court in its judgment.

The history of the litigation, appearing from the judgment of the Courts below, discloses a determined and persistent attempt on the part of defendant 1 to obtain possession of the lands in suit, although his title to the same as a purchaser in execution of his own mortgage decree was not effective. There were two suits brought by the defendant against the plaintiff, in both of which the decision of the Courts went against the plaintiff, on the ground that the tenant on the lands Sita Sundari, had not abandoned the holding. The kabuliyat under which the plaintiff claimed to be the tenant, was found to be ineffective, inasmuch as there was no abandonment by the tenant of the lands appertaining to the holding. It is worthy of notice in this connexion, that the landlords obtained decrees for rent against the plaintiff on the strength of the kabuliyat of 1321 B. S., and on one occasion, the decretal amount had been deposited in Court by the plaintiff, and was withdrawn by the landlords. The questions that appear to have been raised on behalf of defendant 1 in the Court below, were many and various. It was in the first place urged, as it has been urged before us, in support of the decision of the Court of appeal below, dismissing the plaintiff's suit, after reversing the decision of the trial Court, which passed a decree in favour of the plaintiff entitling him to recover khas possession of the lands in suit, by evicting the defendants therefrom, that the plaintiffs claim in suit was barred by the rule of res judicata.

In our judgment, there is no substance in the plea of res judicata as raised on behalf of the contesting defendant in the suit. Apart from the position that the previous suits of 1917 and 1924 were tried in the Munsif's Courts, the cause of action, and the fact of abandonment upon which the plaintiff's claim in the present suit instituted in the Subordinate Judge's Court, came into existence after the decision of the previous suits. The complete abandonment by Sita Sundari of the holding, dates from the decision in the suit of 1924; and the trial Court was therefore right in holding that the abandonment upon which the present claim was founded, occurred after the disposal of the previous suits. The argument in support of the appeal by the plaintiff to this Court, that the bar of res judicata did not apply to the plaintiffs' claim in suit must accord-

ingly be accepted. The point arising for consideration next is whether there was abandonment of the holding by Sita Sundari. On the facts found by the Courts below, regard being had to the position that Sita Sundari's possession after execution of the mortgage decree by defendant 1 was permissive, the defendant having allowed her to possess the homestead, at her entreaty, it must be, on the authority of decisions of this Court, held as a matter of law that there was an abandonment of the holding: see in this connexion *Jogesh Chandra* v. *Radha Gobinda Rai* (1).

There having been abandonment of the holding, the question then arising for consideration was, whether the settlement with the plaintiff of the lands in suit, as evidenced by the kabuliat of 1321 B. S. could be treated as an effective settlement, regard being had to the provisions contained in S. 43, T. P. Act. The landlords defendants in the suit supported the plaintiff, and upon the finding arrived at by the trial Court, not reversed in appeal, the landlords withdrew the rent deposited by the plaintiff as tenant, after a decree for rent was passed against him. In view of the above position, the settlement with the plaintiff which was ineffective at its inception in the year 1321 B. S. became effective and valid under the law, as soon as there was an abandonment of the lands in suit by the tenant, Sita Sundari; and the validity of the settlement was recognised by the landlords themselves by withdrawing rent deposited by the plaintiff as tenant, after a decree for rent had been passed against him. As the trial Court observed, the case is governed by the principles underlying S. 43, T. P. Act, and the imperfect title created by the kabuliat of 1321, was perfected in consequence of abandonment of the holding by the tenant. In our judgment, the plaintiff has established his title to the lands in suit as a tenant, in respect of the same, and there was no such preferential title in defendant 1 which could prevail against that of the plaintiff. The decree obtained by some of the cosharer landlords in the presence of the other cosharers, against defendant 1 could not confer any title on the defendant, seeing that the plaintiff's title must be taken to have been perfected by the recognition of the plaintiff as the tenant, before there was a semblance of a title in defendant 1.

The above view of the case before us, entitles the plaintiff to a judgment in his favour, so far as the relief claimed by him in the suit is concerned. It remains only to consider some observations made by the Court of appeal below, which are apparently findings of fact in favour of defendant 1 in the suit. In regard to the kabuliat of the year 1321 B. S. evidencing settlement with the plaintiff by the landlords, the Court of appeal below has observed that the kabuliat was a collusive and mala fide document; the rent decrees passed against the plaintiff have also been characterised as collusive. The exact import of this is not clear, seeing that there was no case of collusion or want of bona fides involved in the case. The case before the Court, regard being had to the pleadings of the parties, was that there was no abandonment of the holding by the tenant Sita Sundari, the widow of Bhagaban Moral, the original tenant; and that the landlords had never obtained khas possession of the lands appertaining to Bhagaban Moral's tenancy, the lands in suit, and could not therefore grant any settlement to the plaintiff; the kabuliat of 1321 and the rent decree, obtained by the landlords were therefore of no avail to the plaintiff.

The material issues raised for trial in the case were directed to these matters, and were not, and could not, have any bearing on any question of fraud, collusion or want of bona fides. Furthermore, for the purposes of the present litigation, collusion and want of bona fides, as noticed by the Court below, were wholly beside the points at issue, regard being had to the position taken up by the landlords, defendants in the suit. These landlords, as noticed by the trial Court, supported the plaintiff. Furthermore it could not be said that there was any fraud or collusion in the matter of the recitals in the kabuliat of 1321 B. S.: there was no concealment by any party, nor was there any act fitted to deceive. There was of course the statement as to abandonment of the holding by the tenant—regarding which it could, at most, be said that there was a misrepresentation on a mixed question of law and

1. AIR 1928 Cal 848=115 I C 265.

fact. The kabuliat was followed by rent decrees, and with reference to one of these decrees, it cannot but he held that the landlords having withdrawn the rent deposited by the piaintiff as tenant, there was recognition by the landlords making the settlement in favour of the plaintiff complete and operative. We are accordingly of opinion that the observations contained in the judgment of the Court of appeal below, in which the word collusion has been used, and the expression want of bona fides has also been used, do not conclude the case against the plaintiff in any way and cannot be used in favour of defendant 1 for the purpose of supporting his possession of the lands in suit, wholly unsupported by any title.

In our judgment, the conclusion we have arrived at, as mentioned above, is one in consonance with the justice of the case before us. The plaintiff's title, originating from a settlement from the landlords or their agent, which settlement was recognized by the landlords by acceptance of rent, could not be allowed to be defeated by a person in the position of defendant 1, the purchaser of lands appertaining to a non-transferable occupancy holding, and who has since his purchase been successful in keeping the plaintiff out of the lands, by asserting that the holding had not been abandoned, contrary to his own acts, evidenced by his obtaining possession as the purchaser in execution of his mortgage decree, and using the permissive possession of the widow of the original tenant, as a shield against the plaintiff's claim to possession. In the result, the appeal is allowed, the decision of the Court of appeal below, dismissing the suit of the plaintiff-appellant is set aside; and the decision and decree of the trial Court passed in his favour are restored. The plaintiff-appellant is entitled to get his costs in the litigation throughout, including the costs in this appeal, from defendant 1, respondent in this Court.

R.K. *Appeal allowed.*

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MALLIK AND PATTERSON, JJ.

Ramizulla and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 276 of 1932, Decided on 20th July 1932.

Penal Code (1860), S. 366—Single charge for abduction and kidnapping in alternative—Trial is not vitiated in absence of failure of justice—Criminal P. C. (1898), S. 233.

It is desirable that the accused should be charged separately for kidnapping or abduction. But the omission in splitting up the whole thing into two parts would not be sufficient for the interference of the High Court unless it appears that that omission has caused a failure of justice or that the accused was in any way prejudiced thereby especially when the age of the prosecutrix is in dispute, and the accused is not prejudiced by the alternate charge, if the points material for the charges have been separately framed : *A I R* 1930 *Cal* 209 and *A I R* 1927 *Cal* 644, *Rel on*. [P 86 C 1,2]

Hemendra Chandra Das—for Appellants.

Khundkar and *Nirmal Ch. Chakravartty*—for the Crown.

Mallik, J.—The three appellants Ramijulla alias Romiz, Husan Ali alias Husan, Idrisulla and another man Abbas by name were put on their trial on charges under S. 366 and 376, I. P. C. The trial was held with the aid of a jury. The jury unanimously found Abbas not guilty under either of the two charges. They unanimously found also the three appellants not guilty under S. 376, but by a majority of 4 to 1 found them guilty under S. 366, I. P. C. The learned Judge accepting this verdict sentenced the three appellants to rigorous imprisonment for 4 years and 3 months. The facts of the case for the prosecution were briefly these : On the night of 13th April 1931 at about 2 dandas of the night Latifa Bibi who is an unmarried daughter of the complainant Nasri, a young girl of about 14, went out to answer a call of nature accompanied by her mother, the wife of Nasri. The three appellants with the other persons came and dragged Latifa Bibi away and when Nasri on hearing the cries of his wife came out of the house and found his daughter being dragged away, the accused persons threatened to assault him with lathis and Nasri thereupon had to retreat. Nasri wanted to get back his daughter by some amicable arrangement but was unsuccessful. He then went to Sylhet and on 15th April 1931 he filed a petition of

complaint in Court. About a month later the complainant received some information about his daughter and on receipt of that information he went to a place called Sunachak with an Assistant Sub-Inspector of Police and some constables to find and recover his daughter Latifa Bibi from the house of one Ahmed. This was on 13th May 1931. An investigation followed with the result that four men were put on their trial as stated before. The charge which was drawn up against the accused in the present case runs as follows :

" That you with others on or about 13th April 1931 at Malakandi kidnapped Latifa Bibi from the custody of her father Nasri or abducted a woman to wit Latifa Bibi in order that the said Latifa Bibi might be forced or seduced to illicit intercourse or knowing it to be likely that she might be compelled to marry against her will and thereby committed an offence punishable under S. 366, I. P. C., and within the cognizance of the Court of Session."

On behalf of the appellants it was contended before us that this charge, framed as it was, was defective and by this defect the whole trial was vitiated. In support of this contention our attention has been drawn to a decision of this Court in *Mahomed Amit* v. *Emperor* (1) where in a case under S. 366, I. P. C., the charge had been drawn up in similar terms and the conviction was set aside and a retrial of the accused ordered. The decision in this unreported case was based on another decision of this Court in the case of *Mafizaddi* v. *Emperor* (2) where Cuming, J., held that kidnapping is an entirely distinct offence from abduction and the two being distinct offences separate charges should be drawn up if it was desired to charge the accused with both the offences. In a later decision of this Court in *Prafulla Kumar Basu* v. *Emperor* (3) it was however held that when the question of the age of the prosecutrix is in dispute (as it was in the case before us) a charge under S. 366, I. P. C., of kidnapping and abduction in the alternative is not illegal. It is no doubt desirable that it would have been much better if the accused in the present case had been charged separately on one head for kidnapping and on another for abduction. But the omission of the learned Judge in splitting up the whole thing into two parts would not in my opinion be sufficient for our interference unless it appears that that omission has caused a failure of justice or that the accused was in any way prejudiced thereby. That however does not appear to be the case in the case before us. Mr. Dass for the appellants contended that the accused had been prejudiced both at the trial and were prejudiced at the hearing of the present appeal. This contention does not appear to me to be well founded.

The prosecution had four points in their case. These four points were that Latifa Bibi had been taken away, that force had been used, that Latifa was a girl under 16 years of age and that the purpose was immoral and when the charge against the accused was framed, in the way in which it was framed these were the points which the accused were called upon to meet. The prosecution led evidence on each of these four points and the accused had ample opportunity to meet that evidence. In these circumstances I do not understand how it can be said that the accused was prejudiced by the way in which the charge in the present case had been drawn up against them. Mr. Dass contended that the accused, as appellants, were prejudiced in the present appeal inasmuch as it could not be ascertained from the verdict of the jury whether the jury found the appellants guilty of kidnapping or abduction and in the absence of knowledge whether the appellants have been found guilty of abduction or of kidnapping, the learned Judge's charge to the jury could not be adequately assailed. I do not understand what difficulty there could be in assailing the charge on the ground of misdirection or non-direction. The learned Judge in his charge dealt with the abduction case separately from the case of kidnapping and there would be no difficulty whatsoever, in my opinion, to assail the charge on the ground of misdirection or non-direction if there had really been any in it. The only passage in the learned Judge's charge to the jury to which exception was taken before us runs in these words :

" There is no evidence on the record that they had any intent or knowledge of compelling her to marry, but considering the age of the girl as well as of the accused, you may presume that the girl was abducted for immoral purposes."

1. AIR 1933 Cal 194=1933 Cr C 245=145 I C 925.
2. AIR 1927 Cal 644=104 I C 245=28 Cr L J 805.
3. AIR 1930 Cal 209=1930 Cr C 209=125 I C 656=31 Cr L J 903=57 Cal 1074.

It was said that the direction which the learned Judge gave was wrong in law. I am unable to say that there is any defect in what the learned Judge told the jury in this passage. This was not on an observation by which the jury were told to make any presumption of law. It was a passage by which the Judge told them that they might, if they chose, draw an inference on a question of fact, the question as to what the purpose of the accused was, on a consideration of some circumstances, namely the age of the girl on one side and the age of the accused on the other. Beyond this passage we have not found, and our attention was not drawn to anything in the learned Judge's charge to the jury to which any exception could be taken. I would not therefore interfere with the verdict of the jury in the present case. As regards the sentence our attention has not been drawn to any mitigating circumstances that would warrant us in reducing the sentence that has been inflicted. I would dismiss the appeal.

Patterson, J.—I agree.

R.K. *Appeal dismissed.*

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* A. I. R. 1934 Calcutta 87

MUKERJI AND S. K. GHOSE, JJ.

Bibhu Bhusan Dutta and *others*—Appellants.

v.

Anadi Nath Dutt and *others*—Respondents.

Appeal No. 190 of 1930, Decided on 23rd August 1933.

(a) Limitation Act (1908), S. 10—"Vesting"—Mere transference of management of control is not enough to satisfy requirement of vesting.

While transfer of proprietary rights is not intended, mere transference of management or control is not enough to satisfy the requirements of "vesting" as contemplated by S. 10; a right to call for a transfer and to possess the property for the purposes of the trust and also a power to dispose of it according to the terms of the trust without reference to the owner are the essentials that constitute the "vesting." 4 *Cal* 455 and 20 *Cal* 51 (*F B*), *Ref.* [P 89 C 2]

(b) Limitation Act (1908), S. 10—"For any specific purpose"—Purpose must be of restoring property to trust which is specified

The purpose of following the property in the hands of the trustees referred to at the end of S. 10 must be the purpose of restoring it to the trust which is specified in the earlier part of the section: *A I R* 1922 *P C* 212, *Foll*; 6 *All* 1, (*P C*), *Ref.* [P 89 C 2]

*** (c) Limitation Act (1908), S. 10 and Arts. 49 and 145—G. P. notes belonging to joint family of two brothers given as security for service of one of members—Subsequent partition but G. P. notes allowed to continue as security—Other member giving receipt acknowledging receipt of his share of G. P. notes in order to complete transaction as deposit with former—Suit by heirs of latter against heirs of former for recovery of G. P. notes is governed by Art. 145 and not either by S. 10 or by Art. 49.**

Government Promissory notes belonging to two brothers of a joint family were given as security for the service of one of them. In a subsequent partition between them, the other brother executed a receipt acknowledging receipt of his share of G. P. notes, but this fiction of taking and giving again was resorted to, to make the transaction complete as a deposit with the former. After retirement from service of the former, the G. P. notes were given back to him and soon after he died. In a suit by the heirs of the other brother against the heirs of the former for recovery of their share:

Held: that the suit was outside the scope of S. 10 because even assuming that the G. P. Notes vested in the former brother for serving as security deposit for his service, the present suit was not for restoring the G. P. notes to that trust which had been completed and was no longer capable of administration and that it was governed by Art. 145 and not by Art. 49. [P 90 C 1; P 91 C 2]

Held further: that the character of transactions in so far as it was a deposit was not altered by the death of the depositary but that his heirs, in whose hands the thing deposited came, became depositary within the meaning of Art. 145: *A I R* 1925 *Mad* 185, *Rel. on.* [P 92 C 2]

(d) Limitation Act (1908), Art. 145—"Depositary" — When one man's property is handed by that man to another he becomes depositary of it.

Where one man's property is handed by that man to another, he becomes a depositary of it, unless of course, there is something in the terms of that handing over which would prevent his being treated as a person with whom it was deposited at all. *A I R* 1923 *Mad* 578, *Foll.* [P 91 C 1]

Rupendra Coomar Mitter and *Mohendra Kumar Ghose*—for Appellants,

Santosh Kumar Basu and *Dwijendra Nath Dutt*—for Respondents.

Judgment.—The facts of the case may be stated quite shortly. Three brothers, Rajendra, Debendra and Gobendra, lived in commensality as members of a joint family. They had G. P. notes of the face value of Rs. 33,000 as part of their joint family properties. Gobendra held the post of Dewan under the Burdwan Raj. In 1305 (1898) he put in as securities with the Raj for his service G. P. notes of the face value of Rs. 20,000 out of the aforesaid securities. In 1309 (1902) the brothers separated in mess. In 1311 (1905) they had a partition of their properties and as a result thereof,

so far as the G. P. notes are conerned, they were divided into three shares. G. P. notes of the face value of Rupees 11,000 going to each of the two brothers, Debendra and Gobendra and to the sons of Rajendra who had by that time died. Rajendra's sons got the notes that were with the family, but Debendra could not do so as the notes of his share formed a part of the security which Gobendra had lodged with the Burdwan Raj, as already stated. In 1319 (1912) Gobendra retired from service, but the notes remained with the Raj. In October 1914 Gobendra died. Defendants 1 and 2 are his sons and defendants 3 and 4, his grandsons. The plaintiffs are the heirs of Debendra No. 1 being one of his two sons and No. 2 being the widow of the other. They instituted this suit to recover the said G: P. Notes of Rs. 11,000 or, in default, the equivalent money-value thereof together with interest. The Subordinate Judge, made a decree in favour of the plaintiffs ordering the defendants to return the securities within a week, failing which the plaintiffs were to recover Rs..14 thousand and odd representing the value of the securities and the interest thereon, together with interest pendente lite. Defendants 1 to 3 have then appealed, and defendant 4, as respondent, has supported them.

Apart from one other point that was sought to be raised on behalf of the appellants, but which we have not allowed as it was not raised in the Court below and involves investigation of facts, the only ground on which the decree of the Court below has been assailed is the ground of limitation. This contention was overruled by the Court below in the view that the case comes either under S. 10 or under Art. 145, Limitation Act. The appellants' contention is that neither S. 10 nor Art 145 applies, and that the case is governed by Art. 49.

To deal with the question, a few more facts have to be stated. After Gobendra's death, the defendants in 1915 applied for and obtained a suceession certificate wherein the G. P. notes of the face value of Rs. 20,000 were shown as debts which they were entitled to collect, and thereafter within a short time, but the date does not appear; they withdrew the same from the Burdwan Raj. On 27th February 1922, the plaintiff 1 wrote to defendant 1:

"The Government papers of the value of Rs. 11,000 are with you; the interest thereon and the principal amount which are due to me should be paid in full within this month .... if the principal and interest be not paid within this month, I shall have to sue for it within the month of Chaitra."

On 1st March 1922, defendant 1 replied:

"I have been surprised on receipt of your letter .... I do not admit that you will get from me Rs. 11,000 or any sum on account of Government paper or on any other account. I cannot understand why you have written to me in that way? You know very well you never made over to me any money or any Government Paper, and that you have got nothing due from me ...."

On 21st November 1927 the plaintiffs by a letter demanded from the defendants delivery of the promissory notes and interest asserting that their father Debendra had kept them with Gobendra and that the latter held them as Jimmadar and Trustee of Debendre. On 15th February 1928 they instituted this suit.

So far as S. 10, Lim. Act, is concerned the Subordinate Judge has observed thus:

"Express trust or trust for a specific purpose within the meaning of S. 10 may be inferred from the circumstances or the conduct of the parties and it is not necessary that the trust should be proved by a written or oral declaration: vide *Harihar Prasad* v. *Kesho Prosad* (1) (at p. 560 *of* 93 *I C*). Here the specific purpose was security in the Raj Estate. Gobendra was the trustee for the purpose."

Now, one of the most recognized definitions of trust is that given by Lindley M. R. in *Williams* v. *Williams* (2). He defines trust as

"an equitable obligation to deal with property in a particular way. .... A trust is really nothing except a confidence reposed by one person in another, and enforceable in a Court of Equity"

Godfrey says

"A trustee then is he, who, while holding legal ownership or possession of, or dominion over, the subject of the trust, is bound to allow beneficial enjoyment or usufruct of the property to be reaped by another, who is called the 'cestui que trust' or 'beneficiary.' A trustee, properly so called, must have property vested in him or a right to call for a transfer of or to possess such property, and there must be a person or persons for whom he holds or ought to hold such property: *Re Barney* (3)."

So far as S. 10 is concerned and upon the facts of the present case, the words

1. A I R 1925 Pat 68=93 I C 454.
2. (1897) 2 Ch 12=66 L J Ch 485=45 W R 519=76 L T 600.
3. (1892) 2 Ch. 265=61 L J Ch 585=40 W R 637=67 L T 23.

of that section that have to be specially regarded are

"has become vested in trust, for any specific purpose," and "for the purpose of following in his or their hands such property or the proceeds thereof."

The expression "has become vested in trust" has received interpretations from the Courts which are not quite uniform. For our present purpose it is not necessary to discuss this conflict. The word "vesting" implies property in the subject-matter, and that it is contrary to the ordinary accepted meaning of the term "vesting" to say that property is vested in persons by reason merely of their having control over it. Their Lordships of the Judicial Committee in the case of *Vidya Varuthi* v. *Balusami* (4) at p. 315 *of* 48 *I A* observed:

"The language of S. 10 gives the clue to the meaning and applicability of Art. 134. It clearly shows that the article refers to cases of specific trust and relates to property conveyed in trust."

From this it would seem to follow that the words "vested in trust" in S. 10 are equivalent to the words conveyed or bequest had in trust. The section and the article taken together mean that trust property shall not be subject to any law of limitation, that no length of time shall bar an action to recover such property, but that when trust property finds its way into the hands of an assignee for valuable consideration, the ordinary law of limitation will apply and that the assignee shall have the same benefit as an ordinary purchaser of property, not trust property, would have. While thus merely placing the property in the possession or control of a person does not amount to the vesting of the property in him, it cannot be that the word vesting is to imply ownership because a trustee cannot be the owner of the trust property. Markby, J. in the case of *Kheroda Money Dossee* v. *Doorgamoney Dossee* (5) at p. 468, speaking of a Hindu widow who was executrix under the will of her husband, executed prior to the Hindu Wills Act, and dealing with S. 10, Lim. Act of 1871, observed:

"Possibly, as this is an Act which contains the law of limitation for all classes of persons, the word vest may be used when speaking of a person standing in a fiduciary relation, not in the sense of 'owned,' but in the sense of 'held in possession;' at any rate I am not prepared to say that had the gift to the sons of Woodoy been vested, the residue of the testator's property would not have been vested in the defendant Doorgamoney within the meaning of the word 'vested' as used in S. 10 of the Act."

Pigot, J. in the Full Bench case of the *Secy. of State* v. *Guru Prasad Dhur* (6), speaking of money held by the Collector as surplus proceeds of a revenue sale said:

"Possession with all the indicia of property in respect of them, so far as regards third parties is had by the Government. I think this must be vesting of this movable property within the meaning of the section .... The word "become" seems to convey every possible manner in which the vesting could take place."

In our opinion, while transfer of proprietary rights is not intended, mere transference of management or control is not enough to satisfy the requirements of "vesting" as contemplated by S. 10; a right to call for a transfer and to possess the property for the purposes of the trust and also a power to dispose of it according to the terms of the trust without reference to the owner are the essentials that constitute the "vesting."

The expression "for any specific purpose" need not detain us long after the pronouncement of the Judicial Committee in the case of *Khaw Sin Tak* v. *Chuah Hooi* (7).

Their Lordships have said:

"A specific purpose, within the meaning of S. 10 must, in their Lordships' opinion, be a purpose which is actually and specifically defined in the terms of the will or the settlement itself, or a purpose which from the specific terms can be certainly affirmed."

Also in the aforesaid case their Lordships have said:

"The statement which was made in the authority of *Balwant Rao* v. *Puran Mal* (8) that the purpose of following the property in the hands of the trustees referred to at the end of S. 10 must be the purpose of restoring it to the trust which is specified in the earlier part of the section, is, in their Lordships opinion, a sound and critical test by which they consider whether or not any particular trust is within the provisions of this section."

In applying S. 10 to the present case the following facts should be remembered. The G. P. notes stood in the name of Gobendra and presumably he held them as the de facto head of the family and they were deposited with the Burdwan Raj to serve as security for Gobendra's service. The trust pleaded in the plaint was this :

4. A I R 1922 P C 123=65 I C 161=48 I A 302=44 Mad 831 (P C).
5. (1879) 4 Cal 455=3 C L R 315.
6. (1893) 20 Cal 51 (F B).
7. A I R 1922 P C 212=49 I A 37 (P C)
8. (1884) 6 All 1=10 I A 90=4 Sar 435 (P C).

"The Government promissory notes of the value of Rs. 11,000 falling to the share of plaintiff 1 were earmarked and made over to and the same continued to remain as before in the custody of the father of defendants 1 and 2"

The Subordinate Judge has found that the trust consisted in leaving the G. P. notes with Gobendra for a certain purpose namely that they were to serve as security deposit with Burdwan Raj for Gobendra's service there. Assuming that the G. P. notes were vested in Gobendra for that specific purpose, the present suit is not for restoring the G. P. notes to that trust, which had been completed and was no longer capable of administration. On that ground alone. if on no other, the suit would fall outside the scope of S. 10.

Mr. Basu was aware of this difficulty. He accordingly endeavoured to supplement the Judge's finding by asserting that there was a condition that on Gobendra's leaving the service the G. P. notes were to be returned to Devendra or to Devendra's estate. Such an understanding may not have been unlikely, but can it be said that such was one of the specific purposes of the trust? We think we must answer the question in the negative. There is no deed nor any oral evidence as to what the conditions of the trust were, and it would be speculation, and not an inference from proved facts that the transaction evidenced by the Toka papers Exs. 7 and 7-a to assume that a return of the G.P. notes in specie was an object of the trust that was created. For aught one knows if the money had been set off or repaid in some other way the liability of Gobendra would have been equally extinguished. We are unable to hold that there are any materials which would justify us in affirming with certainty that a return of the G. P. notes in specie to Devendra's estate after Gobendra's service with the Burdwan Raj came to an end was a purpose of the trust. In our judgment therefore S. 10, Limitation Act, cannot be applied to the suit.

As regards the applicability of Article 145, which the Subordinate Judge was of opinion, in the alternative, was the article applicable, Mr. Mitter has addressed to us a learned and weighty argument. He has argued that this article is not applicable, but Art. 49 is the correct article to apply. His reasons, with authorities in support, may be summarised here :

Firstly.—That Art. 145 is applicable to the particular class of bailment known to Roman law under the name of depositum which is a bailment of a specific thing to be kept for the bailor and returned when wanted as opposed to commodatum where a specific thing is lent to the bailee to be used by him and then returned, and both of which again are contrasted with mutuum where money or things are given to be used and other things of the same nature and quality are to be returned instead. So in the case of deposit of money or other things which are not intended to be kept, but used the article is not applicable : *Bala Krishnadu* v. *Narayana Swamy* (9), also *Gangenini* v. *Gotipatti* (10). The contention is that Art. 49 is applicable to the present case, where the G. P. notes were made over to be used as security.

Secondly.—That even assuming that Art. 145 is applicable, after demand and refusal, such as there was in the present case, no fiduciary relationship between the depositor and the depositee could subsist, and that from that point of time at any rate, Art. 49 would apply : *Kalyan Mal* v. *Kishen Chand* (11).

Thirdly.—That the transaction was in the nature of a gratuitous bailment, which under the law is terminated by the death of the bailor or of the bailee (vide, S. 162, Contract Act). For this reason, as also the reason that the wording of Art. 145 contemplates a suit against the depositary himself and not against his heirs or assigns that article cannot be applied in the present case, and failing that article the more general article, namely, Art. 49, should apply.

The true nature of the transaction in the present case, in our opinion. was that the G. P. notes were to remain intact with the Burdwan Raj, and remain there as property which Gobendra had put in as security for his service. As between Devendra and Gobendra and at the point of time when the partition took place, and which is the point of

9. A I R 1914 Mad 51=24 I C 852=37 Mad 175.
10. (1910) 33 Mad 56=5 I C 1.
11. A I R 1919 All 102=55 I C 45=41 All 643.

time with which we are concerned, the understanding was, not that Gobendra would be defalcating or incurring liabilities in other ways, a supposition which cannot be made in the absence of any evidence to that effect, but that on the termination of his service they or their substitute would come back intact to Debendra. The parties noted down in the Toke, papers Exs. 7 and 7-a, that the G. P. Notes were in deposit in the Rajbati and at the same time Debendra gave a receipt acknowledging that he had received them. This fiction of taking and giving again was resorted to to make the transaction complete as a deposit with Gobendra. To whatever form of bailment this transaction might correspond it was a transaction which, in the absence of a definition of deposit or depositary in the Limitation Act must be judged by the ordinary dictionary meaning of these words. We entirely agree in the observations of Schwabe, C. J., in the case of *Kishtappa Chetty* v. *Lakshmi Ammal* (12) as to the meaning of this article. He said :

" I cannot believe that it was the intention of the framers of that statute that the various District Munsifs throughout India or other Subordinate Judges who have to administer the law should have to study either *Coggs* v. *Bearnard* (13) or the Roman law in order to ascertain what is the true meaning of Art. 145. I think they meant to use simple and plain language, and they used the word depositary; and in using that word they meant simply to say that, where one man's property was handed by that man to another, he became a depositary of it, unless of course, there was something in the terms of that handing over which would prevent his being treated as a person with whom it was deposited at all."

Taken in this broad sense a deposit would include a commodatum, or the lending gratis to be used by the bailee which is one of the kinds of bailment in Roman Law and one of the six kinds of bailment in *Coggs* v. *Bernard* (13). In Story's Classification of Bailments into three heads it would come under the head of the second class, namely, transaction in the nature of trust for the benefit of the bailee, including gratuitous loans for use. Indeed Story in his Bailments, Ch. 2, treats loans of movables with permission to use under the head of Deposits, the essence of a contract of deposit being the delivery of the thing. Maclean, C J., in the case of *Administrator-General* v. *Kristokamini Dassee*(14) observed:

"It is often not an easy matter to say whether any particular transaction constitutes a deposit or a loan for use."

The learned Chief Justice pointed out that where the thing lent is not cash such difficulty is not generally felt. In that case the suit was for recovery of Government securities or their equivalent in money deposited by the plaintiff's predecessors, it being intended that the depositary should hold the securities on account of the plaintiff subject to the right of dealing with them by sale or pledge should necessity arise. Sale, J., had held that it was immaterial whether the transaction was regarded as one of deposit or of loan because in either case the article applicable would be Art. 145: see *Kristo Kamini Dassi* v. *Administration-General* (15). The decision was upheld on appeal by Maclean, C. J., and Stevens, J., it being held that the defendant might fairly be regarded as a depositary of the notes within the meaning of Art. 145. Hill, J., dissented holding that:

"an essential characteristic of a deposit properly so called is that the thing deposited should not be used by the depositee and his liability is to return in specie the very thing deposited when his right to retain it has determined the general property in the subject-matter of the deposit remaining meanwhile in the depositor."

In *Lala Gobinda Prosad* v. *Chairman of Patna Municipality* (16) it was held by this Court that although the word deposit ordinarily implies the deposit of specific property returnable in specie, it has a wider meaning. Even upon the definition given by Hill, J., the present case, in our opinion, would satisfy the requirements of a deposit for it was not open to Gobendra to destroy the securities, but only, if need be, to be substituted by such fresh securities as the authorities might choose to issue. We are of opinion therefore that the first contention should fail. As regards the second contention we must dissent from the view propounded therein. We are supported in the view we take by a long series of decisions of all the Courts. e. g., *Shivlal* v. *Bhavani Shankar* (17), *Gangentine* v. *Gottipatt* (10); *Gangahari*

12. A I R 1923 Mad 578=72 I C 842.
13. 1 Sm L C 187.
14. (1904) 31 Cal 519.
15. (1903) 7 C W N 476.
16. (1907) 6 C L J 535.
17. (1902) 26 Bom 430=4 Bom L R 72.

v. *Nabin Chandra* (18); *Pramatha* v. *Pradyumno* (19) and *Ma Shew* v. *Ma Saw* (20). As regards the third contention, if the idea of a gratuitous bailment under the Contract Act is to be imported into the Limitation Act it cannot be gainsaid that by virtue of S. 162, Contract Act, the bailment must on the death of Gobendra, have come to an end. But as we read the provisions contained in Art. 145, Lim. Act, it takes no notice of the termination of the bailment; what it is concerned with is the time when the deposit was made.

But the question which presents to us greater difficulty is the question whether the suit as against the defendants who were not themselves the actual depositaries but are only the heirs of the depositary, is a suit within the meaning of Art. 145. The only authority of this Court directly bearing on this question is the case of *Promotho* v. *Pradyumno* (9) at p. 779 (*of* 26 *C W N*) in which it was held that on the death of a depositary his heir may be regarded as involuntary bailees. We find it very difficult to agree in this view. Involuntary bailment as we find in text books is a very different thing. Story in his book on Bailments, para 44-a, says:

"There is another class of deposits, which may properly be called involuntary, as contradistinguished from necessary and voluntary inasmuch as each of the latter presupposes some act of the depositor, whereas involuntary deposits may be without the assent, or even knowledge of the depositor. Thus for example, where lumber, floating in a river, is by a great flood or freshet thrown upon the land of another person, and is there left by the subsidence of the stream, it may properly be called an involuntary deposit."

In para 83-a, Story gives other such instances, e. g., goods coming upon one's land by the act or negligenee of their owner, trees thrown by the wind on the land of a stranger, fruits falling upon another's land by force of wind or like causes. Rights and liabilities of parties in respect of involuntary deposits or of finders of goods whom Story deals with under the head of quasi deposits stand, in our judgment, upon a very different footing from those of the heirs of a bailee of depositary. In our judgment however the Limitation Act does not take any notice of the termination of the contract of bailment, and omitting all reference to bailment has used the word depositary with the object of relying upon the act of deposit as the starting point of limitation. Loan for use, no doubt, is a form of bailment without reward or gratuitous bailment. By the death of the bailee the bailment comes to an end. But the character of the transaction, in so far as it was a deposit, is not altered, and the person in whose hands the thing deposited comes, if it does by virtue of his succeeding to the estate of the original depositary, becomes a depositary all the same. Though we do not agree with all that has been said in the case of *Krishnaswami* v. *Gopala Chariar*, *A. I. R.* 1925 *Mad* 185, on this point, we agree with that decision, for the reasons we have just given in so far as it has held that a suit against the heirs of an original depositary does come within Art. 145. The above being our view on the question of limitation, we order that the appeal be dismissed with costs.

K.S. *Appeal dismissed.*

18. (1916) 34 I C 959.
19. A I R 1921 Cal 416=69 I C 900=26 C W N 772.
20. A I R 1928 Rang 303=116 I C 468=6 Rang 547.

A. I. R. 1934 Calcutta 92

MUKERJI, J.

Anupama Ghose and *others*—Plaintiffs—Appellants.

v.

Parbati Mistery and *others*—Defendants—Respondents.

Appeals Nos. 543 and 544 of 1931, Decided on 4th April 1933, from appellate decree of Addl. Sub-Judge, Khulna, D/- 12th September 1930.

Bengal Tenancy Act (1885), S. 104-H and J—S. 104-H has no application to case of omission of tenancy from settlement rent roll.

Section 104-H speaks of a person aggrieved by an entry in respect of a tenancy which has been entered in the settlement rent roll prepared under S. 104-A to 104-F and specifies the suits which have to be brought in such circumstances. It has no application to a case of entire omission of a tenancy from such a rent roll. Hence, even though no suit is instituted under S. 104-H, a suit for claiming rent higher than that entered in record of rights, is not barred by S. 104-J. [P 94 C 1]

Hemendra Chandra Sen—for Appellants.

Surajit Chandra Lahiri and *Ganga Prosad Bose*—for Respondents.

Judgment.—The facts of the two suits which have resulted in these appeals are the following: One of these suits relates to a jama which used to be held by one Goloke, mistri, and the other to a jama which one Sridam Mondal held, under two persons named Chandramani Majhi and one Asanulla Gain who were temporary-settlement holders from Government. The interests of Chandramoni Majhi and Asanulla Gain have eventually passed to two persons, Charu Chandra Ghose and Purna Chandra Ghose. Goloke's rent was Rs. 29-1-4 and Sridam's Rs. 55-12-4. In 1920 B. S. Goloke and Sridam sold their respective jamas to Baroda Kanta Ghose, father of the aforesaid two persons Charu and Purna, when he was alive, and purported to execute kabuliyats in favour of Baroda at rentals of Rs.38-2-5 and Rs. 70-15-0 respectively for the two jamas and promising that if under any future settlement from Government there be any increment of the rent payable by the lessor they would pay the same by executing a fresh kabuliyat, and if there be a decrease they would get a corresponding diminution. By the Will left by Baroda the two holdings have devolved on his two daughters-in-law, namely, the wives of Charu and Purna. These two ladies are the plaintiffs in the present suits. Their present position is that their husbands are temporary settlement holders under the Government, that they themselves hold under their husbands and that the defendants are tenants under them.

In the Petty Settlement of 1908 the rents of the defendants in respect of the two jamas of Rs. 29-14-6 and Rs.55-12-4 which were enhanced by the kabuliyats of 1290 B. S. to Rs. 38-2-5 and Rs.70-15-0 as already stated, were recorded as Rs. 34-7-2 and Rs. 63-15-3 respectively, and in the more recent District Settlement of 1925 they have been further enhanced to Rs. 40-2-0 and Rs. 69-1-0. The plaintiffs have sued for rents as recorded in these settlements plus a munafa of Rs. 8-2-9 for Goloke's jama and of Rs. 15-2-8 for Sridam's jama. Their case is that the enhancement of rent in the kabuliyats was on the basis of such munafas being reserved for Baroda and consequently of themselves, and that the stipulation in the kabuliyats, to which reference has already been made, makes that clear. In neither of the settlements the rights of Baroda or of the plaintiffs were recorded but the defendants have been recorded as holding directly under the temporary setttement holders for the time-being. The defendants allege that the kabuliyats of 1290 B. S. were not acted upon and that rents were never paid according to their terms. They have not, however, challenged the kabalas in favour of Baroda. They say that they are liable to pay only such rents as are entered in the Settlement khatians, and to such persons as are the temporary settlement holders.

The Munsif found that when Charu and Purna became temporary settlement holders under the purchase which they made from the previous temporary settlement holders they managed the properties on behalf of their respective wives and that the collection papers produced by them showed that they separately realised the munafas payable to their wives under the terms of the kabuliyats aforesaid and kept separate accounts of such realizations. It was contended before the learned Munsif on behalf of the defence that as the plaintiffs did not institute any suit under S. 104-H, Ben. Ten. Act, within time they were incompetent to claim rent on the basis of anything else than what was entered in the Record-of-Rights. But he held that, as in the present cases the rights of the plaintiffs were not recorded in the khatian, they were competent to enforce them in the present suits by showing that the Record-of-Rights was wrong, even though they may not have instituted suits contemplated by that section. The Subordinate Judge agreed with the Munsif in holding that the intermediate interest created by the kabuliyat of 1290, did in fact exist and that under those kabuliyats the relationship of landlord and tenant must be held to exist between the plaintiffs and the defendants. He held however that the rents having been settled under S. 104-J, Ben. Ten. Act, the entry in the Record-of-Rights is final and the plaintiff cannot claim any higher amount. He held

also that before the plaintiffs can claim munafa they must show what the rent payable by them to their own landlords was, but of this there was no evidence and that, in fact, there was no record made in respect of the plaintiffs' tenancy under the temporary settlement holders. He gave the plaintiffs decrees at the rates entered in the settlement khatians and dismissed their claim as regards munafas.

On behalf of the plaintiffs, as appellants, it has been contended that S. 104-J does not operate as a bar because S. 104-H has no application to cases of the present nature. With this contention I agree. The section speaks of a person aggrieved by an entry in respect of a tenancy which has been entered in the settlement rent roll prepared under Ss. 104-A to 104-F, and specifies the suits which have to be brought in such circumstances. It has no application to a case of an entire omission of a tenancy from such a rent roll, as is the case here. The learned Judge, in my judgment, was in error in supposing that S. 104-J is a bar: the rent that is settled and stated in the rent roll is the rent of a tenancy as between the temporary settlement holders and the defendants, and has nothing to do with the rent of the alleged tenancy, on the basis of the kabuliyats of 1290 B. S. as between Baroda and the defendants. Notwithstanding that this tenancy has not found a place in the rent roll it is open to the plaintiffs to show that such a tenancy in fact exists and on its basis to claim rent from the defendants who are in occupation of the lands of the tenancy. It is obvious that if the plaintiffs desired to institute a suit to have their rights entered in the rent roll, such a suit would not fall within any of the descriptions of suits detailed in Cl. (a) to (h), sub-S. (3), S. 104-H. To this extent I must differ from the view which the Subordinate Judge has expressed.

The next question that arises is whether the plaintiffs are entitled to the munafas claimed. For this the plaintiffs will have to show that they are entitled to the amounts of Rs. 8 odd and Rs. 15 odd per year under the terms of the kabuliyats. The kabuliyats, however, do not mention these amounts. The plaintiffs' case is that the enhancement that was made in respect of the rents in 1290 was made on the basis of these munafas. This part of the case may be taken to have been established, because though there is no direct evidence of a contract for payment of such specific amounts as munafas in respect of the two holdings the realization of such amounts as munafas which has been proved by the plaintiffs' collection papers for a series of years may be taken as indirectly supporting such a conclusion. But I am unable to see how such a contract can now be given effect to. The contract, as I gather from the plaints, was that Rs. 8 odd and Rs. 15 odd would remain constant as munafa for the lessor, so that the total rent which the lessee will have to pay will be the amount of rent payable by the lessor to his own landlord plus the said munafa. Such a contract is easily understandable. But here the plaintiffs' tenancy is not recorded in the Record-of-Rights, and nobody can guess what rent the plaintiffs have to pay for it to their own landlords.

There is no evidence of any rents payable by the plaintiffs to their own landlords (their husbands) for the years in suit. In fact by omitting to have their own tenancies recorded they have destroyed the one means that they had of enforcing the contract. They cannot say that the rents of the defendants such as are entered in the rent roll as in respect of tenancies which the defendants hold under the temporary settlement holder should be taken as rents payable by themselves to the latter. Such a supposition is impossible. I think, therefore, that the plaintiffs' claim to the munafas must fail. The decrees which the plaintiffs have obtained on the basis of the rentals stated in the rent roll are perhaps justified on the footing that the defendants' tenancies have been correctly recorded therein except as regards the names of the defendants' landlords. But I need not consider the question of propriety of these decrees any further as there is no objection to that effect on behalf of the defendants. The appeals must be dismissed with costs.

K.S. *Appeals dismissed.*

A. I. R. 1934 Calcutta 95

LORT-WILLIAMS AND MCNAIR, JJ.

Devendra Nath Khan—Petitioner.

v.

Dhanmoni Dassi and *others*—Opposite Parties.

Criminal Revn. Case No. 999 and Criminal Ref. No. 204 of 1932, Decided on 1st May 1933.

(a) Criminal P. C. (1898), S. 145—Questions of title are of little importance except in so far as they determine actual possession.

Questions of title are of little importance under S. 145 except in so far as they may be available to show who was in actual physical possession of the land at the time when proceedings are taken. [P 96 C 1]

(b) Criminal P. C. (1898), S. 148—Question of costs need not be treated as separate issue on which separate judgment should be given—But such question must be determined judicially and upon proper materials.

There is no necessity to treat the question of costs as a separate issue upon which a separate judgment must be given. Of course, no order for costs must be made unless this question has been determined judicially and upon proper materials. If the Magistrate, when giving his decision on the merits, there and then makes an order for costs, the party who has been ordered to pay them may, at that time, raise argument in order to induce the Magistrate not to inflict that order upon him, and the matter will then be decided after hearing any such argument. If however the Magistrate reserves judgment, without mentioning at any time when the parties are before him, that he intends to make an order for costs against any of them, it is his duty to give notice to any party against whom he intends to make such an order, that they may have an opportunity of placing before him arguments to induce him not to make the order: 28 *Cal* 302, *Expl.* [P 96 C 2]

Mukunda Behary Mullik—for Petitioner.

Ganga Prosad Bose — for Opposite Parties.

Order.—In this case there was a dispute about the possession of certain plots of land which belonged to on-Banamali. He was the only son of his mother and died leaving his mother Dhanamani and his widow Sreemuty. Subsequently they lived together for a time, and thereafter the widow who was young and without issue seems to have become attached to one Debendra Nath Khan, and left the premises and went to live with him. On 21st December 1931, she leased the land in which she had a life interest to Debendra. The question which the learned Magistrate had to decide was who was in actual physical possession of the land at the time when the proceedings were instituted under S. 145, Criminal P. C. Evidence was given that in the record of the last settlement proceedings of the District of Khulna, published in November 1925, Sreemuty was recorded as being in possession of all the land in dispute, and a number of witnesses were called on behalf of the petitioner, Debendra to show that he was at the time of the proceedings in actual physical possession. On the other hand, Dhanmani stated that Sreematy had left the homestead some considerable time before, and had gone to Debendra and that her (Dhanmani's) son-in-law Biswambhar had cultivated the land for her at all material times. This story was supported by eight witnesses including a doctor who was described by the Magistrate as being a rich and respectable man whose evidence he had no reason to disbelieve. The Magistrate apparently accepted the evidence of the witnesses for the first party and thought moreover that it was extremely improbable, for various reasons stated in his judgment, that Debendra ever had any possession of the land in question, and he found in favour of the first party Dhanamani and ordered that the second party should pay Rs. 50 as costs to the first party under S. 148, Criminal P. C. This rule was issued on the ground that the Magistrate's decision was inconsistent with his own findings of fact, because at the end of his judgment he says that his decision

"does not mean that Sreemuty has no possession. In fact, the possession of Sreemuty and Dhanmani is joint as already noted."

In those words he was referring to an earlier part of his judgment in which he stated that when the mother-in-law and the young daughter-in-law lived together the possession must have been joint. We are of opinion therefore that the Magistrate in that part of his judgment to which exception is taken was not using the word "possession" very accurately, and meant either that their interest in the land was joint, or else that

they had had jointly possession at the time when they were living together. Reading the judgment as a whole it is clear that the Magistrate did not intend to say that Sreemuty had any actual physical possession of the land at the time when proceedings were taken. The second ground upon which the rule was issued was that the Magistrate had not referred to a material piece of evidence, namely, the Record of Rights and the rent receipts granted to the second party. It is true that the learned Magistrate has not specifically referred to this matter in his judgment, and we think it would have been better if he had. But there is nothing to show—and it has not been argued before us—that the Magistrate failed to take these matters into consideration, and personally I am not surprised that this evidence did not appear to impress him very much. I have had reason on many occasions in this Court to draw attention to the fact that questions of title are of little importance under this section except in so far as they may be available to show who was in actual physical possession of the land at the time when proceedings are taken. The Record of Rights was in 1925—seven years before the proceedings under S. 145 were taken and, in our opinion, the weight of that evidence was insufficient to weigh down the scales in favour of the second party, when the learned Magistrate was satisfied with the verbal evidence given by so large a number of witnesses on behalf of the first party.

The next question raised is as to costs. This matter went on appeal before the Sessions Judge and he set aside the order for costs. The reasons he gave in his judgment are that in a proceeding under Ch. 12, Criminal P. C., coming under Ss. 145, 146 and 147 the Magistrate is empowered to make an order for costs under S. 148, but that he must determine this question judicially, both as regards the amount and the items for which the opposite party will be made liable: further, that his order must not be a part of the judgment passed under S. 145, but must be treated as a separate issue and a separate judgment must be given on a consideration of objections, if any, raised by the party sought to be saddled with costs. His authority for this proposition is the case of *Prokash Chunder* v. *Ram Prosad* (1) and he says it is a ruling which makes it incumbent upon the Magistrate to give notice to the party who is to be made to pay costs, so that he may have an opportuuity of contesting his liability. In our opinion, there is no necessity to treat the question of costs as a separate issue upon which a separate judgment must be given. Of course, no order for costs must be made unless this question has been determined judicially and upon proper materials. If the Magistrate, when giving his decision on the merits, there and then makes an order for costs, the party who has been ordered to pay them may, at that time, raise arguments in order to induce the Magistrate not to inflict that order upon him, and the matter will then be decided after hearing any such argument.

If however the Magistrate reserves judgment, without mentioning at any time when the parties are before him, that he intends to make an order for costs against any of them, it his duty to give notice to any party against whom he intends to make such an order in order that they may have an opportunity of placing before him arguments to induce him not to make the order. That is what was decided in the case reported in *Prokash Chunder* v. *Ram Prosad* (1). That decision was clearly correct because the order for costs had been made on a subsequent date by a Magistrate other than the one who had given the judgment under S. 145, Criminal P. C., and without giving notice to any of the parties and was obviously improper. On this question it is clear that the Magistrate has exercised a discretion which is given to him under S. 148, and there is no reason why we should interfere with it. Consequently, the rule will be discharged. The connected reference is rejected.

K.S. *Rule discharged.*

1. (1901) 28 Cal 302=5 C W N 291.

A. I. R. 1934 Calcutta 97

MITTER AND HENDERSON, JJ.

Bijaya Kanta Lahiri Chaudhury — Claimant—Appellant.

v.

Secy. of State — Defendant—Respondent.

Appeal No. 243 of 1929, Decided on 9th May 1933, from original decree of Dist. Judge, Mymensingh, D/- 16th May 1929.

(a) Contract—Intention of parties must be distinct and common—From correspondence between parties, held no concluded contract.

In order to constitute a binding agreement, the intention of the parties must be distinct and common to both and an agreement does not admit of difference.

In a land acquisition case, there was a series of correspondence between the landlord and the Collector. The Collector had offered a certain amount but the claimant was all along claiming a higher amount and pending the ascertainment of compensation by the Land Acquisition Collector, possession was delivered by the claimant:

Held: that under the circumstances there was no concluded agreement. [P 98 C 1]

(b) Land Acquisition Act (1 of 1894), S. 23—Mode of determination of purchase money in absence of evidence of selling value of similar land in neighbourhood—25 years' purchase plus nazar minus expenses can be taken as purchase money.

In the absence of evidence of the selling value of similar class of khas lands in the neighbourhood the only course of proceeding is to estimate the rent at which the whole plot might be leased and the purchase money might be properly calculated at 25 years' purchase plus the amount of nazar minus the collection expenses. [P 99 C 1]

(c) Land Acquisition Act (1 of 1894), S. 23—Compulsory acquisition—Value to seller or property in its actual condition at time of acquisition with all possibilities and advantages should be considered.

The valuation of property compulsorily acquired is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for the purpose for which the property is compulsorily acquired: *Fraser* v. *City of Fraserville*, (1917) *A C* 187, *Rel on*; *A I R* 1925 *P C* 91, *Ref.* [P 100 C 1]

Pal, Gobinda, M. Roy, Promode R. Guha—for Appellant.

D. L. Kastgir, Sudhir K. Kistagir, S. C. Basak and *Nasim Ali*—for Respondent.

Mitter, J. — This appeal is directed against the judgment and award of the District Judge of Mymensingh, dated 16th May 1929, and arises out of a reference under S. 18, Land Acquisition Act (1 of 1894), made by the Collector at the instance of the claimant who was dissatisfied with the award made by the Land Acquisition Collector.

It appears that the Assam Bengal Railway required certain lands belonging to the claimant for a bazar siding out of an area of 1.394 acres. The original proposal was to acquire a portion of this land. The Assam Bengal Railway required early possession of the land and the appellant through his agent expressed his willingness to give up early possession if the entire plot was acquired. These negotiations took place before 21st June 1926 and then followed certain correspondence between the District Engineer of the Assam Bengal Railway, the Collector and the present claimant. The details of the correspondence will be given later. The declaration was published on 17th March 1927 in the Calcutta Gazette. Formal possession was delivered on 3rd November 1927. The Land Acquisition Collector made his award by which he determined the amount of compensation to be Rs. 3,028-10-2. The claimant was dissatisfied with the award and asked for reference to the Court under S. 18 of the Act. The learned District Judge has increased the award to the sum of Rs. 4,945. Against this award the present appeal has been brought by the claimant and the Collector has preferred cross-objections. The claimant asked for an award for the sum of Rs. 14,000 and odd but before this Court he has limited his claim to compensation to the sum of Rs. 10,573. The Secretary of State has also preferred a cross-objection and contends that the Court should not have granted compensation in excess of the sum awarded by the Deputy Collector. The appellant contends that there was a concluded agreement binding on the Secretary of State to the effect that the amount of compensation would be Rs. 10,573 and not less, and it was not open to the Collector or to the learned District Judge to award anything less than the sum agreed to, and in support of this contention reliance has been placed on a decision of their Lordships of the Judicial Committee of the Privy Council in the case of *Fort Press Co. Ltd.* v. *Municipality of Bombay* (1). The Land Acquisition Judge has come to the

1. A I R 1922 P C 365=68 I C 980=49 I A 331=46 Bom 767 (P C).

conclusion that there was no agreement between the Collector and the owner that the amount of compensation would not be less than Rs. 10,573 if early possession was given. This finding is attacked by the appellant on the ground that it is not justified by the oral and documentary evidence in the case. It becomes necessary therefore to examine the correspondence to see if this conclusion of the learned Judge is right. (After considering the correspondence, His Lordship proceeded.) It appears clear therefore that even if the letter of Mr. Gurner dated the 14th April stating that the amount of compensation has been practically agreed on indicated an offer of Rs. 10,573, that offer was not accepted by the claimant or his manager who were persisting throughout in their claim for a higher amount. In order to constitute a binding agreement the intention of the parties must be distinct and common to both; an agreement does not admit of difference. Here there was a difference between the parties as to the value to be paid for compensation. The Collector might have offerd to buy even (if the most favourable construction be put on the letter of Mr. Gurner, dated the 14th April) at Rs. 10,000 odd. In response to the offer the appellants' Manager agreed to sell for Rs. 14,000 odd. This really amounted to a refusal of the offer by the Collector to buy at Rs. 10,000 followed by a counter offer. On behalf of the appellant it has been strenuously argued that when the Assam Bengal Railway Company took possession they at any rate must have agreed to pay the value determined by the Collector as compensation. Looking at the whole of the correspondence which has already been referred to it is clear that there was never a concluded agreement as to the value and the claimant's own petition (Ex. B, p. 49, part 2) makes it clear that the claimant never agreed to sell at Rs. 10,000 and odd or to deliver possession on the understanding that the compensation was to be Rs. 10,000 odd. The evidence of Surendra, his Manager, also leads to the same view. He says:

"I understood that the amount estimated in Mr. Twynum's letter was only an estimate and that the award might be more or less;"

and again:

"I did not think it necessary to write any letter to the Collector or District Engineer accepting the offer of Rs. 10,000."

It seems to us therefore that the learned Judge below was right in reaching the conclusion that there was no concluded agreement as to 'the compensation. In this view the decision of their Lordships of the Judicial Committee in 49 *Indian Appeals* does not apply as that was a case of concluded contract between the parties. The next ground taken is that there has been no proper determination of the value seeing that the learned Land Acquisition Judge has excluded certain evidence which was relevant on the question of valuation and reference is made to the orders made in this behalf on 26th and 29th April 1929. On the former date the claimant applied for permission to adduce evidence as to the profit of timber business which is carried on in the Gouripur bazar. In our opinion this evidence has been rightly excluded as the timber business is not carried on in the land compulsorily acquired by the claimant and this cannot affect him prejudically so as to entitle him to compensation. On the 29th the claimant wanted to adduce evidence of the transfer of tenants' rights. The learned District Judge has pointed out that there are no tenants on the land and the value of the tenants' right is the selami which the landlord could get and that it was not open to the claimant to show that if the tenants have come forward and paid selami they would have acquired right worth more than the selami. It appears from the evidence of the Manager of the claimant that there has been no sale of land adjoining the approach road and even now the appellant has not produced before us any document to show that there has been any such sale. In these circumstances this ground taking exception to the exclusion of such evidence seems to be unsubstantial. It is next argued that in arriving at the valuation the learned District Judge has not taken into account certain deeds of sale of the lands in the vicinity of the land acquired which would have proved the market price of the lands in the neighbourhood and would have furnished a criterion as to the value of the acquired lands. Reference is made to two deeds of sale Exs. 13 and 14 which are proved by claimants' witnesses 6 and 7 respec-

tively. In the case of the first deed of sale (Ex. 13) 14, acres of land were sold for Rs. 1,951 which shows that the land was sold at Rs. 216 per bigha. It is to be observed however that in both these cases the lands are situate within the bazar and the bazar lands must fetch a higher value than lands situate outside the bazar. Reference however has been made to oral evidence showing that on account of the Railway the value of the land has increased. One witness Nripendra, witness 12 for the petitioner, says "the most valuable land is that nearest to the station." With regard to the land covered by Ex. 14 it is to be noticed further that '03 acres of land in Gouripur bazar with a hut was sold for Rs. 1,285. Witness 7 for the petitioner states that there was a hut on the land worth Rs. 200 or Rs. 300. He produces however no document for the price of the hut and states that there was a bainapatra showing the price of the land but he does not produce the same. Be that as it may the land was situate in the heart of the bazar near the junction of the Approach Road and can furnish no clue to the price of land which is still ill-developed.

The learned Judge has valued the land at Rs. 4,261-4-0 on relevant evidence in the case. He has capitalised the value of the rent less 10 per cent for collection expenses at 25 years' purchase and has reached the figure of Rs. 1,556-4-0 on this head. With regard to the tank land he has allowed Rs. 275 and he has taken Rs. 3,420 as the nazar. The total of these items is Rs. 5,261-4-0; from this he has deducted a sum of Rs. 1,000 for earthwork. This leaves a net value Rupees 4,261-4-0 and in round figures he has estimated the market value of the land at the date of the notification at Rupees 4,300; the additional compensation at Rs. 15 on this amount is Rs. 645. He has awarded the sum of Rs. 4,945. In the absence of evidence of the selling value of similar class of khas lands in the neighbourhood it seems to me that the only course of proceeding was to estimate the rent at which the whole plot might be leased and the purchase money might be properly calculated at 25 years' purchase plus the amount of nazar minus the collection expenses. There is evidence in this case on behalf of the claimant that the rate of rent varies from 4 annas to 6 annas per cubit of frontage. See the evidence of Mahesh Kanta, p. 34, line 25, of Jnanendra Nath Sanyal, p. 46 lines 27 to 30, of Mahendra Chandra Chowdhury, p. 44, line 16, and the learned District Judge has accepted the lower figure for the eastern and the western plots and 2 annas per cubit for the southern plot. The comment of the learned Senior Government Pleader therefore in support of the cross-objection filed on behalf of the Secretary of State to the effect that the valuation is based on assumptions for which there is no foundation in the evidence loses all force. It was further argued on behalf of the Government that the finding that the raising of the plot would cost about Rs. 1,000 is based on pure assumption. This comment is equally unsubstantial seeing that there is evidence on behalf of the Government to the extent that,

" to raise the whole land minus the tank to the extent of 4 feet would cost Rs. 1,440 at the rate of R. 7 per thousand cubit feet : see the evidence of J. L. Biswas, p. 48, line 40."

So the learned Judge has the evidence before him on which he could come to the conclusion that the cost of raising the land would be about Rs. 1,000. There is abundant evidence with regard to the nazar and the learned Judge has taken into consideration that evidence and has discriminated between the rate of nazar with reference to the eastern, wastern and the southern plots into which according to the learned Judge the acquired land could be divided if the land is raised to a height of 3 or 4 feet. In support of the cross-objection it has been argued by the Senior Government Pleader that the position of the land was such that the landlord was not getting any profit and that it has not been shown that the potentialities of the land were such as would justify the District Judge in awarding a sum in excess of the Collector's award. The principle on which the valuation of property compulsorily acquired should be measured has been repeatedly laid down by their Lordships of the Judicial Committee of the Privy Council and by the House of Lords. In a very recent decision this principle was stated by Lord Buckmaster in the following words :

" To use the words to be found in *Fraser* v. *City of Fraserville* (2); it is the value to the

2. (1917) A C 187=86 L J P C 91=116 LT 258.

seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for the purpose for which the property is compulsorily acquired; see *Narsingh Das* v. *Secretary of State for India* (3)."

In my opinion this principle really enunciates two propositions: (1) the value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker (2) the value to the owner consists in all advantages which the land possesses, present or future; but it is the present value alone of such advantages that falls to be determined. I am of opinion that the learned District Judge has kept these principles in view for he points out that as regards rent all the land in the Approach Road except the timber yard pays rent 4 annas per cubit of frontage and he has taken this rate for the eastern and the western plots. For the southern plot he has taken half this rate. He has also considered the rate of nazar which is usual and has disregarded the exceptional rate given for the second plot taken by the Loan Office on the ground that it was needed for its extension and there was a competitor. The learned Judge was not unmindful of the circumstance that the land at the time of the acquisition was not yielding any income, that he considered the evidence at which similar lands in the vicinity after being raised to a height 3 or 4 feet was being let. Considering all these circumstances I am of opinion that the cross-objection should not prevail. The learned advocate for the appellant has finally referred to Ex. 1 dated 12th July 1927 in support of his higher claim of compensation, but it appears that this document was executed after the declaration was published and must be disregarded. On these grounds I am of opinion that the District Judge has arrived at the right conclusion and the appeal and the cross-objection must both the dismissed. The Secretary of State is is entitled to costs in this appeal and the cross-objection is also dismissed with costs. We assess the hearing-fee in the cross-objection at 3 gold mohurs.

Henderson, J.—I have had the advantage of reading the judgment which has just been delivered by my learned brother and I entirely agree with him that this appeal must be dismissed; but I desire to add something with regard to two of the points made by Dr. Pal on behalf of the appellant; (1) that there was an agreement as a result of which the Collector ought to have awarded the sum now claimed as compensation for the land; (2) that the learned Judge wrongly excluded certain evidence. The chief difficulty in dealing with the first point is that it is far from clear who is supposed to have made the agreement and what the agreement was. There are three parties concerned: the appellant, the Collector and the railway. The appellant and the Collector might well have reached an agreement; this is frequently done, as a result of which the claimant endorses a note of acceptance on his claim and the proceedings terminate; the present case is clearly not of that kind. On the other hand there might be an agreement between the claimant and the Railway Company. In such a case according to the authority on which Dr. Pal relies the Collector would not be bound to award the sum agreed upon, though it would be unreasonable for him not to do so, if the Railway Company were to pay the compensation. We were informed by Mr. Kastgir that the compensation was to be paid by the Government: there is in fact no evidence to show by which party it was to be paid and it seems clear that, if in fact it was to be paid by Government, there is no reason why the Collector should award any sum which might have been agreed upon in negotiations to which he was not a party.

It is only necessary to read the petition praying for a reference to the Court in order to see that the appellant himself had no very clear case to make. But at the trial itself the case made was that the appellant was induced to deliver early possession by a promise that the sum now claimed would be awarded. The negotiations with regard to the delivery of possession were carried on between the appellant and the Railway Company. In his letter Ex. F the Collector Mr. Twynam made it perfectly clear that early possession could only be secured by mutual agreement between the Railway Company and the appel-

3. AIR 1925 P C 91=86 I C 556=52 I A 133=6 Lah 69 (PC).

lant; in fact the Collector was not interested in these negotiations for early delivery of possession. In the second place the alleged agreement is not an agreement about the market value of the land; it is a different kind of agreement; it is an agreement to pay for something else, early possession in addition to the market value of the land; and the irresistible inference to be drawn from such an agreement would be that the market value of the property must be less than the sum now claimed. While agreeing with the learned Judge that the appellant's case with regard to an agreement is quite untrue I am further of opinion that the kind of agreement which he attempted to set up would be of no avail to him on this reference.

I will now deal with the second point. Dr. Pal's first complaint is that the learned Judge refused to let in evidence to show the profits made by the appellant in a certain timber business. In my judgment the learned Judge was perfectly right when he ruled that such evidence was irrelevant. No doubt if large profits could be made from the sale of timber and convenient sites for such business were insufficient to meet the demand, rents would immediately rise and the profits of the business would be indirectly reflected in the profits derived from the land; but the actual profits made by the sale of timber do not throw any light on the market value of the land. Dr. Pal's second complaint is that evidence with regard to sales by tenants was improperly excluded. Now I am not prepared to say that such evidence must necessarily be of no value. A surveyor would be able to ascertain the value of the structures transferred, the incidents of the right sold, the amount paid as selami; the rent, etc., and from an examination of several such transactions in the locality he should be able to form a very good idea as to the value of the land as a cleared site. But the real answer to Dr. Pal is, as has been pointed out by Dr. Basak, that his grievance is only theoretical. In the grounds of appeal there is no specific case made that any particular evidence was improperly rejected. Dr. Pal was unable to tell us whether these transfers took place with respect to land in the locality or not and I can only say that the transfers which were proved were of no practical use. I must therefore hold that it has not been shown that the evidence, which was excluded, would have been of any assistance in the present case.

For myself I would be disposed to allow the cross-objection and restore the award of the Collector; that award has been enhanced not on any definite case made by the appellant but on a development scheme propounded by the learned Judge himself. Such schemes are at best an unreliable guide to the market value of the land, even when they are prepared by an experienced and competent surveyor; they must be even more unsatisfactory when prepared by a learned Judge who has not seen the land and is entirely unfamiliar with the local conditions. It has also been assumed that a purchaser of undeveloped land will pay the equivalent of what is estimated to be its full value after development: this is clearly not so; such a purchaser would have to tie up his money during the stage of development and run the risk that the scheme might prove a failure. Even if this scheme were accepted as sound, I should find it difficult to say that the sum awarded by the Collector was not a fair price for the land in its undeveloped state. In the present case there is the further fact that the appellant himself started to develop this land but abandoned it as an unprofitable scheme. Even when he wanted to start a business himself, he preferred to do so on land leased from another zamindar. However out of deference to the opinion of my learned brother and in view of the small sum at stake I am not prepared to express disagreement. I therefore concur in his order dismissing the cross-objection.

K.S. *Appeal dismissed.*

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PEARSON, J.

Hem Lal Ganguly—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 231 of 1933, Decided on 30th March 1933.

Criminal P. C. (1898), S. 499 – Surety bond to produce accused in one Court—Case transferred to another Court —Bond ceases to exist, unless surety has bound himself to be liable even on such transfer and does not re-

vive even if case is re-transferred to former Court.

There is no breach of the conditions of the bail bond, if the surety has failed to produce the accused in one Court and the case is transferred to another, unless from the language used in the bond, the surety has bound himself to be liable even on such transfer. When bond ceases to exist, it does not revive, even if the case is retransferred to the former Court : 30 *Cal* 107, *Rel on.* [P 102 C 1]

Sudansu Sekhar Mukherjee—for Petitioner.

Judgment. — The petitioner in this case stood surety for an accused person and signed the bail bond to the effect that he would attend at the Court of the Suburban Police Magistrate at Alipur on 7th June 1932 and other dates of the preliminary inquiry into the offence charged against the accused and should the case be sent for trial by the Court of Session, he would appear before the said Court to answer the charge against him. It seems that on several occasions the accused appeared and eventually the case was transferred from the file of the Subarban Police Magistrate to that of an Honarary Magistrate of Alipure for disposal. Subsequent to this, on 20th June 1932, the accused failed to appear, whereupon proceedings were taken against the surety for forfeiture of the bond and an order for forfeiture was made. The case was then retransferred to the file of the Suburban Police Magistrate and though the District Magistrate set aside the former forfeiture order, the Suburban Police Magistrate called upon the surety to show cause before himself in regard to his failure to appear on a subsequent occasion. The order for forfeiture was again made against the present petitioner : the case of *Shamsuddin Sirkar* v. *Emperor* (1) is an authority for the proposition that there is no breach of the conditions of the bail bond, if the surety has failed to produce the accused in one Court and the case is transferred to another.

Applying this principle to the present case the obligation under the bond ceased to exist on the transfer of the case and it is difficult to see how in any view of the case the bond could be said to have been revived on the subsequent re-transfer of the case. It is really a question which depends upon the language of the bond by which the surety has bound himself and the surety would no doubt be liable, even in such a case, if appropriate language were used. In the present case, the argument on behalf of the petitioner seems to be sound and the Rule must be made absolute. I direct that the penalty, if already paid, be refunded.

K.S. *Rule made absolute.*

1. (1903) 30 Cal 107=6 C W N 885.

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C. C. GHOSE, AG. C. J. AND
S. K. GHOSE, J.

Loke Nath Mukherjee and *others* — Plaintiffs—Petitioners.

v.

Abani Nath Mukherjee and *others*— Defendants—Opposite Parties.

Civil Revn. No. 843 of 1933, Decided on 25th July 1933, from order of Dist. Judge, Hooghly, D/- 8th June 1933.

Civil P. C. (1908), S. 115 and O. 6, R. 17—Amendment of plaint before trial has begun should be allowed—Defendant can be compensated in costs — That another suit in which same relief sought is pending is no ground for rejecting amendment — High Court can in exceptional cases interfere in revision with discretion exercised by lower Court.

Ordinarily the discretion of a judicial officer in rejecting an amendment of plaint will not be reviewed by the High Court in revision. But it is impossible to lay down a hard and fast rule that in no circumstances will the discretion exercised by a judicial officer be reviewed either under S. 115 or under S. 107, Government of India Act or under the combined operation of the two last mentioned sections. Each case must depend upon its own facts; and, subject to any question of costs, applications for amendment of plaints where trial has begun have got to be considered very carefully. Where the trial has not begun and the issues are not settled an amendment of plaint should be allowed and if any inconvenience or prejudice is caused to the defendants by granting the application for amendment of the plaint, the defendants can well be compensated in costs. Merely because another suit is pending in which the reliefs sought for are nearly the same or identically the same as the reliefs asked for in suit as amended that by, itself would not be any justification whatsoever for the disallowance of the application for amendment of the plaint.

[P 103 C 1, 2 ; P 104 C 1]

A. K. Roy, *Rupendra Kumar Mitter* and *Bijan Behari Mitter* — for Petitioners.

S. N. Banerjee, *S. N. Banerjee (Jr.)*, *Bijan Kumar Mukerjee*, *Haradhan Chatterjee* and *Shyamdas Bhattacharjee* —for Opposite Parties.

Order.—The matter out of which this rule has arisen was an application made

to the District Judge of Hooghly for amendment of a certain plaint in a certain suit filed before him. The suit in question is numbered as suit No. 12 of 1931 in the Court of the District Judge of Hooghly and it was a suit filed by the plaintiffs under S. 93, Civil P. C., under a sanction granted by the Collector of Hooghly. The suit was filed in November 1931 and after various proceedings had been had it appears that on 17th November 1932, an application was made to the District Judge for permission to amend the plaint in certain particulars mentioned in the application. The original application has now come up to this Court as part of the record and it appears from the endorsement on the original application that the application for amendment of the plaint was made with the sanction of the Collector of Hooghly, the latter having been authorised to give sanction by virtue of and under the authority of the Local Government. That appears, as indicated above, from the Collector's endorsement on the application itself. The position therefore is that the suit was instituted with the sanction of the Collector and the application for amendment of the plaint was made with the sanction of the Collector. Therefore as far as it appears to us on the record, there does not seem to have been any technical defect whatsoever as regards compliance with the provisions of S. 93, Civil P. C.

The application has been rejected by the District Judge of Hooghly for the reasons recorded in the order which is the subject-matter of complaint before us. We have carefully considered the terms of the order by which the learned District Judge rejected the application for amendment of the plaint, but it does not appear to us, having regard to the materials on record, that there were sufficient reasons for the rejection of the application for amendment. The only point that need detain us is whether, having regard to the powers of the High Court under S. 115, Civil P.C., and under S. 107, Government of India Act, this is a fit case for our interference with the order of the learned District Judge. No doubt the order of the District Judge was an order made in the exercise of his discretion and ordinarily the discretion of a judicial officer will not be reviewed by this Court in revision. But it is impossible to lay down a hard and fast rule that in no circumstances will the discretion exercised by a judicial officer be reviewed either under S. 115, Civil P. C. or under S. 107, Government of India Act, or under the combined operation of the two last mentioned sections. Each case must depend upon its own facts; and, subject to any question of costs, applications of this nature, that is to say, applications for amendment of plaints where trial has begun have got to be considered very carefully. They have to be considered very carefully because it is essential that the rights of either party should not be prejudiced. In this case it appears that the trial has not begun. The application for amendment of the plaint was made before the issues were settled. No doubt the issues were settled shortly after the date when the application was filed. But, at any rate, the fact remains that the trial has not begun; and, if any inconvenience or prejudice is caused to the defendants by granting the present application for amendment of the plaint, the defendants can well be compensated in costs. But that question has not been gone into and we need not pursue the matter further at this stage.

As indicated above, the real question is whether in the circumstances of this case the amendments should be allowed. In our opinion, the amendments should have been allowed and our reasons are these: The plaintiffs are suing as members of the public; they have obtained the requisite sanction under the statute and they are alleging breaches of trust on the part of the defendants. They have brought forward an application for amendment of the plaint with the necessary sanction under the statute and the matter has got to be considered from this point of view whether on the allegations made in the plaint and in the application the plaintiffs have made out a sufficient case for the amendments being allowed or not. If the amendments are allowed it may necessitate a further written statement on behalf of the defendants. We are minded not to say anything one way or the other and we must leave the matter entirely to the learned District Judge. But it does appear to us that having regard to the stage of the hearing of the suit reached when the application for amendment of

the plaint was brought on, the defendants, if any inconvenience or prejudice can be established to the satisfaction of the District Judge, would be entitled to apply to the District Judge for payment of costs either incurred needlessly or thrown away by reason of the amendments being allowed for the present moment. But subject to that consideration it appears to us that this is a case where the amendments should have been allowed.

It is said that there is another suit pending in which the same reliefs are asked for, namely, suit No. 69 of 1931. We are assured by learned counsel on behalf of the opposite party that the reliefs sought for in that suit are precisely the same as the reliefs sought for in this suit. That may or may not be so; but one cannot overlook the fact that this is a suit by certain members of the public on behalf of the public. It is a suit which is allowed under the law and because another suit is pending in which the reliefs sought for are nearly the same or identically the same as the reliefs asked for in the present suit, that by itself would not be any justification whatsoever for the disallowance of the present application for amendment of the plaint. No doubt the opposite party is entitled to point out that to us for the purpose of showing that this was an unnecessary suit or a mala fide suit; but while they are entitled to bring that to our notice we are not satisfied on the materials before us that that fact in itself concludes the matter and that the present application for amendment of the plaint should be disallowed on that ground. We think, on the whole, subject to any question of costs being determined by the learned District Judge when the matter goes back to him that the application for amendment of the plaint should have been allowed and we accordingly make the rule absolute. We make the order under the combined operation of S. 107, Government of India Act and S. 115, Civil P. C. The costs of this rule (the hearing-fee being assessed at five gold mohurs) will be treated as costs in the suit.

K.S. *Rule made absolute.*

A. I. R. 1934 Calcutta 104

JACK AND NAG, JJ.

Mafizuddin Mandal—Petitioner.

v.

Rahima Bibi—Opposite Party.

Civil Rule No. 219 of 1933, Decided on 3rd July 1933, from order of Dist. Judge, Rangpur, D/- 28th September 1932.

(a) Mahomedan Law—Marriage — Finding as to repudiation of marriage on puberty cannot be interfered with in revision—Civil P. C. (1908), S. 115.

A finding that a Mahomedan marriage contracted by the girl's paternal uncle was repudiated by her on attaining puberty cannot be interfered with in revision. [P 104 C 2; P 105 C 1]

(b) Mahomedan Law—Marriage — No decree is necessary to confirm option of puberty but order of Judge is necessary to impress on act a judicial imprimatur—District Judge can exercise power of kazi.

A minor girl given in marriage has the option of puberty and under the Mahomedan law no decree is required to confirm it, but in order to impress on the act a judicial imprimatur an order of the Judge is necessary. And a District Judge has implied authority to exercise the functions of the kazi under Mahomedan law. And even if a lower Court had jurisdiction, that can be no ground for interference in revision: 43 *Cal* 467, *Dist.*; *A I R* 1924 *Cal* 473; *A I R* 1920 *Cal* 129 and 3 *C W N* 158, *Ref.* [P 105 C 1, 2]

Abinash Chandra Ghose and *Amrita Lal Mukerji*—for Petitioner.

Syed Nasim Ali and *Syed Farhat Ali*—for Opposite Party.

Order.—In this case the petitioner has moved against a declaration made by the District Judge of Rangpur that the opposite party Rahima Bibi had repudiated her marriage with him on attaining puberty on the grounds: (1) That the learned District Judge had no jurisdiction to make such a declaration inasmuch as the option of puberty is a civil right for which a suit should have been brought in a proper Court against the decision of which first and second appeals would lie. (2) From the statements of the opposite party herself and her witnesses the learned Judge ought to have concluded that there had been no repudiation of the marriage of Rahima with the petitioner according to the provisions of Mahomedan law.

As regards the second point the Judge has come to a finding on the evidence that the marriage which was contracted by the girl's paternal uncle was in fact repudiated by her on her attaining puberty. This is a finding with which one cannot interfere in revision under

S. 115, Civil P. C., or S. 107, Government of India Act. As to the first point admittedly the opposite party had the option of puberty and under the Mahomedan law no decree was required to confirm it, but in order to impress on the act a judicial imprimatur an order of the Judge is necessary : vide Amir Ali's Mahomedan Law, Vol. 2, p. 375. Under the Mahomedan regime the Judge was the "kazi" and the question is whether under the British Administration the District Judge has the jurisdiction of the "kazi" in this matter. It appears that shortly after Warren Hastings became Governor of Bengal the East India Company established civil Courts which took over the powers and duties of the Mahomedan Courts and administered Mahomedan law : vide Cowan's Tagore Law lectures on Mahomedan Law, and under S. 4, Civil P. C., the civil Courts retain this jurisdiction in the absence of any specific provision to the contrary. Under Mahomedan law to make the repudiation of marriage by a girl on reaching puberty effective she must make a declaration before the "kazi" or Judge and get his order thereon.

If the husband denies that there was any repudiation the onus was on her to establish it by evidence. The place of the application to the kazi cannot be taken by a suit under S. 42, Specific Relief Act, for a declaration that the marriage has been repudiated, for such a declaration is at the discretion of the Judge, whereas under the Mahomedan law the girl had an absolute right to repudiate the marriage on attaining puberty. But it is objected that even if the civil Court has taken over the powers of the kazi those powers should have been exercised by a Subordinate Court and not by the District Judge. There is however authority for the view that the District Judge is the proper person to perform the functions of the kazi, vide the case of *Shama Charan Roy* v. *Abdul Kabeer* (1), where it is laid down that

"the civil Court of superior jurisdiction in the district is vested, generally speaking, with the powers exercised by the kazi under the Mahomedan regime."

It is true that in the case of *Atimannessa Bibi* v. *Abdul Sohban* (2), Sir Asutosh Mookerjee, J., doubts whether a District Judge has implied authority to exercise the functions of the kazi under the Mahomedan law. But this was with reference to wakf, and earlier authorities were not referred to, nor is it clear that the authority of *Shama Charan's* case (1) has been overruled ; moreover the same learned Judge in the later case *Habibar Rahaman* v. *Saidannessa Bibi* (3) refers to the case of *Fakrunnessa Begum* v. *District Judge, 24 Parganas* (4), as pointing out that the powers of the kazi are ordinarily exercised by the District Judge. Even if it were held that this matter should have been dealt with by the Court of lowest jurisdiction in the first place, the passing of the order by the District Judge would not be a material irregularity justifying our interference under S. 115, Civil P. C. We find that the order objected to was rightly passed by the District Judge and this Rule is therefore discharged. No order as to costs.

K.S. *Rule discharged.*

1. (1899) 3 C W N 158.
2. (1916) 43 Cal 467=32 I C 21.
3. AIR 1924 Cal 473=77 I C 949=51 Cal 831.
4. AIR 1920 Cal 129=56 I C 475=47 Cal 592.

✻ A. I. R. 1934 Calcutta 105

COSTELLO AND M. C. GHOSE, JJ.

Khoda Bux Haji and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 923 and Revn. No. 480 of 1933, Decided on 15th June 1933.

(a) Criminal P. C. (1898), S. 297—Evidence affecting all accused equally or none at all—Failure of Judge while summing up to jury to divide up evidence as against each accused is no misdirection.

Generally speaking it is desirable and indeed obligatory that a Judge in summing up to the jury should divide up the evidence as it affects each individual accused. But where all the accused had taken part in the attack on the deceased and the evidence was such that it affected all accused or none at all :

Held : that the failure of the Judge while summing up to jury to divide up the evidence as against each accused was no misdirection, as no injustice could have been caused to any of the accused. [P 109 C 1]

✻ (b) Criminal P. C. (1898), Ss. 423 (2) and 439 (6)—Accused represented by pleader in appeal against conviction — Court thinking that sentence should be enhanced—No fresh notice to bring accused before Court is necessary — Accused has only same rights as regards challenging convictions under such circumstances as in regular appeal or revision.

Where the accused persons themselves are before the Court as appellants through their pleader, it is open to the Court, should it after

hearing the appeal decide against the appellants, straightway, to give to the accused persons the opportunity referred to in sub-S. (2), S. 439 of being heard upon the question whether the sentence ought to be enhanced or not by calling upon the appellants in the person of their advocate to show cause there and then why their sentences should not be enhanced, and it is not incumbent on the Court to give fresh notice to them to bring them before Court. And where such question of enhancement of sentence is before the Court the convicted person has only the same rights as regards challenging the actual conviction as he would have had, if he had come before the Court by way of a regular appeal preferred by himself or by proceedings in revision instituted by himself. Hence where a sentence has been passed after a verdict of guilty in a trial by jury the arguments on behalf of the convicted person before the appellate Court must be limited to the matters referred to in sub-S. (2), S. 423; and accused cannot claim to have wider rights and to reopen the whole matter : *A I R* 1926 *Bom* 555, *Expl*; 11 *Cal* 530 and 32 *Bom* 162, *Ref.* [P 110 C 1, 2]

A. K. Fazlul Huq, Dinesh Chandra Roy and *Rashidul Hasan* — for Appellants.

Nirmal Kumar Sen—for the Crown.

Costello, J.—This is an appeal by five persons, Khoda Bux Haji (otherwise known as Khudu Haji), Sifat, Bocha, Saban and Khosal. All these five appellants were tried before the Additional Sessions Judge of the first Court, Mymensingh, sitting with a jury, for offences under S. 147 and S. 302 read with S. 34 and S. 302 read with S. 149, I. P. C. The jury acquitted the accused of the more serious charges, but unanimously convicted them under S. 325/149 and S. 147. The learned Additional Sessions Judge sentenced all the five accused under S. 325/149 to two and half years' rigorous imprisonment and in addition each of the four accused Sifat, Bocha, Saban and Khosal to pay a fine of Rs. 50 and in default of payment of that fine to undergo an additional term of rigorous imprisonment for a period of three months. Khoda Bux Haji was sentenced in addition to the term of rigorous imprisonment to pay a fine of Rs. 200 and in default to suffer rigorous imprisonment for a further period of six months. The learned Judge in passing sentence observed that this sentence on all the accused especially on Khudu Haji should have been "stiffer," but he took into consideration the period they had been in prison already and in the case of Khudu Haji his age had also been considered. No separate punishment was awarded under S. 147.

When this appeal was originally opened before us by Mr. Dinesh Chandra Roy who appears on behalf of all the accused, we took the view that the facts and circumstances of the case were such that if we came to the conclusion that the conviction ought to be upheld then the sentences passed on all the five accused were manifestly inadequate. We accordingly therefore took the precaution of directing that a Rule should issue calling upon all the accused to show cause why the sentences passed upon them should not be enhanced. Pending the service of that Rule the further hearing of the appeal stood over until to-day. Mr. Roy in arguing the appeal on behalf of all the convicted persons has directed certain criticisms against the summing up of the learned Judge. In order to estimate the value of these criticisms it is necessary that I should outline the case put forward by the prosecution.

It appears that the convicted man Khoda Bux Haji (who seemed to be nicknamed Khudu) is a Talukdar of some substance. He is the owner of certain Char lands. Khudu Bux Haji, after the recent death of his brother Mir Bux Haji, had been making efforts to oust the widow of Mir Bux from her rights and was trying to get possession of all the properties left by Mir Bux. It was stated on behalf of the prosecution that a third brother Parbat had been championing the cause of the widow whose name is Basiran, and in his efforts on her behalf Parbat had had the assistance of a man Shikari Dewania, who was his uncle-in-law. Shikari Dewania seems to have been a man of some position in his village. Shikari Dewania lived at a place called Amkhour Char, whereas the widow Basiran and her brother-in-law Khudu lived at Dakatear Char which lies on the other side of a branch of the main stream of the river Jumna. On 31st August 1931, Parbat and a man named Aasan Haji came to the house of Shikari Dewania. Parbat asked the latter to accompany them to the house of Basiran in order that certain cases which were pending between her and her brother-in-law Khudu might be compromised. In response to that invitation Shikari Dewania set out with Parbat and Aasan in a boat to cross the river Jumna. After they had proceeded

about half way across the river another boat ran alongside them and obstructed their progress.

Then one of the present convicted persons, Sifat, who was in the second boat forcibly dragged Shikari Dewania into that boat. Parbat and Aasan Haji in fear made away in their own boat and left Shikari to his fate. Later on in the evening of that day, two men, Iman and Jalal who were fishing in the river near by, heard a groaning and on proceeding to investigate, they found Shikari lying near the bank mortally injured. According to the testimony given by Jalal, Shikari there and then gave an account of what had befallen him and asked to be removed to his own house. It appears that these two men were not able to carry the injured man by their unaided efforts ; so they went back to the village to inform some of the relations of Shikari including some men named Kasim, Nasar, Danesh and others. These men proceeded to the spot where the injured man was lying, and then they learnt from Shikari that after Sifat had dragged him from the one boat to the other, he had been beaten mercilessly by a number of men including Sifat, Khudu, Haji and four or five others, Saban, Osman, Bocha, Khosal and Chandulla. Shikari was then taken back to his own house and a number of neighbours gathered there. Parbat and Aasan Haji were called in and they were said to have corroborated all that Shikari had said by narrating what he had told them when they first found him. (His Lordship then after stating that the injured died in hospital after making a dying declaration proceeded.) Upon these facts the five persons named by Shikari were put upon their trial on the several charges I have enumerated. It is right I think that I should add a word or two with regard to the evidence given at the trial by Dr. S. R. Das Gupta, the Assistant Surgeon at Jamalpur, who carried out a post-mortem examination on the body of Shikari at about 5 p. m. on the day he died. That examination shows that there were many and very extensive bruises all over the body of the deceased man. The Medical officer testified that he had found that the whole of the left side of the chest from the collar bone down to the abdomen at the level of the umbilicus was filled with extravasated bright red blood. The muscles also were lacerated. The ribs of the left side from the fiith to the tenth were all broken. The left lung was punctured in two places and at least one rib on the right side was fractured. Extravasation of blood was found beneath all the ecchymosis and bruises. Several of the teeth were broken. Both cheeks contained extravasated blood. The left pleura was injured and also the left lung. He gave as his opinion that death was due to shock and haemorrhage causes as a result of the injuries on the chest. It is evident from the details contained in the post mortem report that this unfortunate man was to all intents and purposes battered to death. The jury however seem to have taken a somewhat perversely lenient and apparently unwarrantable view of the conduct of the accused persons and convicted them only of the less heinous offences. The appellants were in fact, surprising as it may seem, only convicted of voluntarily causing grievous hurt to the deceased man. It seems to us however that in the circumstances of this case, upon the assumption that the accused were guilty at all, they ought to have been convicted of the more serious charges laid against them and that being so, they should at least have been given the heaviest sentence allowable by the section under which they were actually convicted and therefore the maximum penalty should have been imposed.

The criticisms made by Mr. Roy on behalf of these convicted persons as regards the charge of the learned Additional Sessions Judge had reference mainly to two matters. The evidence in support of the case for the prosecution, it is clear, consisted almost entirely of statements made by the deceased man himself, and as the learned Judge himself puts it, "there was only one kind of evidence in this case," The learned Judge rightly pointed out to the jury in the course of his summing up to them that these statements were said to have been made on three occasions that is to say, (1) at the time when the injured man was discovered by Iman and Jalal, (2) later on the same evening when his relatives and neighbours gathered round him after he had been removed to his own house and (3) about noon on 1st

September when the formal dying declaration was made before a duly authorized Magistrate. Mr. Dinesh Chandra Roy has argued that the learned Judge did not adequately direct the jury as to the validity and effect of declarations made by deceased persons under the provisions of S. 32, Evidence Act, particularly having regard to the terms of S. 158, of that Act, which says:

"Whenever any statement, relevant under S. 32 or S. 33, is proved, all matters may be proved either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested."

Mr. Roy invited us to take the view that the learned Judge did not sufficiently emphasise that aspect of the matter or call the attention of the jury to the fact that it was open to the prosecution had they been able to do so to have given more evidence than what they in fact did, by way of corroboration of the statement made by the deceased man. As regards that matter however a scrutiny of the charge to the jury discloses that the learned Judge in actual fact did discuss and at considerable length the question of the several statements made by the deceased, and in particular the declaration recorded by the Magistrate. The learned Judge as to that made this observation:

"As I have already said that if the declaration is fully believed, it is sufficient to warrant a conviction without any corroborative evidence, although a piece of corroborative evidence would strengthen the probability of its being true In the present case such corroboration is lacking. From the circumstances of the prosecution story it might be supposed that some amount of corroboration would be received from the testimoney of Parbat and Aasan Haji who are alleged to have been going in the same boat with Shikari when the latter was dragged away by Sifat, Khudu Haji and others. But both Parbat and Aasan Haji deny it."

In my opinion in that passage as well as by other observations to a like effect made by the learned Judge, he did fully and satisfactorily point out to the jury that the case for the prosecution depended on the declaration made by the dying man and that it would have been open to the prosecution to have sought to fortify that evidence if they had been in a position so to do. There is therefore, in my opinion, no substance in the criticism made by Mr. Roy upon that point. The quotation of the comments made by the learned Additional Sessions Judge concerning the evidence of Parbat and Aasan Haji leads me to the second point put forward by Mr. Roy. It appears that the two witnesses just mentioned did not support the prosecution case as regards the events leading up to the death of Shikari, for in effect they stated in their evidence that it was not the fact that they were instrumental in Shikari's going with them in the boat. Their story was that they were actually waiting to cross the river when Shikari came up and ferried them across and that then they went off and so knew nothing of what happened to Shikari subsequently. The learned Judge in the exercise of his discretion allowed those two men to be treated as hostile witnesses and they were accordingly subjected to a cross-examination by the prosecution. Mr. Roy has complained that the learned Judge did not sufficiently indicate to the jury the manner in which they ought to weigh and consider the evidence of the witnesses who had been treated as hostile. But again upon a close examination of the summing up, one comes definitely to the conclusion that the learned Judge did sufficiently and properly deal with this question. His direction to the jury is as follows:

"These witnesses were declared hostile and permitted to be cross-examined by the prosecution, but from this fact alone it would be wrong to think that they were telling a lie. They are alleged to have made some admissions before the other witnesses on the night of 31st August 1931 which they deny here. These admissions are not substantial evidence, but between these alleged admissions and the present denial of Parbat and Aasan Haji, you have got to decide on which side the truth lies and if you think that Parbat and Aasan Haji are making false statements now, that is a circumstance which would go against the accused and in favour of the prosecution."

Then he goes on to say:

"In order therefore to test the corroboration of the dying declaration made before the Sub-Deputy Magistrate, you should consider first whether there were attempts to manufacture evidence as above, and secondly, whether the deceased made any statement at all on the preceding night and if any was made whether it was in conformity with the statement made before the Sub-Deputy Magistrate."

Then he says:

"Here I may just point out that the mention of the five names in the first information report does not in itself prove it to have been false

because there was evidence that in the earliest statement seven names were mentioned. The dying declaration was recorded at a time when the deceased was about to expire and at that time he might have found it difficult to collect all his thoughts and to express them in words."

Putting the matter tersely we are clearly of opinion that the learned Judge adequately dealt with the depositions of the witnesses who were declared hostile. Clearly the value of their evidence was a matter for the jury to consider and it was for them to decide what credence, if any, they should give to it. The only other criticizm put forward by Mr. Roy, of any substance, was that the learned Judge did not sufficiently put before the jury the evidence as against each of the accused persons individually. Upon this point the learned Judge said towards the end of the summing up:

"It is needless to repeat that the case of each accused should be considered separately."

He gave added emphasis to that point by making it the last thing he said to the jury before leaving the case for their determination. Mr. Roy has urged that the learned Judge ought to have tabulated as it were the evidence and divided it into classified categories as against each of the five persons who were on their trial. But in this particular case owing to the circumstances in which the attack on the deceased man took place, all the evidence was such that it affected all the five accused persons equally or not at all. There was practically nothing to distinguish the case made by the prosecution against any one of these five persons from the case made against any other of them, except that there was the additional allegation against Sifat that he was the one who actually dragged Shikari from the boat in which he originally was into their boat and thus putting him in the hands of all the persons who subsequently beat him to death. I am therefore clearly of opinion that though, generally speaking, it is desirable and indeed obligatory that a Judge in summing up to the jury should divide up the evidence as it affects each individual accused, in the circumstances of the present case, we think that no injustice could have been done to any of the accused persons by reason of the manner in which the facts were put before the jury.

The final criticizm made by Mr. Roy was to the effect that the learned Judge had nowhere in his summing up pointed out to the jury that not only were there discrepancies in the statements made by some of the witnesses in the proceedings before the committing Magistrate as compared with the evidence given by them in the Sessions Court before the jury but also discrepancies as between the statements made by some of the witnesses to the police in the course of the preliminary investigation as compared with the evidence they gave subsequently. That is in my opinion an extremely small matter. Mr. Roy candidly admitted that the statements made in the course of what he called "S. 161 proceedings," were in favour of the defence and were used by the defence. In those circumstances it is obvious that the whole matter must have been fully before the jury even though the learned Judge did not specifically refer to the statements made to the police.

Looking at the charge as a whole therefore we are entirely of opinion that no serious fault can be found with it. Certainly there was nothing put into the charge and nothing omitted from the charge which could have reasonably affected the verdict of the jury one way or the other. It must be borne in mind that this is a case where the jury have given what I may describe as a "selective" verdict in that they were minded to pick out from a number of charges the least grave of them all and upon that and that alone convict all the five persons accused before them. That action would clearly indicate that, to put the matter no higher, the jury must have been satisfied that the deceased man did make a statement denouncing the accused and that such statement was true. If the jury had had any doubt whatever about that matter, it is obvious that they would have not only acquitted the accused of the more serious charges as they did but would also at least have given the accused the benefit of their doubt and so have acquitted them of all the charges. If the jury had had any reasonable doubt as to the identity and complicity of the accused or any of them, it is not to be imagined for one moment that they would have hesitated to return a clean and comprehensive verdict of not guilty. It is obvious that the jury really had no doubt whatever that all the five accused per-

sons were responsible for the death of the man Shikari and it could only have been from some perversity of mind, prejudice or pusillanimity that they acquitted them of the graver offences. I have already indicated that, in our opinion, once it was established that these five persons were responsible for the death of the man Shikari, the jury ought in law to have found the accused persons guilty on the more serious charges. We therefore take the view that the sentence passed by the learned Sessions Judge was wholly inadequate as a punishment for what the accused did.

I observed at the outset of this judgment that as a measure of precaution we directed a rule to be issued upon all the appellants calling upon them to show cause why the sentences passed upon them should not be enhanced by this Court. I desire to say that in my opinion it is by no means clear that any such procedure was really necessary. These five convicted persons had themselves appealed to this Court against their conviction and thus submitted themselves to the judgment of this Court. They had appeared before the Court by their advocate Mr. Dinesh Chandra Roy who, at the previous hearing was prepared to argue and had indeed commenced to argue that the conviction ought to be set aside for the reasons I have aleady discussed. That being the position the accused persons themselves were then before the Court and therefore in my view it was open to the Court, should it after hearing the appeal decide against the appellants, straightway, to give to the accused persons the opportunity referred to in sub-S. (2), S. 439, Criminal P. C., of being heard upon the question whether the sentence ought to be enhanced or not by calling upon the appellants in the person of their advocate to show cause there and then why their sentences should not be enhanced cf. *Mether Ali* v. *Qween-Empress* (1).

It is to be noted that the sub-section only requires that no order shall be made prejudicial to an accused unless he shall have had an opportunity of being heard either personally or "by pleader" in his or their own defence. Where therefore there is already an advocate on behalf of accused persons before the Court, he as "pleader" can put forward on behalf of the accused any answer or argument that might be available as against a projected enhancement of sentence. It would seem that there is nothing in S. 439 which requires that, when accused persons are already before the Court by their advocate or pleader, it is nevertheless still incumbent upon the Court to issue a notice to them to bring them before the Court—a second time as it were—still less to invoke the machinery of the Court in the way of issuing a rule calling upon them to show cause. Of course if the advocate or pleader representing the convicted persons were to state that he wished to consult with his clients or to take further instructions, it would only be right and proper that he should have an opportunity of so doing and an adjournment might have to be granted for the purpose. In the present case when we inquired of Mr. Roy as to what he had to say "as the pleader" (to use the term given in sub-S. (2) for the accused upon the question of enhancement of sentence, Mr. Roy candidly admitted that if the conviction was to be upheld then he had nothing to say on the question of sentence, and only proceeded to argue that as there was a threat of enhancement of sentence and because an opportunity was to be given under sub-S. (2), S. 439 to the accused persons to show cause why their sentence should not be enhanced, therefore he was entitled as representing the accused, to the further advantage of going into the whole of the evidence given before the jury at the trial and asking us to review the whole case as regards the matter of conviction, instead of being bound to limit himself to impugning the correctness of the Judge's summing up.

Mr. Roy's contention was that sub-S. (6), S. 439 confers upon convicted persons who availed themselves of any opportunity given them of showing cause why his sentence should not be enhanced, a right far wider than that they would have in cases where there was merely an appeal against conviction in the ordinary way and there was no question of enhancement of sentence. Mr. Roy contended that where there is a question of enhancement of sentence, a convicted person even though he has already failed to persuade the Court that there was

1. (1885) 11 Cal 530.

such defect in the summing up of the learned Judge at the trial as to enable him to succeed in his appeal, can nevertheless proceed to claim to have the whole matter reopened and to ask this Court to put itself in the place of the jury and to review and reconsider the whole of the evidence in detail. It is to be observed that the powers of this Court on the hearing of an appeal against a conviction by the verdict of a jury are circumscribed by the provisions of sub-S. (2), S. 423, Criminal P. C., which provides that:

"Nothing contained in that section shall authorize the Court to alter or reverse the verdict of a jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him."

In other words if the Judge has properly and clearly put to the jury the evidence and given them a proper direction as to the law to be applied to the facts of the case so that the jury sufficiently understand the points to be considered by them, then the verdict of the jury, generally speaking, must stand. Mr. Roy has invited us to come to the conclusion that sub-S. (6), S. 439 in effect overrides sub-S. (2), S. 423 whenever there is a question of a sentence being enhanced. We cannot subscribe to that view of the matter. In our opinion that is not the law. If a question of enhancement of sentence is before the Court then the convicted person has only the same rights as regards challenging the actual conviction as he would have had if he had come before the Court by way of a regular appeal preferred by himself or by proceedings in revision instituted by himself. Therefore in all cases where the question of enhancement of sentence is before the Court, the position is just the same as if the matter had come before the Court by way of appeal or revision at the instance of the convicted person himself. If that is the correct view of the law, it follows that where a sentence has been passed after a verdict of guilty in a trial by jury the arguments on behalf of the convicted person before the appellate Court must be limited to the matters referred to in sub-S. (2), S. 423.

Mr. Roy relied very strongly upon the opening words of sub-S. (6) and he urged that the effect of the words "notwithstanding anything contained in this section" obliterated the plain language of sub S. 1, S. 439 in which are incorporated Ss. 423, 426, 427 and 428. In my judgment that is not a correct interpretation of sub-S. (6) for the reasons I have already indicated. Mr. Roy has stated that it has been the practice of this Court or at any rate of some Benches of this Conrt to take a wider view of the meaning of sub-S. (6) and accordingly to allow convicted persons who are showing cause against an enhancement of their sentences to have the whole question of their conviction reopened even to the extent of asking the Court to consider for itself the whole of the evidence given at the trial.

When however Mr. Roy was asked by us to cite any authority in support of that procedure he was wholly unable to do so and he was obliged to concede that there is no judicial decision of this Court which would warrant any such procedure being followed. The utmost Mr. Roy could do in support of that part of his argument was to refer us to a Bombay case which was a criminal appeal heard in the Bombay High Court by Fawcett and Madgavkar JJ., *Emperor* v. *Jorabhai Kisanbhai* (2). The judgment in that case however, so far from supporting Mr. Roy's contention, operates in a contrary sense and supports the view I have expressed, namely, that sub-S. (6) means no more than that whenever there is a question of enhancement of sentence the convicted person must be afforded an opportunity not only of showing cause against the enhancement but also of showing cause against his conviction, but nevertheless within the limits prescribed by the provisions of S. 423. The judgment of Fawcett, J., in *Emperor* v. *Jorabhai Kisanbhai* (2), at p. 786 *of* 50 *Bom.*, puts the matter very clearly. Referring to sub-S. (6), S. 439, the learned Judge said:

"The subsection now allows a convicted person, to whom a notice has been given to show cause why his sentence should not be enhanced, a right of showing cause also against his conviction. This, no doubt, supports the contention that the appeal should not have been disposed of prior to the issue of a notice. In my opinion, however, importance attaches to the opening words of that sub-section 'notwithstanding anything contained in this section.' It seems to me clear that the main reason for the introduction of this sub-section was the provision in sub-S. (5) that 'where under

2. AIR 1926 Bom 555=97 I C 805=50 Bom 783.

this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed."

Then the learned Judge says:

"In the case of an accused to whom a notice has been issued, and who has not appealed, or if no appeal lay, has not applied for revision of his conviction, naturally it would be contended that he could not question the correctness of his conviction, and it was in fact decided by this Court in *Emperor* v. *Chinto* (3), that it had been the invariable practice of the Bombay High Court, in cases that came before it for enhancement of sentence, to accept the conviction as conclusive and to consider the question of enhancement of sentence on that basis. It was presumably to overrule that view that the provisions of sub-S. (6) were inserted in 1923. And that being so, it seems to me that sub-S. (6) is primarily intended to operate as an exception to what is otherwise laid down or implied in S. 439 itself."

It is to be observed that in this passage from the judgment of the learned Judge there is a reference to the case of an accused to whom a notice had been issued and who had not appealed. Now in England such a situation could not have arisen because in English Criminal Procedure there is no provision for an appeal by the Crown either against an acquittal or against the adequacy of the sentence passed by the Judge at the trial. Therefore in England the question of enhancement only comes before the Court of Criminal Appeal when there has been an appeal on the part of the convicted person himself. In this country, on the other hand, it is open to the Crown to appeal against an acquittal or to move the Court in revision for an enhancement of sentence after conviction. In either event the convicted person would not be in the position of himself being an appellant before the Court or a person who had moved the Court in revision in a case where no appeal lay. In my opinion it was to meet the situation arising in one or other of the ways just mentioned, particularly the situation which arises when the Crown moves the Court for enhancement of sentence that sub-S. (6) was added to S. 439, in order that in the event of the Crown moving for an enhancement of sentence and the convicted person being called upon to show cause why his sentence should not be enhanced, he may then at the same time have an opportunity of arguing against the correctness or propriety of the conviction itself, but only strictly within the ambit of the provisions of S. 423. That that is the correct view of the law seems to me abundantly clear from the passage in the judgment which I have just quoted.

Taking that view of the matter we were not disposed to allow Mr. Roy to take us through the whole of the evidence on record in the present case, though in effect he had already done so in connection with his argument in support of the actual appeal irrespectively of the question of enhancement of sentence. I should add that as regards the judgment of Fawcett, J., it would appear that when he was discussing the position of an accused to whom notice has been issued, he was only referring to those classes of cases which I have already mentioned, namely those in which a convicted person has not himself appealed or moved in revision and the matter has come before the Court either on the motion of the prosecution, that is to say, the Crown, or otherwise in the circumstances referred to in the opening paragraph of S. 439. We think that where matter has come before the Court on the motion of the convicted person himself, it may well be that it is open to the Court, if it thinks fit, there and then to give his pleader the opportunity called for by sub-S. (2) of S. 439. We are of opinion that there is no substance in the arguments put forward by Mr. Roy. On the question of sentence, we think, that having regard to the nature and extent of the injuries inflicted upon the deceased, this is obviously a case where the maximum sentence ought to be given. There could be no more grievous hurt within the meaning of S. 325, than that which was inflicted in the present case. It is impossible to conceive a more grievous hurt—one which was of such a nature as to cause the death of the victim within a few hours. We accordingly enhance the sentence on each of the four convicted persons Sifat, Bocha, Saban and Khosal to seven years rigorous imprisonment. As regards Khoda Bux Haji we take into account the fact that he is somewhat younger in age than the others and we accordingly enhance the sentence passed upon him to six years' rigorous imprisonment. The fines imposed upon all the five accused persons will stand.

3. (1908) 32 Bom 162=7 Cr L J 119=10 B L R 93.

M. C. Ghose, J.—I agree with my learned brother. Mr. Roy, on behalf of the five appellants, has placed the whole of the charge before us and pointed out what he urged as misdirection or non-direction and also invited us to consider the whole matter. I agree that in this case the charge of the learned trial Judge was on the whole a fair charge and it contained no misdirection or other error.

Having regard to the brutal nature of the attack upon the deceased who was abducted into a boat and there obtained such severe injuries that six ribs on the left side and one rib on the right side were broken and nearly all his teeth were broken, and there were no less than ten ecchymoses and bruises over his body, and that he died in less than 24 hours after the injuries were inflicted, I agree with my learned brother that these appellants who caused those injuries have been very leniently treated by the jury who convicted them under S. 325 for voluntarily causing grievous hurt. In my opinion the injuries were such as were sufficient in the ordinary course of nature to cause death and in fact these five appellants were charged under S. 302, I. P. C. But the jury thought fit to convict them under S. 325, I. P. C. When the appeal was being first argued before us we were struck with the evident inadequacy of the sentence in this case and issued a rule upon the appellants to show cause why the sentence should not be enhanced. Mr. Roy has argued that because the accused persons are asked to show cause against the enhancement of sentence, it gives his clients the right in this case to go behind the verdict of the jury and to show upon a consideration of the evidence that they are not guilty of the charges, S. 439 (6) lays down that when a convicted person is asked to show cause why his sentence should not be enhanced, he shall in showing cause, be entitled also to show cause against his conviction. That sub-section in my opinion does not take away the force of S. 423 (2) whereby in an appeal the verdict of a jury may not be reversed by the Court on appeal unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge or to a misunderstanding on the part of the jury, of the law as laid down by him. In my opinion in an appeal against the verdict of a jury the appellant may not go behind the verdict of the jury and argue upon the evidence that the verdict of the jury was wrong. Two cases were cited by Mr. Roy in support of his argument. On a perusal of the of the judgment in the case of *Emperor* v. *Jorabhai Kisabhai* (2), it appears that it goes against the argument of Mr. Roy. There the learned Judges explained that Sub-S. (c) of S. 439 was enacted so as to remove certain restrictions which were put by the previous clause of S. 439. There is no finding in that case that Cl. 6 of S. 439 operates so as to restrict in any way the operation of S. 423.

The next case cited to us was the case of *Superintendent and Remembrancer of Legal Affairs, Bengal* v. *Jnanendra Nath Ghose* (4). That was a case where the accused persons pleaded guilty in the Sessions Court. The learned Sessions Judge accepted their plea of guilty and gave them a light sentence. Whereupon the Local Government through the Superintendent and Remembrancer of Legal Affairs, Bengal, filed a petition to this Court praying for an enhancement of the sentence passed on the accused. When the accused appeared to show cause, it was urged on their behalf that under S. 439, Cl. (6) they were entitled to show cause against their conviction and in doing so in a case where they had pleaded guilty, it was argued by their counsel that the force of S. 439, Cl. (6) was to reduce the effect of S. 412, whereby it was indicated that where an accused person pleads guilty there shall be no appeal except as to the extent or legality of the sentence. It was argued in that case that the accused having been directed to show cause why the sentence should not be enhanced, the accused had the right to show cause against their conviction and could go behind the provisions of S. 412 and say that they were not guilty of the charge.

There was a difference of opinion between the two Judges, Mukerji, J. and Graham, J. Graham, J. held that the argument taken on behalf of the accused was not correct that their plea of guilty was conclusive and that they could not go behind the provisions of S. 412. On account of the difference of opinion the matter was referred to a third Judge.

4. A I R 1929 Cal 747=1929 Cr C 395=119 I C 201=30 Cr L J 1038=56 Cal 1145.

Buckland, J, accepted the view of Graham, J, and enhanced the sentence of the accused on the ground that the plea of guilty taken by them was conclusive under S. 412. In both the reported cases therefore it has been held that Sub-S. (6) of S. 439 gives the accused person no more right than that when he was asked to show cause why the sentence should not be enhanced he might also show cause against his conviction. This section is intended to operate for the benefit of the accused person who otherwise would have lost his right to show cause against his conviction. I am clearly of opinion that this section does not operate so as to reduce the effect of S. 423, Cl. (2). In this view I am of opinion that Mr. Roy is not entitled to go behind the verdict of the jury and argue upon the evidence. As regards the verdict of the jury, as I have stated above, there is no misdirection in the charge of the Judge and there is no material upon which we can reverse the verdict of the jury. I agree that the appeal of the five appellants should be dismissed and that the sentences passed upon them should be enhanced in the manner proposed by my learned brother.

K.S. *Appeals dismissed.*

A. I. R. 1934 Calcutta 114

LORT-WILLIAMS AND MCNAIR, JJ.

Shibadas Daw and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeals Nos. 819 to 821 of 1932, Decided on 26th May 1933.

(a) Evidence Act (1872), S. 114 (b)—Evidence of accomplice—Corroboration—Material particulars must implicate accused—Criminal Trial.

Section 114 (b) provides that the Court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars and the material particulars must implicate the accused in order that the corroboration may be such as is intended by the section. [P 115 C 2]

(b) Criminal Trial—Evidence of accomplice—Judge sitting without jury must treat himself as jury and apply same rules as in trials with jury—Evidence Act (1872), S. 133.

In a jury trial, it is the duty of the Judge to point out to the jury the position in law affecting the evidence of accomplice and to tell them that they may convict, if they choose, on his evidence alone; but that owing to the circumstances in which the evidence is given, it is, generally speaking, very dangerous to act upon it, unless they find corroborative evidence which implicates the accused person. If such a warning has been given and nevertheless the jury choose to convict the accused in the absence of such corroborative evidence, the conviction will not generally be quashed. In a case where a Judge is sitting without a jury, he must apply the same rule by treating himself as a jury. If, therefore, these factors are not present to his mind, and if there is not sufficient corroborative evidence implicating the accused, then the conviction ought to be set aside. [P 116 C 1]

Hiralal Ganguly, Amrita Lal Mukerjee, Kumud Bandhu Bagchi and *J. C. Gupta*—for Appellants.

D. N. Battacharjee—for the Crown.

Lort-Williams, J. — The appellants Madhu Sudan Sen Gupta, Shiba Das Daw and Nikhil Chandra Guha Roy were tried with one Ramphal in the Court of the Special Judge of Murshidabad under Ss. 4 (a) and 5, Explosive Substances Act (6 of 1908) and S. 440 read with S. 120-B, I. P. C. The trial was under Ordinance 2 of 1932. Ramphal was acquitted and the other three were convicted and sentenced to various terms of imprisonment. It is unnecessary to deal in detail with the evidence, because the case turns almost entirely upon the evidence of the approver Kalu. This evidence was very full and, if it is believed, there can be no question about the guilt of all the three appellants. The real question therefore for us to decide is whether it is safe to allow the conviction to stand upon the evidence of the approver or, in other words, whether there is sufficient and proper corroboration in law of this evidence.

The prosecution story begins with the association of some of the appellants in an Athletic Club. The leading spirit there was Madhu and it appears that there was some theatrical talk among some of the appellants about making oneself physically fit in order to enable one to fight for independence. The Magistrate has rightly disregarded that part of the story which is associated with this club. The Subdivisional Officer thought apparently that the club was not altogether desirable and it was closed by his orders, and there is evidence to show that Madhu, Shiba Das and Kali talked about frightening the Subdivisional Officer for what he had done. The evidence shows that sometimes they spoke of punishing him by throwing a bomb, at other times merely of frightening him. It is clear that they were in touch with the accused Nikhil

who was a detenue living at Bharatpur and who had been sentenced to imprisonment for life. There is ample corroborative evidence of association between Madhu, Nikhil, Shib Das and Kalu. It is suggested that Nikhil advised or taught them how to make bombs or bomb "potkas" which is said to be another name for "crackers": but there is no corroboration of the approver's story on this point except the evidence of P. W. 7 Samed who says that he was present behind a purda or partition when Nikhil was talking to the others and that he heard them say that they would frighten the Subdivisional Officer. Kalu said that he purchased the materials necessary for making bombs upon the instructions of Madhu who gave him the money, and though there is corroboration of the fact that Kalu purchased the articles there is none of the fact that Madhu had told him to do so.

Similar criticism may be made of Kalu's evidence that he was told by Madhu to get pieces of iron and waste paper for the purpose of preparing bombs. According to Kalu, bombs were made and Madhu produced them on 11th March. There were four bomb-patkas and a bundle containing iron pieces and other things. Madhu took two light bomb-patkas, Kalu a heavy bomb-patka and a man who has not been identified took the bundle and another bomb-patka. They went to the house of the Subdivisional Officer and stood at various places round the house. Then they threw their missiles and there were three explosions, the bundle did not explode, and they ran away. Upto this point Kalu's evidence, so far as it implicates Madhu, is not corroborated. But P. W. 27, Bholanath, gave evidence that he was on the road near to this house and that he heard the explosions and saw some men running away and by the light of the hurricane lantern which he held, he recognized Madhu and Kalu. There is no doubt that some of the bombs or bomb-patkas were dangerous both to property and life. The evidence of the expert witnesses is sufficient to show that if some of these articles had exploded within about 15 feet of a human being, it would have been sufficient to kill him. On the other hand, they were not powerful bombs as is shown by the fact that where one of them had struck the wall of the house, only the plaster was damaged. The real danger doubtless lies in the fact that some at least of them contained pieces of iron and glass. Kalu was tendered a pardon at the commencement of the trial.

Some preliminary points were raised by the defence, one being that sanction is required for a prosecution under the Explosives Substances Act and that no explicit sanction had been obtained for prosecution under S. 5. Further that no consent had been given to prosecutions under the sections of the Indian Penal Code and consequently the Special Judge had no jurisdiction to try them. It is true that in the order, dated 27th May 1932, only S. 4, Explosives Act, read with S. 120-B, I. P. C., and S. 436 read with S. 120-B, I. P. C., are explicitly mentioned. But the letter from the Deputy Secretary to the Government of Bengal to the District Magistrate of Murshidabad of the same date shows clearly that the Government consented to a prosecution under S. 4, Explosives Act, read with S. 123-B, I. P. C., and S. 436 read with S. 120-B, I. P. C., and for "such other offence or offences as may be disclosed in the evidence." In our opinion, therefore, the learned Magistrate had jurisdiction to try all the offences for which the appellants were convicted. Another point raised is that in the conspiracy charge Kalu's name was not included. This undoubtedly was erroneous. But it is quite obvious from the course which the trial took and from the evidence which was given that the appellants were not misled by this omission and they have not been prejudiced or embarrassed in their defence by the fact that Kalu's name was not mentioned. S. 114 (b), Evidence Act, provides that the Court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars. This has been explained in many previous cases both in this Court and in the English Courts as meaning that the material particulars must implicate the accused in order that the corroboration may be such as is intended by the section. S. 133, Evidence Act provides that an accomplice shall be a competent witness against an accused person, and a conviction is not illegal merely because

it proceeds upon the uncorroborated testimony of an accomplice.

The position in law is somewhat difficult to state clearly; but it amounts to this. In a jury trial it is the duty of the Judge to point out to the jury the position in law affecting the evidence of an accomplice and to tell them that they may convict, if they choose, on his evidence alone; but that owing to the circumstances in which the evidence is given, it is, generally speaking, very dangerous to act upon it, unless they find corroborative evidence which implicates the accused person. If such a warning has been given and nevertheless the jury choose to convict the accused in the absence of such corroborative evidence, the conviction will not generally be quashed. In a case such as this, where a Judge is sitting without a jury, he must apply the same rule by treating himself as a jury. If, therefore, these factors were not present to his mind and if there was not sufficient corroborative evidence implicating the accused, then the conviction ought to be set aside, just as in a jury case the same result ought to follow where the necessary warning has not been given by the Judge to the jury. As was stated by Lord Reading, C. J., in *Rex* v. *Baskerville* (1). This rule of practice has become virtually equivalent to a rule of law. Now, in the present case, there is undoubtedly some corroboration implicating the accused against all the appellants. With regard to Nikhil and Shiba Das, however, leaving out for the moment the evidence of P. W. 7, Samed, the corroborative evidence is only as to association between Kalu, Madhu, Nikhil and Shiba Das. P. W. 7, Samed, stated that he heard them discussing the question of frightening the Subdivisional Officer. In our opinion, this evidence is not sufficient to eliminate the danger of a conviction upon the evidence of an approver. Such being the position, we think that the conviction of Nikhil and Shiba Das must be set aside. These two appellants are, therefore, acquitted.

Madhu stands in a different position. In addition to the evidence of association and Samed's evidence about the conversation in which the question of frightening the Subdivisional Officer was discussed, there is the evidence of P. W. 27, Bholanath, who saw Madhu running away from the scene of the explosions immediately afterwards. In our opinion Kalu's evidence as against Madhu is sufficiently corroborated and his conviction must stand; but in view of all the circumstances we think that it will be sufficient if he serves a sentence of two years' rigorous imprisonment instead of the four years to which he has been sentenced by the Special Judge.

McNair J.—I agree.

K.S. *Order accordingly.*

1. (1916) 2 K B 658=86 L J K B 28=115 L T 453=80 J P 446=60 S J 696.

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M. C. GHOSE, J.

Jnanda Sundari Rai Chowdhurani—Plaintiff—Petitioner.

v.

Promoda Sundari Rai Chowdhurani and *others*—Defendants—Opposite Parties.

Civil Rule No. 190 of 1933, Decided on 5th June 1933, from order of 2nd Munsif, Munshigunj (Dacca), D/- 30th November 1932.

(a) Civil P. C. (1908), O. 9, R. 13 and O. 17, R. 2 and O. 47, R. 1—Order under O. 17, R. 2—Proper procedure to set it aside is by application under O. 9, R. 13 and not by review application.

The proper procedure in setting aside an order under O. 17, R. 2 is by an application under O. 9, R. 13 and not by review application under O. 47, R. 1: *A I R* 1928 *Cal* 341, *Ref.* [P 117 C 2]

(b) Civil P. C. (1908), O. 26, R. 8—Evidence taken on commission does not ipso facto become evidence in case—It has to be accepted by Court after hearing opposite party.

The evidence taken on commission does not ipso facto become evidence in a case. It has to be offered by the party who has examined the witness on commission and it has to be accepted by the Court after hearing the opposite party, and unless it is tendered by the party and accepted by the Court it is not to be considered as evidence in the case: *A I R* 1928 *Cal* 341 and *A I R* 1927 *Cal* 43, *Ref.* [P 117 C 2]

Jogesh Chandra Roy and *Nagendra Nath Bose*—for Petitioners.

Heramba Chandra Guha and *Prokash Chandra Pakrasi*—for Opposite Parties.

Order.—This is an application under S. 115, Civil P. C., by the plaintiff in a title suit. The plaintiff's case is that in June 1931 the plaintiff instituted a suit against the defendants for declaration of her title to a plot of land with huts thereon and for recovery of possession of the same, that defendants 1 and 2,

mother and son, entered appearance, filed their written statement on 15th August 1931 and thereafter the suit went on for a long time on adjournments till on 26th April 1932 the Court warned the parties to come ready on the next date when the case would be positively heard, and the next date fixed was 8th June 1932; that on 8th June 1932 the plaintiff was ready with her witnesses and defendant 2 along with his junior pleader was present but they did not file any list of witnesses, although some of the defence witnesses themselves filed their hajiras; the defence prayed for one day's time on the ground that their senior pleader was engaged at Dacca and would not be able to come till 3 p. m. The learned Munsif rejected the prayer for a day's adjournment but adjourned the hearing till 2 p. m. Thereafter at 2 p. m. on that day the case was taken up and one witness for the plaintiff was examined. The defendants were asked to cross-examine the witness, but the pleader declined to cross-examine and filed a petition praying for an adjournment till the following day. The Court refused the prayer for adjournment and examined another witness and decreed the suit ex parte. On the following day a petition was filed on behalf of the defence praying that the order of the previous day might be set aside and the suit restored for fresh hearing.

After hearing the parties, the learned Munsif by his order dated 30th November 1932 set aside the order of 8th June and restored the suit for fresh hearing. The Munsif took his action under O. 47, R. 1, Civil P. C., on the ground that the Court had committed an error apparent on the face of the record inasmuch as the Court in passing the judgment did not take into consideration the evidence which had been taken on commission and which was upon the record. The Court considered that the order passed was under O. 17, R. 3, Civil P. C. It is urged by the learned advocate for the petitioner that the order of the Court was passed not under O. 17, R. 3 but under O. 17, R. 2 and as such the Court was not justified in reviewing the said order; but the defendants might have filed a case under O. 9, R. 13 if they had been able to show that they had a sufficient cause for default; and in the second place it is urged that even if it be considered that the case was under O. 17, R. 3 the learned Munsif acted illegally in allowing the case to be restored.

Upon hearing the learned advocates on both sides who have placed the entire record before the Court, it appears that in fact the learned Munsif passed an order on 8th June 1932 under O. 17, R. 2; but when the review application was filed he considered, he dealt with the case under O. 17, R. 3; and even when he dealt with the matter under O. 17, R. 3, it does not appear that the defendants were justified in asking for review. Their action should have been taken under O. 9, R. 13, see *Kristo Kishore Bose* v. *Pancharam Maity* (1), where Sir George Rankin, the learned Chief Justice, has explained the matter very fully: In the next place assuming that the order passed by the Munsif was under O. 17, R. 3, it is to be considered whether he was right or committed an error apparent on the face of the record in not accepting the evidence taken on commission. On this point it is urged on the side of the petitioner, that under the provision of O. 26, R. 8 the evidence taken on commission shall not be read as evidence in a suit without the consent of the party against whom the same is offered unless such conditions are fulfilled. It is clear therefore that the evidence taken on commission does not ipso facto become an evidence in a case. It has to be offered by the party who has examined the witness on commission and it has to be accepted by the Court after hearing the opposite party and unless it is tendered by the party and accepted by the Court it is not to be considered as evidence in the case: see the case in *Kristo Kishore Bose* v. *Pancharam* (1) already referred to and also the case of *Mahim Chandra Guha* v. *Naba Chandra* (2).

In this case six persons had been examined on commission on behalf of the defence and those witnesses proved certain documents but those were not offered in evidence by the defence before the Court. Indeed, as the learned advocate for the petitioner has stated, the junior pleader for the defence pleaded that he was not in a position to conduct the case and the senior pleader who

1. A I R 1928 Cal 341=111 I C 430.
2. A I R 1927 Cal 43=98 I C 852.

alone was said to know the facts of the case and used to look after the case on behalf of his sister, defendant 1, and on behalf of her son, defendant 2, was absent at Dacca on professional engagement. There was a local pleader and defendant 2 present in Court. But the pleader when asked to cross-examine the plaintiff's witness declined to do so. Indeed he professed to be unable to give any assistance to Court and he did nothing except filing two applications for adjournment, and defendant 2 stated in the petition that he was not cognizant of many facts and was not conversant in making *tadbirs*; that as a matter of fact no one but his maternal uncle Babu Rebati Mohan Ghose, pleader, Dacca, knew all the facts of the case. Apparently the defendants took up the position that they could do nothing until Rebati Babu returned from Dacca. In these circumstances they did nothing to assist the Court, and without the evidence taken on commission being presented to Court and consented to by the plaintiff or accepted by the Court without the consent of the plaintiff, it could not be taken as evidence in the case. In this view there was no error apparent on the face of the record.

The learned advocate for the petitioner has also placed for consideration two unreported cases: *In the matter of Mongal Chand Dudhuria* (3) and *In the matter of Abdul Khaleque* (4), in both of which in similar circumstances this Court set aside the restoration of suits. Having regard to the circumstances of the case, I am of opinion that the order of the learned Court below was illegal. It is accordingly set aside and the order of 8th June 1932 is restored. The Rule is made absolute. The petitioner is entitled to her costs, hearing fee being assessed at two gold mohurs.

K.S. *Rule made absolute.*

3. Civil Revision Case No. 297 of 1929.
4. Civil Revision Case No. 1157 of 1932.

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* A. I. R. 1934 Calcutta 118

MITTER, J.

Ashutosh Basu—Petitioner.

v.

Gouri Sankar Saha and *others*—Opposite Parties.

Civil Rule No. 735 of 1932, Decided on 12th December 1932, from order of Munsif, Lalbagh, D/- 30th April 1932.

*** Hindu Law—Debts—Decree against father for debts—Before possession of joint family property can be given to decree-holder. sons must be given opportunity to show that debts are immoral—If debts are for immoral purposes, possession should not be given but decree-holder must seek remedy by partition.**

Where a decree against a father of a joint Hindu family is passed for a debt contracted by the father not for the family purpose and the decree-holder seeks to get khas possession of the joint property, the sons must be given an opportunity to show if they so allege, that the debt was for an immoral purpose. If they succeed in proving that the debt was an immoral one and therefore not binding on them, then possession would not be delivered of the family property and the decree-holder must seek out his remedy by partition of the share of the father for the purpose of recovering possession thereof. If on the other hand the sons are unable to establish that the debts were incurred for immoral purposes the decree-holder will obtain khas possession of the property : *A I R* 1924 *P C* 50, *Ref.* [P 119 C 1]

Jagat Chandra Bose—for Petitioner.

Mani Lal Bhattacharjee — for Opposite Parties.

Order.—This Rule was issued on the opposite parties to show cause why the order of the Munsif of Lalbagh dated 30th April 1932 dismissing the decree-holder's application for delivery of possession should not be set aside. It appears that the decree-holder obtained a decree against one Ram Das Saha for a certain sum of money and in execution of this decree he sold certain properties which are claimed by his sons to-be their ancestral properties. The parties are governed by the Mitakshara School of Hindu law and the sons claim that as the debt of the father was not incurred for family purposes the entire joint family porperty could not be taken in execution. The property which was attached in execution of the decree was joint land or ejmali land and on that there has been constructed a house or a bari. The Munsiff gave effect to the objection that the debt not having been incurred for family purpose the property which was the ancestral property could not be taken in execution. The Munsif accordingly came to the conclusion that the decree-holder purchaser could not get khas possession by ejecting the sons. It is contended on behalf of the petitioner that the view taken by the Munsif is clearly wrong. It is said that the view that the property of a Mitakhsara joint family cannot be taken in execution of a decree against a father

although the debt might not have been incurred for family purposes can no longer be sustained as has now been finally and conclusively laid down by their Lordships of the Judicial Committee of the Privy Couicil in the case of *Brij Narain* v. *Mangla Prasad* (1), where all the earlier authorities both of this Court and of the Judicial-Committee of the Privy Council have been considered. The relevant passage runs as follows:

"If the managing member of a joint undivided family governed by the Mitakshara law is the father and the other members are the sons, the father may by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceedings upon a decree for payment of that debt (see p. 139 of 51 *I A*);

It is however contended by the opposite parties that having regard to the circumstances in which they were called upon to meet this case of delivery of possession sought by the decree-holder they were taken by surprise and could not raise appropriate defence to such proceedings, namely that the debt was incurred for an immoral purpose so as not to bind the sons. I think an opportunity should be given to the sons to show that the debt was, as they claim now, tainted by immorality. If they succeed in proving that the debt was an immoral one and therefore not binding on them then possession would not be delivered of the family property and the decree-holder must seek out his remedy by partition of the share of the father for the purpose of recovering possession thereof. If on the other hand the sons are unable to establish that the debts were incurred for immoral purposes the decree-holder will obtain khas possession of the property in dispute. The Munsif will determine the objection of the sons in the light of the observations I have made. The petitioner is entitled to the costs of this rule as the defence of immorality which is now sought to be set up was never pleaded before the Munsif. The hearing fee of this rule is assessed at one gold mohur.

K.S. *Order accordingly.*

1. A I R 1924 P C 50=77 I C 689=51 I A 129=46 All 95 (P C).

A. I. R. 1934 Calcutta 119

MITTER AND HENDERSON, JJ.

Chundy Churn Law—Plaintiff.

v.

Rohini Kumar Sarkar and *others*—Defendants.

Civil Ref. No. 1 of 1933, Decided on 21st June 1933.

(a) Bengal Tenancy Act (8 of 1885), S. 68—Applicability.

Section 68 does not apply to permanent mokarari leases. [P 120 C 1]

(b) Bengal Tenancy Act (8 of 1885), S. 67—S. 67 applies only where rent is payable quarterly—In monthly kists, interest has to be calculated from the time it falls due and not quarterly.

Section 67 in so far as it defines the time from which interest is to run, applies only to cases where the rent is payable quarterly. If the kists are monthly kists, the interest is to be calculated from the time that it falls due and not from the expiration of the quarter of the agricultural year in which it falls due: 22 *Cal* 214 (*P C*) and 33 *Cal* 683, *Ref.* [P 1 0 C 1]

(c) Interpretation of Statutes—Proceedings of legislature.

It is not a right method of interpretation of statutes to refer to proceedings of the legislature as aids to the construction of a statute: 22 *Cal* 788 (*P C*), *Ref.* [P 120 C 2]

(d) Bengal Tenancy Act (8 of 1885 as amended by Act 4 of 1928), Ss. 67 and 179, Proviso—Landlord cannot recover interest exceeding that mentioned in S. 67 even in case of tenancies before Tenancy Act came into force.

The proviso to S. 179 as amended by Act 4 of 1928 applies to leases created before the Bengal Tenancy Act, 1885, came into operation, and makes it impossible for the landlord to recover by suit interest exceeding that mentioned in S. 67 even in respect of tenancies created before the Bengal Tenancy Act came into force. [P 120 C 2; P 121 C 1]

Narendra Chandra Bose and *Satyendra Nath Mitra*—for Plaintiff.

Abinash Chandra Ghose and *Sachindra Kumar Ray*—for Defendant.

Mitter, J.—Two questions have been submitted to us by the Munsif, Central Court, Comilla, under O. 46, R. 1, Civil P. C. The circumstances under which this reference arises and the nature of the documents which require to be considered have been accurately stated in the letter of reference addressed to the Registrar of this Court:

(A) With reference to the interpretation of the kabuliat (Ex. 1) our view is that on a proper construction of the kabuliat which was executed long before the enactment of the Bengal Tenancy Act of 1885 there can be no doubt that the plaintiff is entitled to realise both interest and damages. This view is in

consonance with construction of similar kabuliats which came up for consideration in this Court in appeals from appellate decrees Nos. 1347—50 of 1928, 1867-68 of 1929, 1930 of 1929 and 2767-2768 of 1929. In appeal from appellate decree No. 584 of 1932 a contrary view was not taken seeing that the words "mai sud" which occurs in the other kabuliats do not occur in the kabuliat filed in the unreported case decided on 2nd June 1924. We are, therefore of opinion that the landlord is entitled to recover both interest and damages. S. 68, Ben. Ten. Act, does not apply to permanent mokarari leases, and cannot affect the terms of the contract. (See S. 179 of the Act).

(B) With regard to question B we are of opinion that for all the years in suit plaintiff is not entitled to recover interest at a rate exceeding that mentioned in S. 67, Ben. Ten. Act. The kists are monthly kists. The interest however is to be calculated from the time that it falls due and not from the expiration of the quarter of the agricultural year in which it falls due, as is suggested by the Munsif. This view is supported by the decision of the Judicial Committee of the Privy Council in *Hemanta Kumari Debi* v. *Jagadindranath Roy* (1), as explained by the case of *Narendra* v. *Gorachand* (2). The Privy Council laid it down that S. 67 in so far as it defines the time from which interest is to run applies only to cases where the rent is payable quarterly. Here the rent is payable by monthly kists. So this portion of S. 67 will not apply. The answer is based on the following reasons: The lease in this case being a permanent mokarari lease is not touched by the provisions of S. 178, Ben. Ten. Act; for in our view S. 179 forms an exception to S. 178. Notwithstanding the change in S. 178 by Act 4 of 1928 (Bengal Council) that nothing in any contract between a landlord and tenant made before or after the passing of this Act shall affect the provisions of S. 67 relating to interest payable on arrears of rent, permanent mokarari leases are governed by S. 179 which forms an exception to S. 178, for S. 179 enacts, "nothing in any Act shall be deemed to prevent a proprietor or holder of a permanent tenure in a permanently settled area from granting a permanent mokarari lease on any terms agreed on between him and his tenant."

Section 178 is a part of the Act; and S. 179 excepts S. 178 in relation to permanent mokarari leases; in other words, it makes the provision of S. 178 inapplicable to the case of permanent mokarari leases. But S. 179 is burdened with the following proviso:

"Provided that such proprietor or holder shall not be entitled to recover interest at a rate exceeding that set forth in S. 67 or anything that is an abwab or the recovery of which is illegal under the provisions of S. 74 or sub-S. (3) of S. 77."

The use of the words "shall not be entitled to recover" makes it clear that the landlord is not entitled to recover by suit interest at a rate exceeding the rate given in S. 67 notwithstanding any agreement to pay at a higher rate. The proviso in our opinion disentitles him from recovering such interest. This is the view which has been taken by my learned brother Mukerji, J., in an unreported decision in Appeal from Appellate Decree No. 2592 of 1930. It has however been argued by Mr. Bose, who appears for the landlord, that the new proviso to S. 179 applies to future leases, i. e. to leases executed after the passing of the amended Bengal Tenancy Act (Act 4 of 1928 B. C.). The Munsif has referred to the object of the proviso as explained in the notes on clauses; but it is not a right method of interpretation of statutes to refer to proceedings of the legislature as aids to the construction of a statute; see *Administrator-General of Bengal* v. *Premlal Mullick* (3). On the other hand while the legislature has made the proviso in so far as it relates to abwab (S. 74) inapplicable to leases registered before the commencement of the Bengal Tenancy Amendment Act 1928 (S. 74, Cl. 3) it has made no such provision with reference to the applicability of S. 67 of the Act. This shows that the provisions of S. 67 applies to leases created both before or after the Bengal Tenancy Act. We are of opinion that the proviso to S. 179 as amended by Act 4 of 1928 applies to leases created before the Bengal Tenancy Act, 1885, came into operation, and makes it impossible for the landlord to recover by suit interest exceeding that mentioned

1. (1895) 22 Cal 214=21 I A 131=6 Sar 473 (PC).
2. (1906) 33 Cal 683=3 C L J 391.
3. (1895) 22 Cal 788=22 I A 197=6 Sar 603 (PC).

in S. 67 even in respect of tenancies created before the Bengal Tenancy Act came into force. Let a copy of this judgment be sent to the Court by which this reference was made under the signature of the Registrar.

Henderson, J.—I agree.

K.S. *Reference answered.*

A. I. R. 1934 Calcutta 121

GUHA AND BARTLEY, JJ.

Manohar Baidya and *another*—Appellants.

v.

Bhabasidhu Mondal and *others*—Respondents.

Appeal No. 1890 of 1931, Decided on 19th June 1933, against appellate decree of Special Judge, 24 Parganas, D/- 25th February 1931.

Bengal Tenancy Act (1885), S. 52 — Rent reserved is consolidated one for all lands in specified boundaries—S. 52 does not apply—No enhancement can be granted.

Where the rent reserved in a kabuliyat is an entire rent for all the lands within certain specified boundaries, the statement of the area mentioned in the document, if at variance with the actual area, must be held to be a false description, regard being had to the definite stipulation contained in kabuliyat that there should be no enhancement on any ground whatsoever. The rent in such a case is a consolidated one and S. 52 does not apply. [P 121 C 2]

Panchanan Ghose and *Gunendra Krishna Ghose*—for Appellants.

Manmatha Nath Ray (Sr.) and *Sujya Kumar Aich*—for Respondents.

Judgment. — This appeal has arisen out of an application made by the landlord, respondent to this Court, for settlement of fair and equitable rent in respect of a tenancy. There was a claim by the landlord for additional rent for additional area. The question raised in this behalf as between the landlord and the tenants concerned was this, as set out in issue 3 raised for determination in the case:

Is the plaintiff entitled to get additional rent for additional area ? If so what is the excess area and what should be its additional rent and at waht rate ?

The Assistment Settlement Officer who dealt with the application made by the landlord under S. 105, Ben. Ten. Act, came to the conclusion on the materials before him regard being specially had to the kabuliyat Ex. B in the case, that the rent payable by the tenants in respect of the tenancy was consolidated rent and the landlord was not therefore entitled to get additional rent for additional area as claimed by him in the application under S. 105, Ben. Ten. Act. On appeal by the landlord the decision of the Assistant Settlement Officer was reversed by the learned Special Judge, 24 Parganas. The learned Judge came to a decision that the application of the landlord, so far as it was in regard to additional rent for additional area should be allowed, in view of the provisions contained in S. 52, Ben. Ten. Act. The learned Judge in his judgment construed the kabuliyat in question, Ex. 2 in the case, to which reference has been made. The kabuliyat has been placed before us for our consideration, and it appears to us that the Assistant Settlement Officer was right in holding that the rent mentioned in the kabuliyat was consolidated rent, and there could not be any application of the provision contained in S. 52, Ben. Ten. Act, in respect of the tenancy which was created by the kabuliyat Ex. 2 in the case. On a careful consideration of the terms of the kabuliyat we have come to the conclusion that the rent payable by the tenants was not enhancible on any ground whatsoever and in that view of the matter the landlord's claim for enhancement on the ground of increase in area should have been disallowed by the learned Judge in the Court of appeal below.

We are clearly of opinion that on a proper construction of the kabuliyat the rent reserved was an entire rent for all the lands within certain specified boundaries. The statement of the area, and the rate per bigha as mentioned in the kabuliyat must be taken along with the other parts of the document The area mentioned in the document must be held, as such, to be a false description, regard being specially had to the definite stipulation contained in the kabuliyat that there should be no enhancement on any ground whatsoever. In the above view of the case this appeal must be allowed. The decision and the decree passed by the Court of appeal below must be set aside. In our judgment the decision come to by the Assistant Settlement Officer in the case was the correct decision governing the rights of the parties in the matter of payment of rent by the tenants to the landlord. The decision

of the learned Special Judge is set aside and that of the Assistant Settlement Officer is restored and affirmed.

In the result this appeal is allowed. The appellants in this Court are entitled to their costs throughout, including the costs in this appeal. The hearing fee in this appeal is assessed at two gold mohurs.

R.K. *Appeal allowed.*

A. I. R. 1934 Calcutta 122 (1)

C. C. GHOSE, AG. C. J. AND MALLIK, J.

Hrishikesh Chatterjee and *others*—Defendants—Petitioners.

v.

B. Naba Krishna Roy Chowdhury and *others*—Opposite Parties.

Civil Rule No. 1064 of 1932, Decided on 15th June 1933, from order of Settlement Officer, 24-Parganas, D/- 8th June 1922.

Bengal Tenancy Act (1885), Ss. 105 and 105-A—Suit by landlord under S. 105—Tenant then applying under S. 105-A for determining his status—Landlord's suit dismissed for default—Tenant's application must still be decided.

Where the landlord brings a suit under the provisions of S. 105 for the settlement of fair and equitable rent and the tenant makes an application under S. 105-A for the decision of the status of the defendant, and subsequently the suit under S. 105 by the landlord is dismissed for default in prosecution, the non-determination of the issue raised by the tenant is a failure to exercise jurisdiction vested in the Revenue Officer by law. [P 122 C 1, 2]

Sitaram Banerji and *Prokash Chunder Bose*—for Petitioner.

Sarat Chunder Basak and *Nasim Ali*—for Opposite Parties.

Judgment.— What has happened in this case is this: In the Record of Rights the defendant was described as being an occupancy raiyat. Thereafter the landlord brought a suit under the provisions of S. 105, Ben. Ten. Act., for the settlement of fair and equitable rent. In that suit the defendant made an application under S. 105-A, Ben. Ten. Act, for the decision of the issue, namely, "What is the status of the defendant?" and under orders of Court he paid ad valorem court-fee on the value of the suit. The landlord wanted to withdraw the application under S. 105, Ben. Ten. Act, with liberty to bring a fresh application. The application of the landlord was refused and thereafter the application under S. 105 filed by the landlord was not proceeded with and the application was dismissed for default in prosecution. No orders were passed deciding the issue raised by the tenant defendant and the position therefore was that unless there was an application for the settlement of fair and equitable rent under S. 105, Ben. Ten. Act, the tenant-defendant would not have any opportunity whatsoever of having the issue which he had raised determined. In reality, looking into the substance of the thing, there were in effect two suits rolled into one before the Court below; and if that was the position of affairs there was no reason whatsoever why the issue raised by the defendant should not have been determined seeing that the condition precedent, namely, the institution of a proceeding under S. 105, Ben. Ten. Act, was already before the Revenue Officer. In our view, the non-determination of the issue raised by the tenant-defendant was a failure to exercise jurisdiction vested in the Revenue Officer by law. In that view of the matter, the Rule is made absolute and there will be a direction that the matter do go back to the Revenue Officer in order that he should determine the issue raised by the tenant-defendant. Costs of this Rule will abide the result. We assess the hearing-fee at two gold mohurs.

R.K. *Rule made absolute.*

A. I. R. 1934 Calcutta 122 (2)

MITTER AND HENDERSON, JJ.

Monomohan Roy Choudhury—Appellant.

v.

Bhupal Chandra Roy Choudhury and *others*—Respondents.

Appeal No. 390 of 1932, Decided on 26th April 1933, from original order of Dist. Judge, 24-Parganas, D/- 29th August 1932.

(a) Provincial Insolvency Act (1920), Ss. 4 and 75—Dismissal of claim under S. 4 entitles appeal under S. 75.

The dismissal of the claim under S. 4 really tantamounts to a decision under S. 4 and entitles the appellant to an appeal under S. 75 read with Sch. 1 of the Act. [P 123 C 2]

(b) Provincial Insolvency Act (1920), S. 4 (3)—Questions of title raised—Conflicting claims put in—Insolvency Court may decide questions or proceed under S. 4 (3).

When questions of title are raised and conflicting claims are put in by different persons the questions may be decided by the insolvency Court or if the Court thinks that it is not expedient that the insolvency Court should decide

them then it may proceed under S. 4 (3) of the Act. [P 123 C 2]

Amarendra Nath Bose and *Ramendra Mohan Mazumdar*—for Appellant.

Hiralal Chakravarty and *Nripal Chandra Roy Choudhury*—for Respondents.

Pramathanath Mitter—for Creditors.

Mitter, J.—This is an appeal from an order made by the District Judge of 24-Pargannas dated 29th August 1932 purporting apparently to have been made under S. 4, Provincial Insolvency Act 5 of 1920. The appeal is on behalf of one Monomohan Roy Choudhury, the claimant who made an application on 11th April 1932, claiming certain plots as belonging to him which had been included in the mortgage executed by the insolvent in favour of the Ghoses. In that petition he alleged in para. 3 that the entry of the dags Nos. 467, 468, 471, 463, 464 in Khatian No. 38 is incorrect; that the appellant was entitled to those dags Nos. 467, 468 and 471 in their entirety and half of dags Nos. 463 and 464; and that they are wrongly recorded in Khatian No. 38. He prayed to the insolvency Court to inquire into the matter after taking evidence and after obtaining a report from the Receiver in insolvency. On that application the learned Judge directed an inquiry by the Receiver. After the Receiver had submitted his report the learned Judge passed an order to the following effect :

" The properties may be sold with a declaration that one Monomohan Roy Choudhury alleges that he has title and possession in respect of dags Nos. 467, 468, 471 and half of Nos. 463 and 464 which are recorded in the name of the insolvent of the Khatian of Mauza Bilkazala. The claim is not maintainable under S. 4, Provincial Insolvency Act, and is therefore dismissed."

Against this order the present appeal has been brought and a preliminary objection has been taken to the hearing of this appeal by Mr. Chakravarty who appears for the Receiver on the ground that no appeal lies as this order merely purports to be an order under S. 4 (3) of the Act and it is really no decision by the District Judge with reference to questions of title, priority, etc., as is contemplated by the provisions of S. 75 read with Sch. 1 of the Act. On the other hand it is contended on behalf of the appellant that the learned Judge has really dismissed the claim of the appellant as being not maintainable under S. 4, Provincial Insolvency Act. The order seems to us to be ambiguous and the contention of the respondent might have been right as to what the true meaning of the order is, but from the last few words of the order which we have quoted it is clear that the Judge holds that the claim is not maintainable under S. 4. Be that as it may the preliminary objection cannot be allowed to prevail, for in our opinion the dismissal of the claim under S. 4 really tantamounts to a decision under S. 4 of the Act and entitled the appellant to an appeal under S. 75 read with Sch. 1 of the Act. The preliminary objection must therefore be overruled.

It appears clear that the petitioner's petition does raise questions of title as between the insolvent and the mortgagee. On the one hand the contention of the mortgagee is that these dags are situated within the estate and are covered by the mortgage in his favour. Contention to the contrary is made by the claimant appellant that they do not form part of the insolvents estate and are outside the mortgage. This is a question which may be decided by the insolvency Court or if the Court thinks that it is not expedient that the insolvency Court should decide it then it may proceed under S. 4 (3) of the Act. That is a matter which is entirely within the discretion of the District Judge who may exercise his discretion if he thinks it necessary when the case goes back to him on remand. The result is that the order of the District Judge is set aside and the case is sent back to him for re-hearing of the matter in accordance with the observations which we have made. The costs of this appeal will be paid by the Receiver out of the estate. The hearing-fee is assessed at one gold mohur.

Henderson, J.—I agree. In view of the words used by the learned District Judge it certainly might be held that he had inquired into the claim of the appellant and dismissed it.

R.K. *Case remanded.*

A. I. R. 1934 Calcutta 124

GUHA AND BARTLEY, JJ.

Manar Ali and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 62 of 1933, Decided on 2nd June 1933.

(a) Criminal P. C. (1898), Ss. 164 and 288—Statement before committing Magistrate resiled in Sessions Court—Statement recorded under S. 164 is admissible to corroborate statement before committing Magistrate as it forms under S. 288 substantive evidence.

A statement by a witness recorded by a Magistrate under S. 164 is admissible in evidence to corroborate the statement made by that witness before the committing Magistrate from which statement the witness resiled in the Sessions Court, because the credibility of the statement in the committing Magistrate's Court which must be considered as substantive evidence before the Court of Session, must be tested in exactly the same way as one made in the Sessions Court: *A I R* 1923 *Mad* 20, *Rel on*. [P 125 C 2]

(b) Criminal P. C. (1898), Ss. 164 and 288—Statement under S. 164 can be put in to corroborate statements put in under S. 288—Evidence Act (1872), S. 145.

The provisions contained in S. 145, Evidence Act, relates to cross-examination as to previous statements in writing but does not militate in any way against such previous statements being used by way of corroboration of statements put in under S. 288, Criminal P. C., which are substantive evidence in the case before the Court of Session specially when the accused are not prejudiced. [P 126 C 1, 2]

(c) Criminal P. C. (1898), Ss. 288 and 164—No evidence under S. 288 susceptible of corroboration—Whole statement under S. 164 cannot be put in under Evidence Act, S. 145.

The statements under S. 164, Criminal P. C., cannot be put to the jury in their entirety, under S. 145, Evidence Act or under any other provision of law if there is no evidence susceptible of corroboration recorded under S. 288, Criminal P. C. [P 126 C 2]

(d) Criminal Trial—Circumstantial evidence—Rule that it must be incompatible with innocence does not apply when case depends both on 'direct and circumstantial evidence.

The proposition that in cases dependent on circumstantial evidence in order to justify any inference of guilt incriminating facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt, does not strictly apply when decision in the case is not dependent on, circumstantial evidence alone : 8 *C W N* 278, *Dist.* [P 126 C 2]

(e) Criminal P. C. (1898), S. 297—Judge need not repeat to jury every argument of defence.

A mere omission to refer to this or that circumstance or suggestion is not non-direction which amounts to misdirection. It is not the function of the Judge to repeat to the jury every argument or suggestion urged on behalf of the defence [P 127 C 1, 2]

S. C. Talukdar and *Hamidul Huq Chaudhury*—for Appellants.

Satyendra Kishore Ghose—for the Crown.

Judgment.— The case for the prosecution against the accused appellants in this Court, divulged a diabolical crime of murder, the occurrence having been traced after the dead body of one Abdul Rahaman was accidently discovered, after some time had elapsed from the date when the man was killed on 26th July 1931. An information to the police what is generally known as "a missing information," was lodged by one Makbul, nephew and son-in-law of the murdered man, on 27th July. The deceased Abdul Rahaman was last found going to the house of Abdul Gafur alias Gauhar Ali, one of the appellants before us, and his dead body was found in a decomposed condition lying buried under earth on 2nd August, when dogs were found scratching the place, and a foul smell was coming through a hole made by the dogs,

The learned Additional Sessions Judge of Bakarganj, against whose order of conviction and sentences passed on the appellants, the appeal to this Court is directed, accepted the verdict of eight of the jurors before whom the trial of the accused was held, and passed the sentence of transportation for life against each of the four accused persons put upon their trial, under S. 302 (read with S. 120-B), and S. 302 (read with S. 109), I. P. C.. The case for the prosecution rested on evidence under two heads, referred to as direct and circumstantial, by the learned Additional Sessions Judge. The direct evidence consisted of the evidence of two witnesses Sabar Bhanu (wife of the accused Gauhar Ali), and Jalekha (the wife of a deceased brother of Gauhar Ali). As the main question raised in this appeal relates to this, that the Sessions Judge ought to have excluded the statements of Sabar Bhanu and Jalekha recorded under S. 164, Criminal P. C. as inadmissible

under the law, and that the Judge ought to have directed the jury that the procedure followed on behalf of the prosecution in putting in these statements recorded under S. 164 was unjustifiable and illegal, it is desirable to deal with the same first. It appears that statements made by these two girls, Sabar Bhanu and Jalekha, were recorded by a Magistrate under S. 164, Criminal P. C., on 5th August 1931. They were subsequently examined as witnesses on the side of the prosecution before the committing Magistrate on 25th September and 30th September 1931. The two girls were examined as witnesses for the prosecution at the trial before the Court of Session, after the accused had been committed to that Court for trial. It appears that the statement of Sabur Bhanu recorded under S. 164, Criminal P. C., were put in at the trial before the Sessions Court at the instance of the Public Prosecutor, under S. 145, Evidence Act, and her depositions before the committing Magistrate were also put in at the instance of the Public Prosecutor, under S. 288, Criminal P. C,, So far as the statement of Jalekha under S. 164 and her depositions before the committing Magistrate were concerned, they were put in at the trial before the Sessions Court at the instance of the pleader for the defence. The Additional Sessions Judge referred to the statements made by Sabar Bhanu and Jalekha on the three different occasions mentioned above, in his charge to the jury, and stated as follows:

"All these statements, three in the case of each of the witnesses are before you. The statements before the committing Magistrate are evidence as much as their statements in Court. But you should bear in mind that the statements under S. 164 can be used only for the purpose of corroborating or contradicting their statements in Court. Sabar Bhanu, in this Court, denies all knowledge about the occurrence. There are certain unimportant variation in the details, but the account of the occurrence as given in these three statements is substantialiy the same . . . . Which of the statements should you believe. , . . All that I can do is to place before you all that has been urged for and against the different statements. Sabar Bhanu states before you that she made her previous statements because she was tutored to make them. . . . . Her previous statements implicated her brother Manar Ali, and went very near implicating her husband Gauhar Ali. "

With reference to the Judge's charge to the jury as contained in his statements quoted above, it must be said that the learned Judge was right in telling the jury that the deposition of the witnesses Sabur Bhanu and Jalekha before the committing Magistrate put in under S 288, Criminal P. C., was substantive evidence in the case: they were as much evidence in the case as their depositions before the Court of Session. In regard to the statement under S. 164, Criminal P. C., the correct view to take is, in our judgment, undoubtedly the view taken by the Madras High Court in the case of *Villiah Kone* v. *Emperor* (1), that a statement by a witness recorded by a Magistrate under S. 164, Criminal P. C., was admissible in evidence to corroborate the statement made by that witness before the committing Magistrate from which statement the witness resiled in the Sessions Court. In support of the above proposition the learned Judges of the Madras High Court gave reasons in their judgments with which we express our agreement. The credibility of the statement in the committing Magistrate's Court which must be considered as substantive evidence before the Court of Session, must be tested in exactly the same way as one made in the Sessions Court, and it was of utmost importance to know how it compared with the statements made soon after the event, before a competent authority. The object and effect of S. 288, Criminal P. C. was to place the deposition in the committal enquiry, on exactly the same footing as the deposition in the Sessions Court.

If that be a proposition sound in law, as we hold to be the case, the credibility of the statement in the committing Magistrate's Court must be considered and tested in exactly the same way as one made in the Sessions Court. This is the position with reference to the statements referred to by the Judge in his charge to the jury on the question of their admissibility and value as evidence. It has to be considered, in the next place, whether the statement under under S. 164, Criminal P. C., could be put in under S. 145, Evidence Act, as it was done by the Public Prosecutor without declaring the witness Sabar Bhanu a hostile witness, under S. 154 of the Act. In the case before us the

1 A I R 1923 Mad 20=72 I C 529=24 Cr L J 417=45 Mad 766.

witness was not declared hostile by the Public Prosecutor, and there was no intention declared to cross-examine the witness with the permission of the Court.

What appears to have happened was that the statement of the witness under S. 164, Criminal P. C., was put in for purpose of corroborating the deposition of the witness before the Committing Magistrate, treated as substantive evidence; there was no bar in law to such a procedure being adcpted, and there was no illegality involved in the same. The witness Sabar Bhanu was examined before the Court of Session, with all her previous statements put in, and placed on record before that Court. The defence had the fullest opportunity of putting all questions to the witness in support of its case. There is no question of prejudice involved, and none was or is suggested on behalf of the accused. The provision contained in S. 145, Evidence Act, relates to cross-examination as to previous statements in writing, but does not militate in any way against such previous statements being used by way of corroboration of statements put in under S. 288, Criminal P. C., which are substantive evidence in the case before the Court of Sessions. In our judgment it could not be said in the case before us that the statement under S. 164, Criminal P, C., was inadmissible in evidence inasmuch as they were not put in strictly under S. 145, Evidence Act; and we are decidedly of opinion that the contentions urged in this behalf by the learned advocate for the appellants, cannot be sustained. The procedure followed in the matter of using the statement under S. 164, Criminal P. C., was not illegal. As indicated already, even on the assumption that there was any irregularity involved in the procedure, the statements having been put in under S. 145, Evidence Act, the appellants before us were not prejudiced in their trial in any way, by reason of the irregularity in the Public Prosecutor not having declared the witness hostile, and not having put any question to her which might have been put in cross-examination, with the permission of the Court. We desire however to make the position clear that the statements under S. 164, Criminal P. C,, could not be put to the jury in their entirety, under S. 145, Evidence Act, or under any other provision of law had there not been evidence susceptible of corroboration recorded under S. 288, Criminal P. C.

The point next raised before us was the one relating to the direction of the Judges to the jury so far as circumstantial evidence in the case was concerned. It was urged that the proper warning had not been given to the jury in this behalf: that it was not sufficient for the Judge to say that you must see whether the circumstances taken together lead reasonably to no other conclusion than the guilt of the accused; it was incum bent upon the Judge to tell the jury exactly in line with the decision of this Court in the case of *Emperor* v. *Imam Ali* (2) that it is a fundamental principle and one of universal application in cases dependent on circumstantial evidence, that in order to justify any inference of guilt, the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt, if the circumstances are found to be as consistent with the innocence or with the guilt of the accused, no inference of guilt should be drawn. It is only necessary to state in this connexion that although the words used in the decision to which reference has been made above, had not been used by the learned Judge, the direction and the warning given by him are in consonance with that decision. We are unable therefore to hold that there was any misdirection in the matter of the circumstantial evidence in the case which was placed before the jury in detail. Furthermore, the decision in the case before us was not dependent on circumstantial evidence alone and the proposition laid down in the decision of this Court in *Imam Ali Sircar's* case (2), referred to above, cannot be held to be strictly applicable. There was the evidence of the crime directly given by witnesses before the Court and there was also the circumstantial evidence to which reference was made by the Judge in his charge to the jury; the jury were asked to give their verdict on evidence classed under two heads, direct and circumstantial.

In regard to the evidence of Jalekha whose previous statements were put in

2. (1904) 8 C W N 278.

by the pleader for the defence, the complaint made before us on behalf of the appellants was, that her story incriminating the accused had gradually developed. This is a position on which stress was laid by the pleader for the defence in the Court below, and was clearly indicated by the Judge in his charge to the jury. The jury were asked to come to their own conclusion regard being had to the previous statements made by the witness and her deposition before the Court of Session. No question of any illegality or irregularity in the matter of reception of Jalekha's previous statements nor any question of misdirection or non-direction in the matter of placing the witness's evidence before the jury could be seriously pressed for our consideration.

A point was made before us as to non-examination of material witnesses in the case. It has not however been established to our satisfaction that there was any witness who could be described as a material witness in the case, was not examined on the side of the prosecution, excepting the investigating police officer. So far the non-examination of that officer was concerned, there was in our opinion sufficient materials before the Court to enable the Judge to say that the officer could not be examined in the case as was stated in the charge to the jury. Some other matters of detail were referred to during the course of the argument of the appeal before us, by the learned advocate for the appellants, but we are not in a position to hold that there was any material misdirection, or non-direction amounting to misdirection, which could vitiate the trial, or which could or had in any way prejudiced the appellants. The learned Judge's charge to the jury appears to us to be fair and complete and nothing was left out which could go in favour of the appellants. The case for the defence was fully laid before the jury, for their consideration, without any expression of opinion on the part of the Judge which could possibly be interpreted to go against the accused. The defence was subtantially put to the jury; a mere omission to refer to this or that circumstance or suggestion, is not non-direction, which amounts to misdirection. It is not the function of the Judge to repeat to the jury every argument or suggestion urged on behalf of the defence. In the above view of the case before us, regard being had to the conclusion we have arrived at, after giving our very best consideration to all the questions arising for determination in this appeal, the conviction of the appellants, and the sentences passed on them must be upheld. The appeal of all the appellants, Manar Ali, Makarali alias Mobarakali, Abdul Kadar and Abdul Gaffur alias Gauharali is accordingly dismissed.

R.K. *Appeal dismissed.*

A. I. R. 1934 Calcutta 127

GUHA AND BARTLEY, JJ.

Jarman Gomez — Plaintiff — Appellant.

v.

Ram Kumar Kaibarta and *others*— Defendants—Respondents.

Appeal No. 859 of 1931, Decided on 12th July 1933, from appellate decree of First Court Sub-Judge, Backergunge, D/- 20th November 1930.

(a) Landlord and Tenant—Notice by entire body of landlords—Tenancy terminates.

A tenancy is effectively determined after notice to the tenants has been given on behalf of the entire body of landlords interested in the tenancy. [P 128 C 1]

(b) Landlord and Tenant — Ejectment—Suit for, by one cosharer—Others made defendants—Plaintiff is entitled to decree to extent of his share jointly with others.

A cosharer landlord, who has made the cosharer landlords pro forma defendants in the suit for ejectment, is entitled to get a decree for recovery of possession of the property in suit to the extent of his share, jointly with the pro-forma defendants in the suit. [P 128 C 1]

Jatindra Nath Sanyal — for Appellant.

Charu Chandra Chowdhury for *Iswar Chandra Chakrabarty*—for Respondents.

Judgment.—This is an appeal by the plaintiff in a suit for recovery of khas possession, as also for arrears of rent and mesne profits. The claim for possession, as made in the suit, was resisted by the contesting defendants. The case for the defendants was that no notice had been served upon them. The trial Court on the materials before it passed a decree in favour of the plaintiff, and directed that khas possession be delivered to the plaintiff. On appeal the decision of the trial Court was reversed. The learned Subordinate Judge observed that though the notice was served at the instance of all the landlords only one of them had evinced a desire to eject the

tenants and that ejectment could not be allowed, unless the whole body of landlords joined in bringing the suit, and further that service of notice was one thing, and the determination to follow it up by a regular suit was another thing. In the above view of the case the prayer for ejectment of the defendants was disallowed by the Court of appeal below. It appears to us that the tenancy was effectively determined after notice to the tenants had been given on behalf of the entire body of landlords interested in the tenancy.

The question that next arises for consideration, is, whether one of the cosharer landlords could get a decree for ejectment of the defendants in view of the fact that the other cosharer landlords did not join him as plaintiffs in the suit. In our judgmont the proper course to follow is to hold that the plaintiff who had made the cosharer landlords proforma defendants in the suit for ejectment, was entitled to get a decree for recovery of possession of the property in suit to the extent of his share, jointly with the proforma defendants in the suit. In view of the conclusion we have arrived at, the decision and decree passed by the Court of appeal below are modified in the manner following. The plaintiff-appellant will recover possession of the Jalkar in suit jointly with the cosharer landlords, proforma defendants in the suit. The parties will bear their own costs in this Court and in the Courts below.

R.K. *Decree modified.*

A. I. R. 1934 Calcutta 128

COSTELLO AND M.C. GHOSE, JJ.

Secy. of State — Defendant — Appellant.

v.

Ramnath Bhatta—Plaintiff—Respondent.

Appeal No. 1448 of 1931, Decided on 16th June 1933, against appellate decree of Addl. Sub-Judge, Chittagong, D/- 12th January 1931.

Tort — Damages — Money paid to wrong person by Deputy Collector in exercise of statutory duties — No benefit to Government —Secretary of State is not liable.

Secretary of State for India in Council is not liable for a wrongful act of a Deputy Collector in performance of his statutory duties caused by the error or delinquency of the subordinate staff under the Collector, where no benefit is caused to Government by such act. [P 131 C 1]

Surplus of sale proceeds were paid by the Deputy Collector to the recorded proprietor, even though a purchaser of the taluk in execution of the mortgage decree had an order passed by the Collector in his favour before the revenue sale that the surplus should be paid to him. By such payment no benefit was derived by the Government :

Held : that the Secretary of State was not liable : *Case law reviewed.* [P 131 C 1]

Syed Nasim Ali—for Appellant.

Chandra Sekhar Sen and *Rohini Binod Rakshit*—for Respondent.

M. C. Ghose, J.—This is an appeal by the defendant, the Secretary of State for India in Council, in a suit in which the plaintiff, Ramnath Bhatta, claimed damages for a wrongful act of the Collector of Chittagong. The facts, on which there is no dispute, are that one Faizali was the recorded proprietor of a certain revenue paying taluk. The plaintiff purchased the taluk on 14th May 1919 in execution of his mortgage decree. Two years later, on 16th June 1921, he applied for registration of his name in place of Faizali. The Land Registration Officer decreed his case on 19th September 1921. The decree was drawn up in January 1922, and the plaintiff's name was substituted in place of Faizali in the register on or about 16th February 1922. But before that date namely on 22nd November 1921, the taluk was duly sold by the Collector for arrears of revenue under the Bengal Land Revenue Sales Act of 1859. After paying all Government arrears there remained a sum of Rs. 1,504 cdd the surplus sale proceeds which under S. 31, Act 11 of 1859 was to be held by the Collector in deposit on account of the late recorded proprietor or proprietors and to be paid to them according to their recorded interest in the taluk sold. The plaintiff on 22nd January 1922 applied to the Collector that the surplus sale proceeds might be paid to him. His application was registered and on 15th March an order was passed that the money be paid to him. But a third person, Siddiq Ahmed, instituted a suit in the civil Court and the Court sent a request to the Collector not to pay the money to the plaintiff until the matter was decided by the civil Court. Thereafter on 22nd March Faizali who was the recorded proprietor on the date of the sale applied that the money might be paid to him.

It does not appear that the rival claims of Faizali and the plaintiff and Siddiq Ahmed were duly considered by the Collector or the Deputy Collector but that on 22nd March an order was made that the surplus sale proceeds be paid to Faizali and on 23rd March accordingly the money was paid to Faizali. Thereafter the plaintiff instituted the present suit claiming that he was justly entitled to the surplus sale proceeds and the Collector in paying the same to Faizali has unjustly deprived him of his dues and he claimed the sum of Rs. 1,504 odd from the Secretary of State for India in Council. The defence taken was two-fold : in the first place that the Collector was right in paying the money to Faizali who was recorded proprietor on the date of the sale, and secondly that in any case the plaintiff had no cause of action against the defendant. Both the Courts below have decided on the facts that the Collector committed an error in paying the money to Faizali and that it was justly due to the plaintiff and thus decided issue 1 in favour of the plaintiff. As to issue 2, that in any case the defendant was not liable, the learned Munsiff held that the Collector was in the position of a trustee for the plaintiff in respect of the surplus sale proceeds and that the Collector in full possession of the facts paid out the money to the wrong man through the fault of the office in not bringing the plaintiff's claim if not also the prohibitory order of the civil Court to his notice. He therefore held that the liability of the defendant was undoubted. The learned Subordinate Judge did not record his opinion on the issue at all holding it apparently as an axiom that when the Collector committed an error the Secretary of State for India in Council must be held liable.

In appeal it is urged by the learned Assistant Government Pleader that assuming the facts, namely, that the Collector committed an error in paying the money to Faizali the Secretary of State for India in Council is not liable to make good the loss to the plaintiff in the circumstances of this case. It is to be observed that the order of payment was not made by the gentleman who was acting as the Collector of the district at the time. The order was made by a Deputy Collector. It also appears that the Deputy Collector's attention was not drawn at the moment when he signed the order of payment to Faizali, that a previous order of payment to the plaintiff remained uncancelled, and that the civil Court's request for postponement also remained without consideration. There was thus an error or delinquency on the part of the clerical staff who apparently did not bring the proper facts to the notice of the Deputy Collector and the Deputy Collector committed an error in ordering payment of the surplus sale proceeds to Faizali. The question then is whether on these facts the Secretary of State for India in Council is liable to make good the loss to the plaintiff.

Various cases were cited in argument in respect of the liability of the Secretary of State for India in Council : *Peninsular & Oriental Steam Navigation Co.* v. *Secy. of State* (1), *Nobin Chunder Dey* v. *Secy. of State* (2), *Secy. of State* v. *Hari Bhanji* (3), *Shivabhajan Durgaprosad* v. *Secy. of State* (4), *Mc Inerny* v. *Secy. of State* (5), *Secy. of State* v. *Moment* (6), *A. M. Ross* v. *Secy. of State* (7), *Secy. of State* v. *Cockcraft* (8), *Secy. of State* v. *Shreegobinda Choudhury* (9). In the first case the *Peninsular Oriental Steam Navigation Company* claimed Rs. 340 damages to their horse on account of default of some dock labourers. It was held by Peacock, C. J. and Jackson and Wells, JJ., that on the facts the Secretary of State was liable because the Government through the dock labourers was engaged in an ordinary business which private persons might do and not in the exercise of powers which could not be lawfully exercised by anybody except by a Sovereign in which latter case the Secretary of State for India would not be liable.

In the second case *Nobin Chunder Dey* v. *Secy. of State* (2) the plaintiff had deposited some money in order to obtain license for some excise shops, but afterwards the Excise Officers did not give him

1. (1862-65) 5 Bom H C R 1.
2. (1875) 1 Cal 11.
3. (1882) 5 Mad 273.
4. (1904) 28 Bom 314=6 Bom L R 65.
5. (1911) 38 Cal 797=13 I C 370.
6. (1913) 40 Cal 391 = 18 I C 22 = 40 I A 48 (PC).
7. A I R 1915 Mad 434=19 I C 353=37 Mad 55.
8. (1916) 39 Mad 351=27 I C 723.
9. A I R 1932 Cal 834 = 140 I C 856 = 59 Cal 1289.

the licence thereby causing him some damages by their action. The suit was dismissed, Garth, C. J., and Macpherson, J., holding that the Secretary of State for India in Council was not liable for acts done in exercise of Sovereign powers and that in this case the persons who were guilty of default were officers of a department for taxation of the subject by imposition of custom and duties, that these were acts done in the exercise of Sovereign powers and that the Secretary of State for India would not be held liable.

The case of *Hari Bhanji* (3) was a peculiar case. The plaintiff claimed some damages for alleged over-imposition of duties. His suit was dismissed on the merits but the trial Judge held that he had jurisdictcn to hear the suit. He therefore ordered the parties to bear their costs. The Secretary of State for India in Council appealed against that order, questioning his decision on the issue of jurisdiction. In a learned Judgment Turner, C. J. and Ayyar, J. dissented from the decision in the case of *Nobin Chunder Dey* (2) and held that the Sovereign powers exercised by the Government of India might be divided into two categories: (1) acts which are done in the exercise of sovereign powers and are not justified by the Municipal law of the country; and (2), all acts done in exercise of sovereign powers which profess to be justified by the Muncipal law. They held that it was only the acts of the first category, namely treaties of peace and war against foreign states where the Government would not be liable; but in all cases under the second category, namely, all cases where action is taken in the internal administration of the country the Secretary of State for India in Council would be liable in the same manner as a private person. I may say that this was a decision of the Madras High Court and with due respect it is my duty to follow the decision of this Court in the case of *Nobin Chunder Dey* (2).

The decision in the case of *Nobin Chunder Dey* (2) was followed in the case of *Shivabhanjan* (4) where Jenkins, C. J., and Aston, J., held that where the loss to the plaintiff was caused by the default of a Subordinate Officer and the act was not productive of benefit to the revenues of the Government nor was it a transaction out of which any profit could be derived there was no liability incurred on account of the Government of India. The plaintiff's suit for damages was accordingly dismissed. Similarly, in the case of *McInerny* (5), Fletcher, J. followed the case of *Nobin Chunder Dey* (2) as binding upon him, refusing to follow tne case of *Haribhanji* (3) as it was not a decision of this Court and dismissed the suit of the plaintiff who had got hurt by colliding against a post in the Maidan, holding that in putting up the post on the Maidan the Government were not carrying on a commercial undertaking or other trading operation and therefore the Secretary of State for India was not liable.

In the case of *Moment* (6) their Lordships of the Privy Council in an appeal from Burma held that certain sections of Burma Act 4 of 1898 were ultra vires and invalid and that a suit for damages for wrongful interference with the plaintiff's property would lie against the Secretary of State for India in Council for the reasons explained by Sir Barnes Peacock in the *P. & O case*. In the case of *Ross* (7) the plaintiff claimed damages for alleged wrongful acts by a certain District Magistrate. Wallis, J., dismissed the suit holding that the Secretary of State for India in Council was not liable for the alleged wrongful acts of the District Magistrate inasmuch as the acts were done by him in the exercise of statutory authority. He also quoted with approval Storey on Agency that Government itself is not responsible for the

> misfeasances, or wrongs, or negligences or omissions of duty of the subordinate officers cr agents engaged in the public service; for it dces not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs; since that would involve it in all its operations, in endless embarrassments and difficulties and losses which would be subversive of the public interests."

In the case of *Cockcraft* (8) plaintiff sued the Secretary of State for damages in respect of injuries sustained by him in a carriage accident due to the negligent stacking of gravel on a military road. It was held by Wallis, C. J., and S. Ayyar, J., that on the facts the defendant was not liable inasmuch as in respect of acts done by the East India Company in the exercise of its Soverign powers it could not have been made liable for the negligence of its servants.

in the course of their employment and the liability of the Secretary of State for India in Council is similar to that of the East India Company, that the provision and maintenance of the military road was one of the functions of Government carried on in the exercise of its Sovereign powers and was not in undertaking for profits which might have been carried on by private persons. All the above cases were summed up in the case of *Sreegobinda Choudhuri* (9) decided by George Rankin, C. J., and Sir C. C. Ghose, J. In that case the plaintiff sued for damages for alleged errors and omissions of a Manager under the Court of Wards. It was held that the Secretary of State for India in Council could not be made liable for alleged default of the Manager under the Court of Wards.

In the present case the allegd loss of the plaintiff was caused by the error or delinquency of the subordinate staff under the Collector of Chittagong. The question is whether for their acts the Secretary of State for India in Council is liable or in other words, whether the Government revenues are liable for the alleged losses. In this case the surplus sale proceeds were held in the interest of the late recorded proprietor. It was not held by the Collector for the profit of the Government. By the order of payment of the money to Faizali the Government did not derive any benefit. The act was done by the Deputy Collector entirely in the exercise of his statutory duties. If he committed an error in his duty the Secretary of State for India in Council cannot be held liable for the same. It may be noted that in similar cases in England claims of plaintiffs for alleged tort due to wrongful acts of subordinate officers have been refused by the Courts. See the case of *Viscount Canterbury* v. *The Queen* (10). That case was instituted upon a petition of right. There the Speaker of the House of Commons had left certain furniture in the Parliament building which was burnt down by the negligence of some officers of the department of Woods and Forest. It was held that the Crown was not responsible for the conduct of all persons holding public offices and appointments, nor was the Crown bound to make good any loss or injury occasioned by their negligence or delinquency.

I am therefore of opinion that the defendant, the Secretary of State for India in Council, is not liable for the act of the Deputy Collector in performance of his statutory duties. I would allow the appeal and dismiss the suit with costs in all the Courts.

Costello, J.—I agree that this appeal must be allowed and with costs throughout. In my opinion the facts of this case are covered by the principles laid down in the case just referred to by my learned brother, *Secy. of State* v. *Shreegobinda Chowdhury* (9).

K.S. *Appeal allowed.*

10 (1842) 4 State Trials (NS) 767.

A. I. R. 1934 Calcutta 131

MUKERJI, J.

Sadhan Nath Das and *others*—Petitioners.

v.

Aghore Nath Das—Opposite Party.

Appeal No. 1386 of 1930, Decided on 3rd February 1933, from appellate decree of Addl. Dist. Judge, 24-Parganas, in Title Appeal No. 418 of 1929.

(a) Bengal Tenancy Act (1885) — Applicability —Portion used for agricultural purpose and portion for homestead — Tenancy is not necessarily for agricultural purpose—Question depends on particular facts.

A portion of the land was used for homestead purpose and another portion for agricultural purpose. The question as to whether the tenancy was originally agricultural or not is a question which would depend on an investigation into facts. It cannot be assumed from the statement in the plaint that the original tenancy consisted of several plots some of which were agricultural and some homestead, that the original tenancy must necessarily be regarded as having been created for agricultural purposes: 8 *C W N* 454 and *A I R* 19 5 *Cal* 202, *Appr.* [P 132 C 2]

(b) Civil P. C. (1908), O. 47, R. 1—Investigation of facts and other things necessary—Ground not taken in suit or appeal—Review is not maintainable.

An investigation into various questions of fact, namely the incidents of the parent tenancy, the purpose for which it was created, and custom and not taken at any previous stage of the suit or of the appeal cannot be entered into by way of an application for review. [P 132 C2; P 133 C1]

Apurba Charan Mukherjee and *Sudhansu Kumar Sen*—for Petitioners.

Surendra Nath Basu — for Opposite Party.

Order.—I am of opinion that this application for review ought not to succeed. It raises a point which was never put forward by the petitioners either in this Court at the hearing of the appeal before me or in any of the Courts below.

The point which they now seek to put forward arises in this way. The suit was one for ejecting the petitioners from a plot of homestead land. The question which was canvassed as being of prime importance in all the Courts up to the decision which is now sought to be reviewed was whether the defendants' tenancy was governed by the Transfer of Property Act or by the Bengal Tenancy Act. Various contentions were put forward in support of the position that it was the Bengal Tenancy Act that applies to the tenancy and this position was sought to be refuted upon various grounds: res judicata and things of that sort.

It has been found by this Court in the judgment which is sought to be reviewed that there is nothing which would justify a decision to the effect that the Bengal Tenancy Act applies to the tenancy, nor that, is there anything to show that if the tenancy is governed by the Transfer of Property Act it can be regarded as a tenancy for agricultural purposes. It has now been contended on this application for review that upon the facts stated in the plaint itself it is clear that the original tenancy, out of which this sub-tenancy has been carved out, was a tenancy governed by the Bengal Tenancy Act and that therefore the sub-tenancy also should be governed by that Act. Two decisions of this Court have been relied upon for this purpose. One is the case of *Babu Ram Roy* v. *Mahendra Nath* (1) in which it was held that where the lands included in the holding of an agricultural raiyat consisted partly of agricultural and partly of homestead lands, and the portion which could be used as homestead was let out to a sub-tenant for use as homestead, then the under-tenant was an under-raiyat within the Bengal Tenancy Act and that the Transfer of Property Act has no application to the case.

The other decision is the case of *Ram Pado* v. *Atore Dome* (2), in which it was held following the case of *Babu Ram Roy* v. *Mahendra Nath* (1) to which reference has just now made, that in the absence of a local custom or usage, the homestead portion of an agricultural holding is governed by the provisions of the Bengal Tenancy Act precisely in the same manner as the portion under actual cultivation; that the question whether a case is governed by the Bengal Tenancy Act or the Transfer of Property Act depends upon the nature of the original Tenancy and not on the character of the parcels included in the sub-tenancy; and that for this it is enough to look into the incidents of the original tenancy when the sub-tenancy is created. Now in the plaint it was stated that the original tenancy consisted of several plots some of which were agricultural and some homestead. And from this it has been argued that it must be taken therefore that the original tenancy was one governed by the Bengal Tenancy Act. This position I am not prepared to assume. It is quite true that agricultural holdings are governed by the Bengal Tenancy Act, but then nothing else is known of the parent tenancy except that it has been found that a portion of the land was used for homestead purpose and another portion for agricultural purpose.

In such circumstances, the question as to whether the tenancy was originally agricultural or not is a question which would depend on an investigation into facts. If this point had been taken in the pleadings and proper issues had been raised, it might have been open to the plaintiff to show that the tenancy was not one which was created for agricultural purposes. The point not having been taken, such an opportunity was not given to the plaintiff; and I am not of opinion that it can be assumed from the statement in the plaint referred to above that the original tenancy must necessarily be regarded as having been created for agricultural purposes. If it could be so regarded, then undoubtedly, in the absence of anything else, if a sub-tenancy was created in respect of either an undivided share or specific parcel, the sub-tenancy would have partaken of the character of the original tenancy. An investigation into various questions of fact, namely, the incidents of the parent tenancy, the purpose for which it was created, and custom, etc., would be necessary. While there can be no dispute as regards the proposition of law laid down in the two cases on which the petitioners rely, I do not think I should be justified in giving effect to the contention which has been thus raised on behalf of the

1. (1904) 8 C W N 454.
2. AIR 1925 Cal 202=84 I C 743.

petitioners. Besides, I am very doubtful whether on a ground like this, which was not taken at any previous stage of the suit or of the appeal in the Court below or in this Court, the application for review can be regarded as being maintainable.

It may be stated here that the 15 days' notice on the basis of which the suit in ejectment was instituted was served on the petitioners so far back as on 7th March 1928, roughly corresponding to 23rd Falgoon 1334. The decision of this Court was passed on 28th July 1932 and we are now in February 1933. I do not see that the petitioners can complain of any hardship on the ground of insufficiency of notice, even if it be held that the notice was not sufficient. The result is that this application for review, in my opinion, ought to fail. It is accordingly dismissed. There will be no order for costs.

R.K. *Application dismissed.*

A. I. R. 1934 Calcutta 133

PEARSON, J.

Mofizuddin Mondal and *another* — Accused—Petitioners.

v.

Sekandar Molla — Complainant — Opposite Party.

Criminal Revn. Petn. No. 224 of 1933, Decided on 10th April 1933.

Criminal Trial—Evidence — Document admitted in evidence at request of prosecution after conclusion of arguments—Accused must be given opportunity of adducing evidence in rebuttal of it.

Where a Magistrate admits a document after the conclusion of the arguments at the request of the prosecution, he should ascertain from the accused as to whether they wish to give any evidence in rebuttal, and if they should so desire he should give them opportunity by granting an adjournment to produce such evidence.

[P 133 C 2]

Sudhanshu Sekhar Mukerji—for Petitioners.

Abdul Ali—for Opposite Party.

Order.—A complaint is made by the petitioners in this case that after the conclusion of the arguments the Magistrate allowed P. W. 2 who had already been examined—a man named Moula Bux—to give further evidence and to produce and prove a document in spite of objections taken by the defence. The counter-affidavit which has been put in alleges that the defence did not object to this evidence at the time nor was the accused prejudiced by this further examination of the witness by the Court. So far as the order sheet goes it appears that on 5th November one defence witness was cross-examined. Then this witness who was present in Court was called by the Court for examination and he was examined for the ends of justice to prove this document to which reference has been made. Subsequent to this, arguments were heard. Then a petition was filed on behalf of the defence in which exception was taken to the calling of this prosecution witness and the filing of this document on the ground that they had no opportunity of dealing with the matter. So far as the record of the evidence goes it does not appear whether after this additional evidence was given by the witness Moula Bux, the defence were asked to cross-examine or whether they applied to cross-examine or whether cross-examination was refused.

The record in that particular is unsatisfactory. It is true that the counter-affidavit again says that the defence lawyer was asked to cross-examine the witness, but in that event one would certainly expect to find some reference to that either in the record or in the order sheet. It is said that the defence would have had no prejudice owing to what was done because the document was a very old one and was known to the parties. It appears to me that having regard to the fact that at this very late stage in the case this document was admitted in evidence called at the request of the prosecution and having regard to the fact that the Magistrate says that he admits the document as it will help his judgment, he should have been particularly careful to see that the accused were satisfied that they were being treated fairly. He should have ascertained from them as to whether there was any evidence that they wished to give in rebuttal apart from the question of cross-examining the witnesses and should have then considered, if necessary, whether an adjournment was not a proper procedure to take in order to give them an opportunity of adducing any evidence that there might have been. I have not seen the document and I am not able to say that the learned advocate for the opposite party is right when he says that it was not a

matter whereby the defence were prejudiced, even though it was admitted at such a late stage.

On the whole therefore the rule will be made absolute to this extent: that the conviction and sentence will be set aside and the fine if paid will be refunded and the matter will be reheard from the point where the examination of this witness, Moula Bux, was concluded on 5th November 1932, in the light of the remarks which I have made above, so as to give the accused an opportunity of adducing evidence, if they are so advised, in regard to this additional bit of evidence contained in the document which was admitted on that occasion.

K.S. *Rule made absolute.*

A. I. R. 1934 Calcutta 134

MUKERJI, J.

Sitabuddin Biswas — Defendant—Appellant.

v.

Behari Lal Mondal—Plaintiff—Respondent.

Appeal No. 1415 of 1930, Decided on 22nd July 1932, against appellate decree of Dist. Judge, Murshidabad, D/- 13th February 1930.

Landlord and Tenant—Tenant treated as trespasser but notice to quit given on account of some entry in settlement records—Suit for ejectment prior to period of notice—Defendant not entitled to remain as tenant—Court can make decree in favour of plaintiff.

Where the plaintiff treats the defendant as a trespasser, but gives a notice to quit merely because there was an entry in the settlement record-of-rights to the effect that the defendant had certain rights as a tenant, if it be found that the defendant is not entitled to remain on the land as a tenant, then the Court would be perfectly justified in making a decree in plaintiff's favour although the suit may have been filed prior to expiry of period of notice..

[P 134 C 2]

Urukramdas Chakrabarty — for Appellant.

Rupendra Kumar Mitter — for Respondent.

Judgment.—The suit was instituted by the plaintiff for ejectment of the defendant on declaration of his own title and for mesne profits. It was instituted on the allegation that the defendant was a trespasser. For greater safety however the plaintiff had chosen to serve a notice on the defendant giving him time till the 31st Chait 1335 to vacate. This he did because of an entry in the settlement record-of-rights in which it had been stated that the defendant was a Korfa tenant with occupancy right. Defendant pleaded that he held the suit lands in Korfa right at a jama of Rupees 9-12-6 under the plaintiff and that he had acquired a right of occupancy to the jote by custom. The trial Court overruled both the pleas taken in defence and decreed the suit. On appeal preferred by the defendant the District Judge upheld the decision of the trial Court. As regards the question of notice, the argument that has been advanced before me is that the suit was instituted before the expiry of the date mentioned in the notice and inasmuch as the plaintiff asked the defendant to vacate by the end of Chait 1335, it should be held that the defendant was occupying under the leave and license of the plaintiff and that therefore the plaintiff had no right to institute the suit before the expiry of that date. So far as this matter is concerned, it is perfectly clear that no question of leave and license can arise in this case.

The plaintiff treated the defendant as a trespasser, and it was merely because there was an entry in the settlement record-of-rights to the effect that the defendant had certain rights as a tenant, that this notice had been given. If it be found that the defendant is not entitled to remain on the land as a tenant, then the Court would be perfectly justified in making a decree in plaintiff's favour. In any case, on the date that decree was passed by the trial Court no question of any leave or license could arise, because the date fixed in the notice had expired long before. So far as the question of the defendant's right to remain on the land is concerned, the trial Court went into it very carefully and recorded a finding against the defendant. The learned District Judge has not dealt with this matter at all with any degree of clearness in his judgment. All that he intended to find may be gathered from one single sentence in his judgment which runs in these words: "It is true that the record-of-rights shows defendant as a Korfa raiyat, but it is manifestly wrong." There the learned Judge was evidently referring to the fact that the defendant in a previous written statement had claimed to hold the land not under the plaintiff but under the Midnapore Zamindari Com-

pany, whereas the record was to a different effect. Be that as it may, this question has not been properly determined by the District Judge.

I therefore allow the appeal and send the case back to the lower appellate Court on remand, only in order that the defendant's right to remain on the land may be determined upon the evidence on the record. No other question will be allowed to be raised nor any other question will have to be decided. On the said question only the Court will proceed to make its order in this case. Costs of this appeal will abide the result.

R.K. *Case remanded.*

A. I. R. 1934 Calcutta 135

MITTER AND M. C. GHOSE, JJ.

Dasarathi Kumar—Plaintiff—Appellant.

v.

Sarat Chandra Ghose and *another* —Defendants—Respondents.

Appeal No. 1600 of 1932, Decided on 13th March 1933, from appellate decree of Dist. Judge, Hooghly, D/- 20th June 1932.

Transfer of Property Act (1882), Ss. 106 & 116—'In absence of agreement to contrary' refer to terms of lease and not of notice.

The words in S. 116 "in the absence of an agreement to the contrary" refer to an agreement as to the terms of holding over and not to the term of notice : 32 *Cal* 123, *Rel. on.*

[P 135 C 2]

Amarendra Nath Basu and *Sambhu Nath Banerjee*—for Appellant.

Mukherjee and *Promotha Nath Mitra* —for Respondents.

Mitter, J.—This is an appeal on behalf of the plaintiff and arises in a suit in ejectment. The only question which has been debated before us is the question as to the necessity and sufficiency of the notice to quit. It appears that the defendant was holding under two leases which he had obtained from Raja Peary Mohan Mukherjee on 7th Aswin 1320 B. S., in respect of two different plots. The leases were for a term of nine years and they expired on 16th September 1922 corresponding to the end of Bhadra 1329 B. S. The case made by the defendant is that he held over after the expiry of the leases. The plaintiff, it appears, subsequently got an intermediate lease from the Raja on 27th Pous 1331 corresponding to 11th January 1925. After obtaining the said lease the plaintiff issued a notice to quit on the defendant and that was served on 9th April 1925. The notice required the defendant to quit on 30th Aswin corresponding to 16th October 1925. The suit in ejectment was commenced on 1st March 1926. The defendant raised various contentions and amongst others he questioned the sufficiency of the notice. The trial Court negatived all the contentions of the defendant; on the question of sufficiency of notice it held in favour of the defendant and was of opinion that the notice was insufficient but that no notice was necessary. The defendant appealed to the District Judge who affirmed the findings of the Subordinate Judge but came to the conclusion that the notice was necessary and that it was insufficient. He accordingly dismissed the suit of the plaintiff.

Against this decision the present appeal has been brought and it has been contended before us that as the holding over must be taken to be on the same term as the original lease and as the original lease contained a clause to the effect that the defendant was to be ejected without service of new notice to quit that clause must be imported into the new contract of tenancy which was created by the landlord's acceptance of rent after the expiry of the term mentioned in the original lease. It is argued that this term, namely the liability of being ejected without notice, must be held to be "a contract to the contrary" within the meaning of S. 106 and S. 116, T. P. Act. The matter is really governed by the provisions of S. 116, T. P. Act, That section runs as follows :

"If a lessee or under-lessee of property remain in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee or otherwise assents to his continuing in possession, the lease is in the absence of an agreement to the contrary, renewed from year to year, or from month to months according to the purpose for which the property is leased, as specified in section one hundred and six."

It is conceded that in this case the tenancy is for manufacturing purposes and therefore it is a tenancy from year to year. There can be no question that the words in the section "in the absence of an agreement to the contrary" must refer to an agreement as to the terms of holding over. This point was decided so far back as in the year 1904 by Sir

Francis Maclean, C. J., Bodilly, J., and Mookerjee, J., in the case of *Troilakya Nath Roy* v. *Sarat Chandra* (1). The Chief Justice in delivering the judgment of the Court pointed out that the words "in the absence of an agreement to the contrary" in S. 116 must mean an agreement as to the terms of the holding over renewed from year to year, or from month to month, according to the purpose for which the property is leased as specified in S. 106. In our opinion as soon as the rent was accepted it was a new contract of the tenancy and that it was a contract of tenancy from year to year according to the purposes for which tenancy was taken. That being so we are of opinion that the District Judge took a correct view of the case. The appeal is dismissed with costs.

M. C. Ghose, J.—I agree.

R.K. *Appeal dismissed.*

1. (1905) 32 Cal 123=8 C W N 901.

A. I. R. 1934 Calcutta 136

GUHA AND M. C. GHOSE, JJ.

Kailash Chandra Das and *another*—Petitioners.

v.

Sm. Kanchani Dassya and *others*—Opposite Parties.

Civil Rule No. 220 of 1932, Decided on 25th May 1932.

Hindu Law—Reversioner—Suit by widow—Preliminary decree touching corpus of estate—On death of plaintiff, reversioners defendants can be substituted as plaintiffs but not the co-widow defendant without her consent—Civil P. C. (1908), O. 1, R. 10.

The ultimate reversioners are recognised by Courts of law, as having a right to demand that the estate be kept free from waste and free from danger, during its enjoyment by a widow or other owner for life. Where therefore the preliminary decree passed in favour of the original plaintiff (a widow) clearly touches the corpus of the estate, the order substituting the reversionary heirs (some of the defendants) in the place of the original plaintiff is in accordance with the rule but a co-widow of the plaintiff cannot be transposed from the position of the defendant to plaintiff without her consent: *A I R* 1916 *P C* 117, *Rel on.* [P 136 C 2]

Atul Chandra Gupta, Bankim Chandra Banerjee and *Amrita Lal Mukerjee*—for Petitioners.

Troilokya Nath Ghose and *Abinash Chandra Ghose*—for Opposite Parties.

Guha, J.—This Rule is directed against an order of the Munsif, Second Court, Dacca, dated 10th February 1932, disallowing the objections raised by the petitioners before this Court, in regard to an order for substitution of parties and for transference of defendants in a suit to the category of plaintiffs. The facts of the case giving rise to the application on which this Rule was issued, are set out in the order recorded by the Court below. Defendants 5 and 6 in the suit, who were substituted as plaintiffs on the death of the original plaintiff Kamini Sundari Dasya, one of the widows of Ishan Chandra Das, after the passing of a preliminary decree for dissolution of joint family business, and for accounts, against defendants 1 to 3 in the suit, were the ultimate reversioners after the death of defendant 3, Kanchani Dasya, the co-widow of the original plaintiff in the suit. By the order of the Court below, all these three persons, defendants 5 and 6 and defendant 3, have been made co-plaintiffs.

So far as defendants 5 and 6, who have been made plaintiffs are concerned, the order of the Court below appears to us to be one which should not be interfered with by us, regard being had to the subject-matter of the litigation in which a preliminary decree was passed. The ultimate reversioners are recognised by Courts of law, as having a right to demand that the estate be kept free from waste and free from danger, during its enjoyment by a widow or other owner for life, a reversionary heir thus appealing to the Court truly for the conservation, and just administration of the property, so that the corpus of the estate may pass unimpaired to those entitled to reversion. (See the case of *Janaki Ammal* v. *Narayanasami Aiyar* (1). On the face of the preliminary decree passed in favour of the original plaintiffs in the suit, which clearly touches the corpus of the estate, the order substituting the reversionary heirs, defendants 5 and 6, in the place of the original plaintiff is in accordance with the rule of law well established now, to which reference has been made above; and the order made by the Court below in that behalf is affirmed. The question arising for consideration in regard to the substitution and transfer of defendant 3 to the category of the plaintiffs stands on a different footing. In our judgment, there was no justification for the Court below in making her a plaintiff in the suit, without

1. AIR 1916 P C 117=37 I C 161=43 I A 207=39 Mad 634 (P C).

any application on her part and without her consent. This part of the order made by the Court below appears to us to be wholly irregular and unsustainable and it is accordingly set aside. The Rule is therefore made absolute in part. The order of the Court below is modified in the manner indicated above. We make no order as to costs in this Rule. Let the record be sent down as soon as practicable.

M. C. Ghose, J.—I agree.

R.K. *Rule partly made absolute.*

A. I. R. 1934 Calcutta 137

PANCKRIDGE AND PATTERSON, JJ.

Shantaram Sharma — Complainant—Petitioner.

v.

Kanai Lal Jatia and *another*—Accused—Opposite Parties.

Criminal Revn. Case No. 319 of 1933, Decided on 5th April 1933.

(a) Criminal P. C. (1898), S. 528—Discretion to transfer is not fettered—But there must be reasons for transfer and they must be satisfactory from point of view of principle—Previous knowledge instead of being qualification is a disqualification.

In S. 528 there are no words which have the effect of fettering the discretion of the Chief Presidency Magistrate or other Magistrates in transferring cases from the files of Magistrates subordinate to them. Before such an order is made, the Magistrate must and should have reasons and those reasons should be such as the law regards as satisfactory from the point of view of principle. If the accused persons are prejudiced by the fact that they have no locus standi before the issue of process it is not the proper way to counteract that prejudice by ordering the case to be dealt with by a particular Magistrate who happens to have knowledge of matters which the law prevents persons complained against from bringing to his notice. So far from previous knowledge of the facts being a qualification for the enquiring Magistrate it is in many cases a disqualification. [P 138 C 2]

(b) Criminal P. C. (1898), S. 528—Order of transfer—Setting aside—High Court cannot disregard circumstances of case.

An order of transfer of a case is entirely a matter of discretion; while setting aside that order the High Court cannot disregard the circumstances of the particular case. [P 138 C 2]

N. K. Basu, P. C. Chatterjee, Nagendra Nath Banerjee and *Bireswar Chatterjee*—for Petitioner.

A. N. Choudhury, S. K. Sen and *Satindra Nath Mukherjee*—for Opposite Parties.

Panckridge, J.—This is a Rule obtained by the petitioner Shanta Ram Sharma calling upon the Chief Presidency Magistrate and the opposite parties to show cause why an order of transfer made by him on 25th March should not be set aside. The complainant is a munim gomastha of a firm known as Dilshukhroy Sagarmull and the opposite parties are members of a firm known as Mahaliram Ramjidas, opposite party 1 being a partner and opposite party 2 being a gomastha of that firm. It appears that Dilsukhroy Sagarmull instituted a suit in 1930 against the firm of Mahaliram Ramjidas on the allegation that the plaintiffs had advanced a lac of rupees to the defendants. Among other defences taken was that the sum had never in fact been advanced and that if it had been advanced the borrower was not the firm of Mahaliram Ramjidas but a deceased partner, Gajanand Jatia. In the course of the litigation the plaintiff obtained an order for affidavit of documents. The defendants filed an affidavit, disclosing certain entries made in the latter part of 1928 which, it is said, supported their case that the advance had never been made. On various dates in March 1931 the plaintiffs inspected the documents disclosed by the defendants including the entries I have mentioned. Owing to the course the litigation took it became unnecessary for the Court to decide whether or not the books of the defendant were genuine on this point and the suit was dismissed with costs.

The defendants then successfully applied to my learned brother Buckland, J., who had tried the case to make a complaint to the Chief Presidency Magistrate that in giving evidence in the case Sagarmull, a partner of the complainant firm, had wilfully given false evidence and thereby committed an offence punishable under S. 193, I. P. C. The Chief Presidency Magistrate issued processes, tried the case and convicted Sagarmull. Sagarmull appealed to this Court but his appeal was dismissed. He has now applied for special leave to appeal to His Majesty in Council and I understand that he is now on bail pending the decision of the Privy Council. In the complaint filed on 20th March 1933 it is alleged that the entries in the cash books of 1928-29, which were inspected in the circumstances I have mentioned, are forgeries. The complaint

does not state on what materials this allegation is based and merely alleges that the complainant has since made further enquiries into the whole affair with the result which I have indicated. Nothing is stated in the complaint about the conviction of Sagarmull for perjury and it appears to me that the complaint is most disingenious and is intended to give an impression that the proceedings before Buckland, J., terminated in an amicable compromise.

On the allegations made in the complaint the Additional Chief Presidency Magistrate on the application of the complainant issued a search warrant for the books which it is alleged were forged. The opposite parties at once went before the Additional Presidency Magistrate and on their undertaking to produce the books he stayed execution of the search warrant and subsequently set it aside. Emboldened by their success the accused then presented a petition to the Chief Presidency Magistrate asking him to transfer the case from the file of the Additional Presidency Magistrate to his own file on the ground that it would be more convenient and expeditious for the Chief Presidency Magistrate to deal with the matter himself. The Chief Presidency Magistrate heard the parties and made an order under S. 528, Criminal P C., transferring the case to his own file. The reasons he has given are that he considers that by suppressing the fact of the conviction of Sagarmull the complainant wrongfully obtained the search warrant which the learned Additional Presidency Magistrate would have declined to issue ex parte had he been in possession of the whole history of the previous relations between the parties. He also states that inasmuch as the accused persons will have had no locus standi before the Additional Presidency Magistrate or before any other Magistrate who deals with the case under Ch. 16, Criminal P. C., he apprehends that advantage will again be taken of the Additional Presidency Magistrate's lack of acquaintance with the details of the case. He states that as he is aware of the whole history of the litigation he thinks that in the interests of justice he should hold the enquiry himself.

The ground on which the complainant has obtained this Rule is that the reasons given by the Chief Presidency Magistrate are insufficient and erroneous. In S. 528 there are no words which have the effect of fettering the discretion of the Chief Presidency Magistrate or other Magistrates in transferring cases from the files of Magistrates subordinate to them. At the same time it is in my opinion beyond argument that before before such an order is made the Magistrate must and should have reasons and those reasons should be such as the law regards as satisfactory from the point of view of principle. In my opinion the reasons given by the Chief Presidency Magistrate are open to criticism and I should sincerely regret it if anything I say or any order I make lent colour to the view that a Magistrate is exceptionally qualified to deal with particular cases because he approaches it with a knowledge of facts, whether that knowledge be derived from what he has learnt in his personal capacity or from what has come before him in his judicial capacity. If the accused persons are prejudiced by the fact that they have no locus standi before the issue of process it is not the proper way to counteract that prejudice by ordering the case to be dealt with by a particular Magistrate who happens to have knowledge of matters which the law prevents persons complained against from bringing to his notice. So far as from previous knowledge of the facts being a qualification for the enquiring Magistrate it is in many cases a disqualification.

This being so, the question arises whether we should set the order aside, for it is entirely a matter of discretion in the exercise of which we feel we cannot disregard the circumstances of the particular case. The complainant is not a person in whose favour I feel disposed to interfere. The delay between the production of the books in 1931 and the institution of the proceedings is not explained. Moreover, I agree with the Magistrate that the complainant was guilty of disingenious conduct in not saying anything in his complaint as to the events which happened after the dismissal of his employer's suit. His personal interests are admittedly not involved and so he cannot take it as a personal injustice if we decide not to accede to his application. So far as the previous knowledge is concerned the two Magistrates are very much in the same

position because in connection with the proceedings for setting aside the search warrant affidavits have been filed which put the Additional Presidency Magistrate in possession of the facts relative to the previous litigation. We see no reason to suppose that the Chief Presidency Magistrate will not deal with the complainant's petition fairly and indeed it has not been seriously suggested that any intentional bias on his part is to be apprehended. Were the position different and had the transfer been made to a Magistrate with knowledge of the fact against the wishes of the accused I should not have hesitated for a moment to set the order for transfer aside on the application of the accused. However, in the circumstances of the case we consider that the conduct of the complainant has not been such that we ought to interfere at his instance and we do not think that there is any chance of failure of justice if we discharge the Rule. The Rule is accordingly discharged.

Patterson, J.—I agree.

R.K. *Rule discharged.*

A. I. R. 1934 Calcutta 139

LORT-WILLIAMS AND NCNAIR, JJ.

Surendra Nath Kabashi and *others*—Petitioners.

v.

Gostha Behari Kabashi — Opposite Party.

Criminal Revn. No. 444 of 1933, Decided on 25th May 1933, from order of Dist. Magistrate, 24-Parganas.

(a) Criminal P. C. (1898), S. 144 (2)—Action under S. 144 (2) can be taken only where immediate prevention or speedy remedy is desirable.

Under S. 144 (2) the Magistrate may proceed only when immediate prevention or speedy remedy is desirable and he must be satisfied, among other things, that there is danger to human life or a disturbance of public tranquillity or a riot or an affray. [P 139 C 2]

(b) Criminal P. C. (1898), Ss. 144 (2), (4) and 439—Exparte order under S. 144 (2)—Though proper remedy of aggrieved party is to apply under S. 144 (4), he can go to High Court direct when Magistrate postpones hearing and matter has to be disposed of expeditiously.

Where an order under S. 144 (2) is passed exparti the proper remedy of the aggrieved party is to apply to District Magistrate under S. 144 (4) to have the probihitory order set aside; but where the Magistrate postpones the case and the matter has to be disposed of expeditiously, such party can go to High Court direct under S. 439: *AIR* 1921 *Cal* 76, *Dist.* [P 140 C 1]

Nani Bhusan Mukerjee — for Petitioners.

Purnendu Sekhar Basu—for Opposite Party.

Order.—In this case a Rule was issued upon the District Magistrate of the 24-Parganas and the opposite party named in the petition one Gostha Behari Kabashi to show cause why the order complained of should not be set aside on the grounds that it was illegal and made without jurisdiction and that there was no sufficient evidence of emergency before the learned Magistrate. Gostha Behari is a resident of village Jadurati in the district of 24-Parganas and a member of the District Board Dispensary Managing Committee. The villagers raised funds to build a dispensary and steps were being taken to acquire a suitable site by means of the Land Acquisition Act. Among other sites the land in possession of the second party was selected. Subsequently the petitioner second party began to excavate a tank on his land. Thereupon Gostha Behari petitioned the Magistrate stating these facts and saying that unless the petitioners second party were restrained from excavating a tank on the site, there was every likelihood of a disturbance of public tranquillity. Thereupon, the Magistrate made an exparte order on 29th April under S. 144 (2), Criminal P. C. Under this Section the Magistrate may proceed only when immediate prevention or speedy remedy is desirable and he must be satisfied, among other things, that there is danger to human life or a disturbance of public tranquility or a riot or an afiray. The only evidence before the Magistrate was that of Gostha. Subsequently, on 4th May, the Magistrate received a report from the police stating that the petitioner second party did not wish to part with his land and that the villagers did not wish to raise any ill-feeling by compelling him to do so, because there were other suitable sites but that Gostha Behari with his men was determined to obtain the petitioner second party's land for the purpose of the dispensary. On 1st May the petitioner second party had appeared before the Magistrate to show cause, and after hearing him the Magistrate adjourned the matter until the 17th.

The petitioner second party complains of this—and we think rightly-because in

a matter of this kind it is obvious that it ought to be disposed of expeditiously. For this reason the petitioner second party came direct to this Court under S. 439, Criminal P. C. On behalf of the first party Gostha Behari, who was the petitioner before the Magistrate, it is argued by his learned advocate that the petitioner second party ought to have proceeded in the first place under S.435, Criminal P. C., and applied to the Sessions Judge who would have reported to the High Court and he has referred us to the case of *Rash Behari* v. *Phani Bhusan* (1) in which the learned Judges said that the practice of this Court is not to entertain an application in revision against an order made by a Magistrate in a proceeding under S. 133, Criminal P. C., unless the party aggrieved has first moved the Sessions Judge under S. 435. But that decision refers to orders made under S. 133, and would not apply to such circumstances as exist in this case.

The proper procedure under S. 144 would have been to have applied under Sub-S. (4) to the District Magistrate who has power to set aside the prohibitory order. The petitioner second party however contends that in view of the Magistrate's order postponing the hearing for over 15 days, he was justified in coming direct to this Court. We think, in the circumstances, that this contention is reasonable. On the merits, it appears that no notice has yet been issued under the Land Acquisition Act, nor have any steps been taken which are requisite before an order to acquire the land can be made. It seems therefore premature to urge these proceedings before the Magistrate as a reason to induce him to make the order. Up to the present, the land belongs to and is in the possession of the petitioner second party, and so far as we know his possession may not be disturbed. He has therefore every right to excavate a tank on his own land. The police report seems to show that the only trouble is caused by the first party who is determined, if possible, to get his own way about the selection of a site for the dispensary. On the whole and taking into consideration all the circumstances, we do not think it is a case in which a prohibitory order ought to have been made. The Rule accordingly is made absolute and the order of the learned Magistrate set aside.

1. AIR 1921 Cal 76=63 I C 410=22 Cr L J 650 =48 Cal 534.

K.S. *Rule made absolute.*

A. I. R. 1934 Calcutta 140

MITTER AND HENDERSON, JJ.

Saroj Ranjan Sinha and *others*—Appellants.

v.

Joy Durga Dassi—Respondent.

Appeal No. 408 of 1931, Decided on 6th June 1933, from original order of Sub-Judge, Nadia, D/- 9th July 1931.

Civil P. C. (1908), O. 21, R. 53 — Attachment of decree by judgment-debtor—Decree-holder can still execute his decree, after giving set-off to judgment-debtor's decree — Civil P. C. (1908), O. 21, R. 18.

An attachment order in favour of the judgment-debtor has not the effect of staying execution permanently. It does not prevent the decree-holder from applying for execution of his decree for money, after allowing the decree of the judgment-debtor against him to be set off: 24 *Cal* 778 and *A I R* 1924 *Bom* 383, *Foll.*

[P 142 C 2]

Bejoy Kumar Bhattacharjee and *Santimoy Mazumdar*—for Appellants.

Rupendra Kumar Mitter and *Jijan Behari Mitter*—for Respondent.

Mitter, J.—Tnis is an appeal from an order of the Subordinate Judge of Nadia dated 9th July 1931 made in the course of execution of a decree. It is necessary to state a few facts in order to determine the soundness or otherwise of the contentions raised on behalf of the judgment-debtors who are appellants before us. It appears that the decree-holder in the present execution case, Joy Durga Dasi, obtained a decree against the appellants for a sum of Rs. 6,093 odd. It further appears that the judgment-debtors Saroj Ranjan Sinha and others obtained against the decree-holder Joy Durga Dasi a decree for a certain sum of money. Joy Durga put her decree into execution on 15th November 1929. In that execution case she calculated the amount which was due to her and allowed a set-off and the total sum after allowing the set-off due to her came to about Rs. 6,156 odd. Then Joy Durga instituted a title suit against the present judgment-debtors but she failed in all Courts including the Privy Council and the costs awarded against her in favour of the present appellants have been stated to be Rs. 326 in the first Court, Rs. 1,004 in the Second Court, that is

in the High Court, and £238 are the costs awarded against her by the Judicial Committee of the Privy Council.

On 29th November 1929 the present appellants applied for transmission of the order of His Majesty in Council to the lower Court under the provisions of O. 45, R. 15, Civil P. C. After the said order was transmitted it was open to Joy Durga to take the plea of set-off. On 10th December 1929 Joy Durga made an application for set-off of costs due to the judgment-debtors which came to about Rs. 4,442. On 11th December 1929 the Court executing the decree of Joy Durga, that is the Subordinate Judge of Nadia received a notice of attachment before judgment of the decree which Joy Durga the decree-holder had obtained against the present appellants. That order was made in Suit No. 167 of 1929. On 15th January 1930 the same Court received another notice of attachment before judgment in respect of another suit which is said to be numbered 65 of 1930. An objection was filed on behalf of the appellants that as the decree sought to be executed by Joy Durga formed the subject matter of the present execution proceedings the property was directed to be attached and notice of attachment had been received by the Court of the Subordinate Judge that had the effect of arresting the execution of the decree of the present decree-holder respondent namely Joy Durga Dasi. This is the objection which was taken before this Court although it was not taken precisely in the present form before the executing Court. The precise objection which was taken before that Court is to be found in para. 8 of the petition of objection on behalf of judgment-debtors filed on 15th February 1930 where the objection ran in these terms:

"These judgment-debtors have got the decree in money Suit No. 167 of 1929 of your Honour's Court and the decree in money Suit No. 65 of the First Munsif's Court at Krishnagar passed in favour of the decree-holder put under attachment before judgment. Under the circumstances there cannot be any set-off."

It appears therefore clear that the objection which is now taken before us is that the effect of the attachment before judgment brought about at the instance of the present appellants was to arrest or stay the execution of the decree of the present decree-holders against the judgment-debtors. This argument which has been addressed to us will be dealt with later on. It will be sufficient to state here that the objection which was taken did not prevail with the Subordinate Judge who remarked on this part of the case as follows:

"In this case we find that as soon as the decree-holder filed an application for set-off the judgment-debtors brought suits and got the decree of the decree-holder attached before judgment, thus making it impossible for her to realize her own dues while keeping their liabilities unpaid."

The Subordinate Judge accordingly allowed the prayer of the decree-holder and allowed also the decree of the judgment-debtors to be set-off as against the decree of the decree-holders, and execution was directed to be taken in respect of the balance. Against this order the present appeal has been brought and the main contention which has been advanced before us is, as has already been indicated, that the execution of the decree cannot proceed against the appellant in view of the two requests made before the different Courts for attachment before judgment of the decree now sought to be executed. This argument is based on the provisions of O. 21, R. 53, Civil P. C. It is argued that where the decree sought to be attached was passed by another Court then by the issue to such other Court of a notice by the Court which passed the decree sought to be executed, requesting such other Court to stay the execution of its decree unless and until the holder of the decree sought to be executed or his judgment-debtor applies to the Court receiving such notice to execute its own decree. It is said that notwithstanding the use of the words 'or his judgment-debtor' in Cl. (ii) after the words 'executed' the effect of the attachment is to stay the execution permanently. This view is opposed to the clear provisions of the statute. On the other hand it is to be noticed that the introduction of the words 'or his judgment-debtor' in O. 21, R. 53 (b) (ii), after the words 'to be executed' in the Code of 1908 give a legislative recognition to what has been understood to be the law, so far as this Court is concerned, so far back as in the year 1897, when Sir Francis Maclean, C. J., observed with reference to the corresponding provisions of S. 273 of the Code of 1882 as follows :

"The judgment-creditor still had an interest in the decree which he had obtained, and the attachment order did not prevent him from presenting the decree with a view to its execution. Such a step would not be adverse to the rights of his own judgment-creditor, as it would be for the interest of both, that if possible, the fruits of the decree should be obtained by execution"'

The introduction of the words "or his judgment-debtor" in the Civil Procedure Code, 1882 really recognizes this rule of law which was stated correctly by Sir Francis Maclean in the case of *Adhar Chandra Das* v. *Lal Mohun Das* (1) to the decision of which reference has just been made. The learned advocate for appellants, Mr. Bhattacharjya, has argued with great force that if the view is taken it defeats the object which it was intended to secure by this provision of the statute. We have to administer the law as we find it, and the express words of O. 21, R. 53, as they now stand after amendment leave no room for doubt that it is open to both judgment-debtors and decree-holder in the present case to execute the decree which is the subject matter of execution. That this is the correct view of law also been recognised by a recent decision of the Bombay High Court in the case of *Chanbasappa Nagappa* v. *Halibasappa* (2) where Sir Norman Macleod, C. J., observed with reference to the matter before him as follows:

"Under sub-R. (3) the holder of the decree sought to be executed by the attachment of another decree of the nature specified in sub-R. (1) shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof."

Again he says:

"The stay does not prevent either the holder of the decree sought to be executed or the judgment-debtor from seeking to execute the original decree, and that being the case, time must be taken as running against them."

In another passage the learned Chief Justice also made the following remarks which may be usefully quoted :

"From another point of view this must be the necessary result of the proceedings under O. 21, R. 53 (1) (b). Otherwise the proceedings between the original decree-holder and his judgment-creditor might continue over an unlimited space of time to the great disadvantage of the original judgment-debtor who might be faced with proceedings in execution many years after the decree has been passed without any intermediate steps being taken in aid of execution."

The view expressed in *Adhar Chandra Das* v. *Lal Mohun Das* (1) and *Chanbasappa Nagappa* v. *Halibasappa* (2) seem to be in consonance with commonsense and we are therefore unable to accept this contention of the appellant which must be overruled. The next ground taken is that there can be no set-off as there has been no application for execution of the decree by the judgment-debtors appellants and that there is only an application to this Court under the provisions of O. 45, R. 15, Civil P. C., for transmission of the decree of His Majesty in Council and it is said that as the appellants are entitled not only to the costs of the Privy Council but also to the costs of the two Courts below there ought to be proper application for execution before O. 21, R. 18 of the Code can be called into play. It is to be noticed however that this objection was not taken in the Court of first instance and we do not think that we should allow it to be raised at this stage. This contention therefore fails. The result is that this appeal fails and must be dismissed with costs. The hearing fee is assessed at two gold mohurs.

Henderson, J.—I agree that this appeal must be dismissed. It has an air of unreality about it and it must have been brought for some ulterior purpose. The order which the appellants seek to set aside is an order to their advantage and I cannot see that they have got any grievance.

R.K. *Appeal dismissed.*

1. (1897) 24 Cal 778=1 C W N 676.
2. A I R 1924 Bom 383 = 80 I C 239=48 Bom 485.

A. I. R. 1934 Calcutta 142

GUHA AND BARTLEY, JJ.

Fajer Ali Darji and *others*—Appellants.

v.

Emperor—Opposite Party.

Admitted Appeal No. 89 of 1933, Decided on 30th May 1933.

(a) Criminal P. C. (1898), S. 297—Charge to jury—All main points placed before jury—That one or two minor details were not placed is not such misdirection as to vitiate trial.

Where a Judge has in his charge carefully placed before the jury all the main points in the evidence, the fact that one or two minor details were not placed will not amount to such a misdirection as to vitiate the entire trial: *AIR* 1914 *P C* 116, *Ref.* [P 143 C 2]

(b) Criminal P. C. (1898), S. 297—Judge need not explain law on a point which does

not arise upon materials placed by prosecution and defence.

It is not necessary for a Judge in his charge to the jury to explain the law on a point which does not arise upon the materials placed before the Court by the prosecution and the defence.

[P 144 C 1]

Hamidul Huq Choudhuri—for Appellants.

Satindra Nath Mukerjee — for the Crown.

Judgment.—This appeal is by four accused persons. Accused Fazar Ali has been convicted under Ss. 147, 326/149 and S. 323, I. P. C., Kasimali under Ss. 148, 326/149 and under Ss. 323 and 325, I. P. C.; Abdul Aziz under Ss. 148 and 326, I.P.C. and Yonus under Ss. 148, 324 and 326/149, I. P. C. The accused have been sentenced to various terms of imprisonment on a unanimous verdict of a jury.

It appears to be perfectly clear that the facts of the case giving rise to the prosecution have been elaborately dealt with by the learned Sessions Judge in his careful charge to the jury and that all the salient features of the case for the prosecution as well as for the defence were placed before the jury with great care and attention. The defence case was laid before the jury in detail and all the main features of the defence so far as the evidence was concerned were placed before the jury by the learned Judge in his charge. After placing the material portions of the evidence before the jury, the learned Judge explained the law applicable to the case. The charge to the jury shows that S. 147, I. P. C., was explained to the jury in very great detail and the elements of the offence contemplated by that section were placed before the jury. With reference to the other sections arising for consideration in the case all the provisions of those sections had been explained by the learned Judge to the jury of which mention may be made of of Ss. 147 to 149 and to Ss. 321 to 326, I. P. C. The learned Judge's summary of the provisions of those various sections was definite and clear, and we are of opinion that nothing was left out which could be of real assistance to the jury in applying the law to the facts and circumstances of the case before them.

The learned advocate appearing for the appellants has, in the first place argued that the learned Judge's explanation of the law was not clear and that it had the effect of confusing the jury. As has been indicated already the learned Judge's charge to the jury so far as it related to the explanation of the law appears to us to be not one open to any just comment. The provisions of the law were carefully analysed by the learned Judge in his charge to the jury and in our opinion there was nothing left out in view of which it could be said that the jury had not the law applicable to the case explained to them in the proper way.

As to the other part of the Judge's charge, so far as it related to the placing of the evidence before the jury was concerned it appears to us that in view of the manner in which the learned Judge placed the evidence before the jury it is impossible to say that there was any misdirection in the charge. Reference has been made before us to matters of detail, and it has been argued that there were some matters which were not placed before the jury and to which the attention of the jury was not specifically drawn by the learned Judge. With reference to this it may be said that matters of detail which may appear to be of importance to the learned advocate for the accused may not be matters of such great importance taking the evidenee as a whole. As their Lordships of the Judicial Committee observed in the case of *Arnold* v. *Emperor* (1):

"In a protracted narrative of fact the determination of which is ultimately left to the jury, it must needs be that the view of the Judge may not coincide with the views of others who look upon the whole proceedings in black type. It would however not be in accordance either with usual or with good practice to treat such cases as cases of misdirection, if upon the general view taken, the case has been fairly left within the jury's province."

In the case before us all the main points in the evidence had been carefully placed before the jury, and the fact that one or two minor details to which reference has been made before us had not been placed before the jury would not amount to such a misdirection on account of which it could be said that the entire trial was vitiated. The learned advocate for the appellant laid stress upon the position that the learned Judge had not placed before the jury

1. AIR 1914 P C 116=23 I C 661=15 Cr L J 309=41 I A 149=41 Cal 1023 (P C).

the law relating to the right of private defence in the accused persons so far as person and property were concerned. According to the learned advocate that right had not been explained, and it would have been possible for the jury to come to the conclusion that the accused persons had the right of defence of person and property in them, if the law on the subject had been explained to the jury. It is to be noticed in this connexion that the whole of the defence case was placed before the jury, in detail; but on behalf of the defence no question of any right of private defence or defence of person and property was raised before the learned Sessions Judge. If upon the materials placed before the Court, by the prosecution and the defence there was no question of the right of defence of person and property which could possibly arise it was not necessary for the learned Judge to explain the law on the subject to the jury, to enable them to come to a conclusion on that question. As indicated above such a question was not involved in the case before the jury.

The learned advocate appearing for the appellants has stated in the course of his argument before us, that the sentence passed on the accused persons are very severe. We are unable to hold that on the facts and in the circumstances of the case and regard being had to the unanimous verdict of the jury there is any reason for our interfering with the sentences as passed by the learned Sessions Judge. The result is that the appeal is dismissed. The conviction of and the sentences passed on the accused appellants are upheld. The appellants must surrender to their bail and serve out the remainder of the sentences passed on them.

K.S. *Appeal dismissed.*

A. I. R. 1934 Calcutta 144

MALLIK AND PATTERSON, JJ.

Nagendra Bhakta — Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 73 of 1932, Decided on 5th August 1932.

Penal Code (1860), S. 201 — Corpse in particular place no evidence of commission of murder—Person removing it to another place is not guilty under S. 201.

To constitute an offence under S. 201 there must be disappearance of some evidence of the commission of an offence.

In a murder case, the corpse of the deceased was removed by the accused from a certain house to the verandah of a mosque.

***Held*: that the fact that the corpse was lying in the house was no evidence of the commission of murder and that accused were not guilty under S. 201 by such removal. [P 144 C 2]**

Nirmal Kumar Sen—for the Crown.

Mallik, J.—The appellants Nagendra Bhakta and Kamala Kanta Bala were put on their trial with three other persons, Jamini Bhakta, Rajani Bhakta and Kanchi Bewa, under Ss. 201 and 302/120-B, I. P. C. The trial was held with the aid of jury a consisting of 9 jurors. The jury unanimously found all the five persons not guilty under S. 302/120-B. They also unanimously found Jamini, Rajani and Kanchi not guilty under S. 201 either. But they found the other two accused persons, the two appellants before us, guilty under S. 201, I. P. C., by a majority of 7 to 2 in the case of Nagendra and 6 to 3 in the case of Kamala.

The allegations of the prosecution, so far as the charge under S. 201 was concerned were that one Provat Chandra Sarkar was murdered in the house of one Sarat Bhakta and the appellants Nagendra and Kamala with some other persons removed the dead body of Provat from Sarat's house to the verandah of a mosque with the intention of screening the offenders—persons who had committed the murder. It was the removal of the corpse from Sarat's house to the mosque which, according to the prosecution, constituted an offence under S. 201, I. P. C. Now to constitute an offence under S. 201 there must be disappearance of some evidence of the commission of an offence.

The offence that was committed in the present case was an offence of murder and the evidence that was caused to disappear was the fact that the corpse was lying at Sarat's house. This fact, namely that the corpse was lying at Sarat's house and at no other place, was no evidence of the commission of the offence of murder. It may be some evidence of where the offence was committed or who had committed it, but it was no evidence of the fact that a murder had been committed. It is not impossible to conceive of the commission of an offence apart from where and when and by whom it was committed. This

aspect of the case the learned Judge did not put to the jury in his charge, an aspect which in my judgment was a very important aspect in a case under S. 201, and I am very doubtful if the verdict of the jury would have been what it was if there had been no omission on the part of the Judge to put that important aspect of the case well before the jury in his charge. This omission, in my judgment, was a misdirection of prime importance and therefore vitiated the verdict of the jury. I would therefore allow the appeal and set aside the conviction and sentence of the two appellants. Both the appellants must be set at liberty at once.

Patterson, J.—I agree.

K.S. *Appeal allowed.*

A. I. R. 1934 Calcutta 145

MITTER AND HENDERSON, JJ.

Nishi Kanta Shaha Mondal and *others* —Judgment-debtors—Appellants.

v.

Kumar Promotha Nath Roy and *others* —Decree-holders—Respondents.

Appeal No. 173 of 1933, Decided on 23rd May 1933, from appellate order of Dist. Judge, Dacca, D/- 11th February 1933.

Civil P. C. (1908), S. 47 — Lessee under lease from judgment-debtor pending litigation is "representative."

A lessee inducted on the land by the judgment-debtor pending litigation is a representative of his judgment-debtor within the meaning of S. 47 and is bound by the decree passed against the judgment-debtor: *A I R* 1914 *Cal* 828, *Ref.* [P 145 C 2]

Jogesh Chandra Roy, *Gunada Charan Sen* and *Bankim Chandra Banerjee*—for Appellants.

Basak and *Asita Ranjan Ghose* — for Respondents.

Mitter, J.—A very forcible argument has been addressed to us by Mr. Jogesh Chandra Roy who appears for the appellants in this case. The appeal arises out of a proceeding in execution in a suit which was instituted so far back as the year 1921 and numbered as Suit No. 53 of that year. The present decree-holders seek to recover possession in execution of the decree in the said suit. They are resisted by tenants on the land who were inducted during the pendency of that litigation by Harendra Lal Roy Chaudhury who was defendant 1 in the suit of 1921. It is true that these tenants were no parties to that suit. An objection was taken to the execution of the decree by the tenants on the ground that there had been a subsequent suit which was numbered 675 of 1927 by which an exception was taken to the delivery of the lands in suit which were determined not to belong to the present decree-holders and in respect of which their claim was dismissed; and it is generally argued that the effect of the dismissal of the Suit No. 675 of 1927 is that the decree in respect of which execution has been sought for has been superseded and is no longer capable of execution. These objections seem to have prevailed with the Munsiff who has dealt with the matter in the fiirst instance. An appeal, however, was taken by the respondents to the Court of the District Judge of Dacca who has reversed the decree of the Munsiff.

Two grounds have been debated before us in support of the appeal on behalf of the present appellants. It is argued in the first instance that no appeal lay to the lower appellate Court as the application of the decree-holders was one which was purported to have been made under the provisions of O. 21, R. 97, Civil P. C., and as the present appellants were no parties to the suit the matter could not be dealt with as one between a party to the suit and the representatives of another party to that suit within the meaning of S. 47, Civil P. C. It is therefore sought to be argued that the lower appellate Court had no jurisdiction to entertain the appeal which was preferred to that Court. The answer to that contention is that it has been found by the lower appellate Court that these tenants were inducted on this land by Harendra Lal Roy Chaudhury during the pendency of the litigation. In other words leases were granted to them when this litigation of 1921 was pending. In this view it seems to us that these transferees were representatives of the judgment-debtor within the meaning of S. 47, Civil P. C. In the well known commentaries of the Right Hon'ble Sir Dinshaw Mulla or the Code of Civil Procedure at p. 156 of the last edition the learned author states thus:

"The term 'representatives' in this section includes not only 'legal representative,' in the

sense of heirs, executors or administrators, but also "representative in interest," that is any transferee of the decree-holder's interest, or any transferee of the judgment-debtor's interests who, so far as such interest is concerned, is bound by the decree."

As the transfers were made pendente lite there can be no question that the tenants appellants were bound by the decree which was obtained against the landlord Harendra Lal Roy Chaudhury. A distinction, however, was sought to be made by Mr. Roy on the ground that the cases on the basis of which this proposition is stated by the Right Hon'ble Sir Dinshaw Mulla are cases of either of absolute transfer or are not cases of lease. It appears, however, that the case of *Tara Prosanna* v. *Nilmani* (1) is a case of mortgage; and we do not see any distinction in principle between a transfer by way of sale, a transfer by way of mortgage or a transfer by way of lease. So far as the question of lis pendens is concerned, this ground of Mr. Roy therefore fails. The other ground taken is that the lower appellate Court has not put a proper construction on the decree of Suit No. 675 of 1927 in coming to the conclusion that the lands in respect of which execution is now sought for are not covered by any of the plots which were claimed in that suit. Mr. Roy has sought to argue this case as if a question was raised in this appeal as to the construction of the decree in the sense of legal effect. That, however, is not the case before us. (His Lordship after overruling the contention on the findings of facts concluded). The result is that both these grounds on which this appeal has been sought to be rested fail and the appeal is dismissed with costs. The hearing fee is assessed at two gold mohurs.

Henderson, J.—I agree. On the merits the appeal is concluded by the findings of the learned District Judge. He was not concerned with the construction of the decree. He was merely trying to find out the identity of the disputed land.

K.S. *Appeal dismissed.*

1. A I R 1914 Cal 828=25 I C 118=41 Cal 418.

A. I. R. 1934 Calcutta 146

MUKERJI, J.

Dharani Mohan Roy—Plaintiff—Appellant.

v.

Rajani Kanta Tarafdar and *others*—Defendants—Respondents.

Appeal No. 2375 of 1930, Decided on 22nd March 1933, against appellate decree of Addl. Sub-Judge, Khulna, D/- 28th April 1930.

Landlord and Tenant—Rent—Suspension—For application of principle, land dispossessed from should be proved to be part of tenancy and dispossession should be wrongful or tortuous.

F r he application of the principle of suspension of rent, it should be proved firstly that lands dispossessed from formed at one time or other part of the original tenancy and secondly that the act of dispossession was wrongful or tortuous. [P 148 C 1]

Gunada Charan Sen and *Jnan Chandra Roy*—for Appellant.

Urukramdas Chakravarty—for Respondents.

Ramendra Mohan Mazumdar—for Deputy Registrar.

Judgment.—The plaintiff is the appellant in this appeal. The appeal has arisen out of a suit which the plaintiff instituted for recovery of arrears of rent with cesses and damages for the years 1331 to 1334 in respect of certain lands and the claim was laid at an annual rental of Rs. 82 odd in plaintiff's eight annas share. Amongst the pleas that were taken on behalf of the defendants was a plea of suspension of rent on the ground of dispossession. The land which forms the subject-matter of this suit will be found depicted in the settlement map as being bounded on the north by a khal and on the east by a river. The controversy between the parties as regards dispossession relates to two plots marked 602 and 603 on that map. These two plots also as would appear on the map were bounded on the north by the khal and on the east by the river. The defendant's case is that they have been dispossessed by the plaintiff in respect of these two plots and inasmuch as the plots formed part of the original tenancy which was created by a kabuliyat Ex. A, so far back as in the year 1876, the plaintiff is not entitled to recover any rent from them.

The Munsif found that the said two plots were not covered by the kabuliyat. He accordingly found that there was no

evidence to satisfy him that the plaintiff had dispossessed the defendants from any part of the rent lands. It seems that in the course of argument before the trial Court it was urged on behalf of the defendants that as these two plots had accreted to the rent lands, the defendants were entitled to possess them treating them as accretions, but that the plaintiff had prevented the defendants from doing so and that therefore, there should be an order for suspension of rent. This argument also was overruled by the Munsif because he was not satisfied that the defendants ever attempted to possess the lands after they had accreted and furthermore because the defendants had been paying rent without protest for a long time ever after the lands had accreted. In this view of the facts, the Munsif held that the rent claimed in the suit should not be suspended. He then dealt with the question as regards the amount of rent that was to be decreed and relying upon the terms in the kabuliyat under which the contract had been created between the parties and which were to the effect that in case of increase or decrease in area of the lands covered by the kabuliyat as would be found on measurement by a particular standard the defendants would be liable to pay increased rent or would be entitled to abatement of rent and giving effect to these terms, the Munsif held that on the quantity of lands which would be found on such calculation, Rupees 154-8-0 would be the rent for the 16 annas share of the lands and accordingly the rent in the plaintiff's eight annas share would be Rs. 77-4-0. From this, the Munsif deducted certain charges which under the terms of the kabuliyat the defendants would be entitled to and he came to the conclusion that the suit should be decreed at the rate of Rs. 57-15-0 per year as rent together with cesses and damages. That was the decree which the Munsif made.

From this decision, an appeal was taken by both the parties. In the plaintiff's appeal, the question raised was as regards the rate of rent that had been assessed for the lands. In the appeal which the defendants preferred they assailed the conclusion of the Munsif that there should be no suspension of rent. The Subordinate Judge allowed the defendants' appeal and dismissed the plaintiff's appeal as well although he was not prepared to record any conclusion upon the question that was raised therein. Indeed, it was not necessary for him to deal with the latter appeal because he came to the conclusion that the entire rent should be suspended and that this was not a case in which the ends of justice would be met by ordering a reduction or abatement of rent in respect of the portion of which the defendants had been dispossessed. The present appeal, as already stated, has been preferred by the plaintiff.

The decision of the learned Subordinate Judge which has been placed before me does not seem to me to be one which can on any ground be supported. All that he has been able to find is that there is no satisfactory evidence that the two plots of land in respect of which dispossession was complained were char lands which had formed by the silting up of the khal or of the river by which they were bounded on the north and the east respectively. What the learned Judge had to find in the first place, if he was to give effect to the plea of suspension on the ground of dispossession was that the two plots of land from which the defendants said they had been dispossessed were lands which at one time or other formed part of the original tenancy. It is plain that the plea is a plea which the defendants set up and that in order that the defendants may be able to get the benefit of it, it is necessary that they should establish that these two plots of land formed part of the said tenancy. The learned Judge has not approached the case from that point of view. He has compared the boundaries of the kabuliyat with the boundaries of the lands in respect of which dispossession was complained of and on a comparison of the boundaries he has found that the northern boundary is Haldar Khali khal and the eastern boundary is Jamna river and from that fact alone he has held that prima facie, the two plots of land appertained to the defendants' jama which extended right up to Haldar Khali khal on the north and the river on the east. I am unable to appreciate how upon these materials the learned Judge could come to such a conclusion. The boundaries being on the north a khal and on the east a river

they would apply equally well to a position in which the two plots were not in existence just as well as if those plots were in existence at the time when the kabuliyat was executed.

The first element mentioned above, that has got to be established in order to make out a case of suspension of rent, in my opinion, has not been established in this case. Then there is the question as to whether there has been such a dispossession as would entitle the defendants to claim suspension of rent. It is not any and every act of dispossession by a landlord which ought to be penalized by the enforcement of this principle. A wrongful or tortuous act of dispossession is necessary in order that the principle may be applied. There is no finding going anywhere near such a position. In these circumstances, it is impossible to uphold the decision of the learned Subordinate Judge which seems to have proceeded on the ground that as soon as it is found that the portion of land adjoining a certain tenancy is in the possession of the plaintiff landlord and the plaintiff landlord is not able to show that it was outside the tenancy originally created, the defendants would be able to claim suspension of rent and that their prayer in that respect should be granted.

The next question that arises is as to whether the proper course in this case to adopt would be to order a fresh investigation with regard to the facts of the case. It is quite clear that if a fresh investigation has to be made it will have to be made upon two points: Firstly, the point which arose upon the plaintiff's appeal to the lower appellate Court and which has not been dealt with by the Subordinate Judge, namely, the point relating to the question of rate of rent; and secondly, the question which arose upon the defendants' plea, namely, the plea of suspension of rent, the point being as to whether in the first place these two plots of lands formed part of the original tenancy created by the kabuliyat Ex. A and nextly, whether there has been any wrongful or tortuous act of dispossession on the part of the plaintiff such as would disentitle him to recover rent so long as he did not restore possession to the defendants. The plaintiff says that he is not particularly anxious to have the rate of rent agitated in the present suit if the question as regards the rate of rent be left open. The defendants on the other hand have pressed for a remand. I do not think that this is a case in which the present litigation should be protracted any further.

In this view of the matter, I am of opinion. that the proper order to make in this case would be to allow the appeal, to set aside the decision of the Subordinate Judge and to restore that of the Munsif as a decree for rent in respect of the years 1331 to 1334 and for those years only. The question as regards the rate of rent will be left open and the plaintiff will be at liberty to agitate the same question in a future litigation in which he considers it necessary to raise. The defendants also will be entitled to raise the question of suspension of rent should they be so advised in any suit for rent that may be instituted against them for any subsequent period. With this reservation, the decree of the trial Court is restored and with costs in this Court and in the Court of appeal below to the extent of the plaintiff's success in this litigation.

K.S. *Appeal allowed.*

A. I. R. 1934 Calcutta 148

GUHA AND BARTLEY, JJ.

Sudha Mukhi Debi—Plaintiff—Appellant.

v.

Chairman of Commissioners of the Tollygunge Municipality—Defendant—Respondent.

Appeal No. 749 of 1931, Decided on 7th July 1933, from appellate decree of 3rd Court Sub-Judge, 24-Parganas, D/- 5th November 1930.

Bengal Municipal Act (1884), Ss. 361 and 363—Sale under S. 361 not completed—Possession not delivered—Purchaser is entitled to claim refund of purchase money—No notice is necessary to such a suit—Suit is governed by Limitation Act (1908), Art. 97.

There is nothing contained in the Bengal Municipal Act, 1884, which militates against a sale held under S. 361 of that Act being completed under the law, and the possession of the property being given to the purchaser, from whom purchase money has heen received by the Municipality. If the sale is not completed and possession not delivered to the purchaser, he is entitled to get refund of the purchase money with damages. To such a suit Art. 97, Limitation Act, is applicable. No notice under S. 363 is necessary in such a case as the section is applicable only in those cases where the plainti

claims damages or compensation for some act done in the exercise of, or honestly supposed exercise of, statutory powers. [P 149 C 1, 2]

S. C. Basu and *Phanindra Nath Das* —for Appellant.

Syed Nasim Ali and *Syed Farhat Ali* —for Respondent.

Judgment.—This appeal by the plaintiff in a suit for refund of money paid by him for the purchase of property, and which purchase could not be, and was not, completed by the defendant and of which possession could not be delivered, for the reason that the property became non-existent, must be allowed. The defendant was not either under law or equity entitled to retain the money paid by the plaintiff for purchase of property, without taking any step for completing the sale, and for putting the plaintiff in possession of the property sold.

There is nothing contained in the Bengal Municipal Act, 1884, which militates against a sale held under S. 361 of that Act being completed under the law, and the possession of the property being given to the purchaser, from whom purchase money has been received by the Municipality. The sale not having been completed in the case before us, and possession not having been delivered, the plaintiff he was entitled to get refund of the purchase money with damages as claimed in the suit. The question of limitation as raised by the defendant in the suit must be, on the facts of the case, decided against the defendant. The purchase money was paid on 16th June 1925; the defendant asked the plaintiff to send necessary stamped papers for a conveyance, and the plaintiff sent the stamped papers on 5th January 1926; subsequently on 16th March 1929, the defendant informed the plaintiff that the conveyance could not be executed. The defendant failed to deliver possession of the property on repeated demands made by the plaintiff; and the plaintiff failed to obtain delivery of possession when he attempted to do so on 29th March 1929. The suit for refund of purchase money, out of which this appeal has arisen, was instituted on 17th May 1929. The suit was not therefore barred by limitation. The case is one to which Art. 97, Sch. 1, Limitation Act, is clearly applicable. It has been held by the Courts below that no notice under S. 363, Bengal Municipal Act, 1884, was necessary in the case of the present nature.

According to the trend of authorities bearing upon the subject, the section is applicable only in those cases where the plaintiff claims damages or compensation for some act done in the exercise of, or honestly supposed exercise of, statutory powers; and not in a case where there was no statutory power to refuse to complete a sale held under S. 361 of the Act, and put the purchaser in possession, or to refuse the refund of the purchase money on non-completion of the sale. In the above view of the case before us, the appeal is allowed, the decision of the Court of appeal below is set aside, and the decision and decree of the trial Court passed in favour of the plaintiff appellant are restored. The appellant is entitled to get his costs in the litigation, including the costs in this appeal, from the respondent.

R.K. *Orāer accordingly.*

A. I. R. 1934 Calcutta 149

GUHA AND BARTLEY, JJ.

Prosanna Kumar Halder—Appellant.

v.

Girish Chandra Ghose—Respondent.

Appeal No. 1554 of 1932, Decided on 10th April 1933.

(a) Mortgage— Usufructuary — Mortgagee not calling upon mortgagor to furnish additional security for 21 years — Mortgagee is deemed to have acquiesced in diminished security and is not entitled to interest on account of portion dispossessed.

A usufructuary mortgagee, if he does not take steps in time (for 21 years) calling upon the mortgagor to furnish additional security by way of compensation and for the purpose of reimbursing himself to the extent of his loss, if any, the mortgagee would be deemed to have acquiesced in the diminished security, and cannot therefore claim interest on the mortgage money on account of dispossession from a portion of mortgaged premises: 24 *All* 521 (*P C*), *Relon.* [P 150 C 2]

(b) Mortgage— Usufructuary — Mortgagor cannot claim credit for rent unless actually paid by him.

The usufructuary mortgagor cannot get credit for any rent payable to landlord on account of the mortgaged properties which are not actually paid by him. [P 150 C 2]

Bankin Chandra Mukerji, Sarat Chandra Janah and *Basanta Kumar Mukerji* —for Appellant.

Gunada Charan Sen, Pyari Mohan Chatterji, Krishna Lal Bannerji, Bankim Chandra Roy, Dasarathi Chatterji and *Bibhuti Bhusan Basu*—for Respondents.

Judgment.—This is an appeal by the defendant mortgagee in a suit in which the plaintiffs sought to exercise their right of redemption in regard to five usufructuary mortgages, four of them executed in the year 1898, and the fifth in the year 1904, by one Dwarika Nath Ghose, the predecessor-in-title of the plaintiffs. According to the plaintiffs the mortgagee was in possession of the mortgaged properties consisting of several items, in lieu of interest as stipulated in the mortgage bonds; the mortgagee in possession was to get interest on the mortgage money at the rate mentioned in the mortgage bonds, if the mortgagor failed to deliver possession of the mortgaged properties; there was the further stipulation contained in the mortgage bonds that the mortgagee was to pay the rent payable in respect of the mortgaged properties to the landlords concerned, out of the profits derived from the mortgaged properties. The allegation of the plaintiffs was that rents payable by the defendant were not paid by him. There was a prayer made in the suit for redemption of the mortgaged properties after account has been taken of the dues of the parties in respect of the five mortgages in suit according to the stipulation contained therein. The main defence of the defendant was that he did not obtain possession of some items of property covered by the mortgages in suit and that he was therefore entitled to get interest on account of the mortgagor having failed to give him possession, or having dispossessed him from a portion of the properties mortgaged on the proportionate amount of the mortgage money which was charged on the properties from which there was dispossession. In regard to rents payable to landlords the defendant's case before the Court was that he had paid the same in terms of the mortgage bonds and that the plaintiffs could not get credit for amounts payable as rents unless they proved that payment was made by them.

The Court of appeal below has held that the fact of dispossession or failure to put the mortgagee in possession of a portion of the properties mortgaged was made out, but that at no time within the long period of 21 years after the alleged dispossession did the defendant take any step to require the mortgagor to give any additional security for the mortgage-debt and did not sue for the mortgage money. It was clear therefore that the mortgagee remained satisfied with the diminished security in his possession and having acquiesced it was not therefore open to him to claim interest in lieu of the rents and profits of the portion of the mortgaged properties of which he was not in possession. The position indicated by the learned Judge in the Court below, that the mortgagee, if he does not take steps in time, calling upon the mortgagor to furnish additional security by way of compensation and for the purpose of reimbursing himself to the extent of his loss, if any, the mortgagee would be deemed to have acquiesced in the diminished security, and could not therefore claim interest on the mortgage money on account of dispossession from a portion of the mortgaged premises, is amply borne out by authority of the decision of their Lordships of the Judicial Committee of the Privy Council in the case of *Raja Partab Bahadur Singh* v. *Gajadhar Baksh* (1). The question arising for consideration next is whether the contention of the defendant-appellant in regard to the rents payable to the landlords in respect of the mortgaged properties could be given effect to. It appears to be in consonance with principles of justice, as also with the equities involved in the case before us that the plaintiffs cannot get credit for any rent payable on account of the mortgaged properties which were not actually paid by them or the predecessor in-title, Dwarka Nath Ghose, by whom the mortgages in suit were executed.

A further question requires consideration in view of the cross-objection preferred by the plaintiffs-respondents in the appeal. It would appear from the direction given by the Courts below in the matter of accounting that the right of the mortgagors to get credit for the usufruct of the properties in possession of the mortgagee with interest thereon at the current market rate which the plaintiffs seek to redeem, has not been kept in view. In our judgment there can be no doubt that it may be found in the course of accounting that the several mortgages stood redeemed one by one,

1. (1902) 24 All 521=29 I A 148 (P C).

at different dates, in view of the appropriation of profits by the mor gagee so far as the properties in his possession were concerned. The position taken up by the plaintiffs-respondents in this behalf in their memorandum of cross-objections before this Court has to be accepted. In the above view of the case, the decree passed by the Court below requires modification, and we direct that a self-contained decree be prepared in this Court giving effect to our decision.

The plaintiffs' suit is disposed of in the manner following: The plaintiffs are entitled to a decree for redemption. An account is to be taken of the amount which the plaintiffs may have to pay to the defendant on the footing of the five mortgages mentioned in the plaint; the defendant has to account for the usufruct or the profits out of the properties in his possession on the strength of those five mortgage bonds. As to the rents payable to the landlords in respect of the mortgaged properties, the accounting will be on the basis that the plaintiffs are not entitled to get credit for any amount which has not been paid by them or by their predecessor-in-interest, the original mortgagor, Dwarka Nath Ghose. In order to get credit for rents in respect of the mortgaged properties, the plaintiffs are to establish what amount was actually paid by them or their predecessor-in-interest, and they will get credit for that amount, and not for the amount of rent which should have been paid by the defendant, as mentioned in the order portion of the judgment of the trial Court. The costs of the litigation up to the present stage, including the costs in the appeal and the cross-objection, will be awarded by the trial Court to the parties concerned, according to the discretion of that Court. The appeal and the cross-objection filed by the respondents in this appeal are allowed to the extent indicated above, the decree of the Court below being modified.

R.K. *Decree modified.*

A. I. R. 1934 Calcutta 151

MUKERJI AND NAG, JJ.

Secy. of State — Defendant—Appellant.

v.

Ramdhan Das Dwarka Das Firm—Plaintiff—Respondents.

Appeals No. 259 of 1929 and 49 of 19 0, Decided on 27th June 1933, against original decrees from Addl. 3rd Court Sub-Judge, 24 Parganas, D/- 27th April 1929.

(a) Railways Act (1890), Ss 72 and 76—Railway company need only prove that it has taken every reasonable care—As to how actual loss has happened need not be proved but all material evidence available should be placed before Court—Standard of care to be taken by company is what a man of ordinary prudence would take of his own goods under similar circumstances—Contract Act (1872), S. 151.

It would be enhancing the burden of proof upon a railway company to an absurd extent if it has to prove not only that it has taken every reasonable care but also that it knew how the loss had happened. Where it cannot assign the cause of the loss it may always give "evidence to prove, if it can, that although unknown, the cause must have been external to itself and beyond its control. Failing that to exonerate itself, it, would have to prove that while unknown and in all probability attributable to itself the cause was of such a nature that it could not have foreseen and prevented it by taking all reasonable care and procaution. Hence it is for the company to place all material evidence that may be available before the Court and if there is failure on its part in this respect the plaintiff may ask the Court to presume that if produced such material would have gone against the company and upon such materials as may be produced by the company the plaintiff has to show as all plaintiffs must in order to establish a liability on the company, that there was want of diligence or that there was negligence on the part of the latter or its servants or agents, or, in other words, that the requirements of S. 151 of Contract Act, have not been fulfilled. And the standard of care that has to be taken by the company is what a man of ordinary prudence would take of his own goods in similar circumstances: *Case law referred.* [P 153 C 2, P 154 C 2]

(b) Contract Act (1872), S. 151—Gratuitous bailee and bailee for hire should take same amount of care.

Section 151 makes no reference to distinction between a gratuitions bailee and a bailee for hire as in English law. Both have to exersise the same amount of care, viz. what a man of ordinary prudence would take of his own goods in similar circumstances. [P 154 C 2]

(c) Contract Act (1872), S. 151—Gratuitous bailee is responsible for negligence of his agent or servants committed in course of employment—Railways Act (1890), S. 72.

A bailee is responsible for the negligence of his agents and servants committed in the course of their employment, but not on acconnt of an

unauthorised act done outside the course of their employment. [P 155 C 1]

S. C. Basak and *Nasim Ali*—for Appellants.

Bimala Charan Deb Tarakeswar Nath Mitra and *Hiralal Ganguly*—for Respondents.

Judgment.—These two appeals and the application in revision have arisen out of three suits which were instituted for recovery of damages for non-delivery of goods, which were entrusted for carriage to the Eastern Bengal Railway. Appeal No. 259 of 1929, has arisen out of Suit No. 3 of 1929, Appeal No. 49 of 1930 out of Suit No. 1 of 1929. and the revision petition out of Suit No. 7 of 1929. Suit No. 3 was instituted in respect of 285 half-bales of jute consigned on 16th March 1927 from Station Bogra to be delivered at the Cossipore Road Station. Suits Nos. 1 and 7 were for damages for loss of 82 half-bales and 20 half-bales of jute, respectively, consigned on 17th March 1927 from Station Sitalda for the same destination. In Suit No. 3 it was alleged that on 21st March 1927 the agent of the plaintiffs in that suit paid down the freight and obtained tickets and gate passes but no delivery could be had. In Suits Nos. 1 and 7 it was alleged that on 20th and 21st March 1927 attempts were made to obtain delivery but without success. The claims laid in the suits were: Rs. 5343-12-0 in Suit No. 3, Rs. 13,83-12-0 in suit No. 1 and Rs. 360 in Suit No. 7.

The defence, so far at it is necessary to be stated at this stage, was to the effect that at about 13-40 hours (railway time) on 21st March 1927, when the goods of these consignments, along with a large number or other bales of jute, were lying stored in Shed No. 8 of the Cossipore Road Station, a fire accidentally broke out: that the fire was not due to any negligence on the part of the railway administration or its servants; that every effort was immediately made to extinguish the fire, but notwithstanding the same only 17 bales of jute could be saved; that the salvaged jute was thereafter removed to the extension yard of the station in order to be dried; that in that yard another accidental fire broke out on 2nd April 1927 at about 15-15 hours (railway time) inspite of every precaution taken against such fire and every effort made to quench it. The Subordinate Judge decreed the suits for the price of the jute and also for the freight paid as claimed in Suit No. 3 and as regards Suits Nos. 1 and 7 on calculating the price of jute at a slightly lower rate than what was claimed.

Before dealing with the facts it would be convenient to say a few words about the law to be applied. Sub-S. (1) of S. 72, Railways Act, 1890, makes the railway administration liable as bailees under Ss. 151, 152 and 161, Contract Act, 1872. S. 151, Contract Act, requires a bailee to take as much care of the goods bailed to him as a man of ordinary prudence would under similar circumstances take of his own goods of the same bulk, quality and value as the goods bailed. S. 152 makes the bailee, in the absence of a special contract, not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in S. 151. And *S.* 161 makes the bailee responsible for delivery or tender at the proper time of the goods bailed and in default makes him liable for any loss, destruction or deterioration thereof from that time. Along with S. 72, Railways Act, one has to read S. 76 of that Act which lays down that in any suit against a railway administration for compensation for loss, destruction or deterioration, it shall not be necessary for the plaintiff to prove how the loss, destruction of deterioration was caused. Sub-S. (3), S. 72, Railways Act, excludes the operation of the Carriers Act (3 of 1865) and of the principles of the Common Law of England with respect to the carriage of animals and goods by railway in this country. The primary question in all cases of this sort, having regard to S. 72, Railways Act, read with Ss. 151 and 152, Contract Act, obviously is : Has the Railway Company taken as much care of the goods as a man of ordinary prudence would under similar circumstances take of his own goods of the same description—in bulk, quality and value.

As regards burden of proof, the three classes of suits have to be kept apart from each other: one, dependent entirely upon Ss. 151 and 152, Contract Act; another in which S. 9, Carriers Act has to be borne in mind; and the third, within which category the present suits fall, in which not only Ss. 151 and 152, Contract

Act, but S. 76, Railways Act, also have to be applied. So far as the class of suits last mentioned is concerned : Scott, C. J., in the case of *Lakhmi Chand* v. *G. I. P. Ry.* (1) at p. 11 observed that S. 76, Railway Act, is not by any means the same in terms as S. 9, Carriers Act, and it should not be read as increasing the onus of proof laid upon a bailee by S. 151, Contract Act. The learned Chief Justice was inclined to take the view that the section may have been enacted to make it clear that a suit against a Railway Company was to be regarded as an action for breach of contract and not an action in case. Batchelor, J., and Robertson, J., in the same case seem to have been inclined to the view that S. 76, Railways Act, by taking away from the plaintiff the burden of proving how the loss, destruction or deterioration was caused, has recognized the principle that loss, destruction or deterioration itself in prima facie evidence that due care was not taken, because the goods were in defendant's sole possession and he ought to be able to account for the loss destruction or deterioration. In the view taken by the learned Judges, this presumption or inference of negligence may be rebutted or repelled on behalf of the railway administration. The foundation of this presumption was explained in the case of *Phipps* v. *New Claridge's Hotel Ltd.* (2), in which it was said that where goods are given into the sole custody of a person and accepted by him as bailee and they are lost while in his custody, the onus lies on him to show circumstances negativing negligence on his part, and Bray, J., observed :

> " No such evidence had been placed before him. The story which their witnesses told he could not accept, and he must therefore hold that they had not proved that reasonable care was taken and must come to the conclusion that there was negligence on their part."

In a large number of other cases it has been held by Indian Courts that loss or damages of goods entrusted to a bailee is prima facie evidence of negligence and the burden of proof to disprove negligence lies on the bailee and that this burden also lies on a railway administration in the absence of a special contract to the contrary (see *Nanku Ram* v. *Indian Midland Ry. Co.* (3); *Surendra Lal* v. *Secy. of State* (4), *Hirji Khetsey & Co.* v. *B. N. W. Ry. Co.* (5). In a case of loss due to fire which originated from an unknown cause the Judicial Committee observed that the defendants had not exonerated themselves from the onus cast upon them of showing that the fire originated from causes over which they had no control and could not have been expected to have had control : *River Steam Navigation Co.* v. *Choutmull* (6). But, as has been observed in the case of *Bullen* v. *Swan Electric Engraving Co.* (7) it would be enhancing the burden of proof upon a defendant to an absurd extent if he has to prove not only that he has taken every reasonable care but also that he knew how the loss had happened. Their Lordships, in *River Steam Navigation Co.* v. *Choutmull* (6) therefore could not have meant that even though the Court is satisfied that there was due care on the part of the bailee the bailee would be liable if he cannot account for the cause of the fire. What is necessary, as pointed out in the case of *Hirji Khetsey & Co.* v. *B. N. W. Ry. Co.* (5) is :

> " Where a bailee cannot assign the cause of the loss he may always give evidence to prove, if he can that although unknown, the cause must have been external to himself and beyond his control. Failing that to exonerate himself, he would have to prove that while unknown and in all probability attributable to himself the cause was of such a nature that he could not have foreseen and prevented it by taking all reasonable care and precaution,"

The Judicial Committee in the case of *Dwarkanath* v. *Rivers Steam Navigation Co. Ltd.* (8) has pointed out that under S. 106, Evidence Act, when a fact is especially within the knowledge of any person the burden of proving that fact lies on him, and in that way the bailee may be bound to place before the Court all material witnesses who were on the spot, but that this provision of the law of evidence does not discharge the plaintiff from proving the want of due diligence or (expressing it otherwise) the negligence of the defendant or his servants. Their Lordships in that case appear to have overruled the view which the trial Judge in that case had propounded, namely, that it was for the defendant company to satisfy him that

1. (1913) 37 Bom 1=14 I C 793.
2. (1905) 22 T L R 49.
3. (1900) 22 All 361=1900 A W N 111.
4. (1917) 38 I C 702.
5. (1917) 39 Bom 191=25 I C 241.
6. (1899) 26 Cal 398=26 I A 1 (P C).
7. (1907) 23 T L R 258.
8. AIR 1917 P C 173=46 I C 319 (P C).

they had taken as much care of the goods as a man of ordinary prudence would take of his own goods, and their Lordships expressly said that that was not a correct statement of the law. Their Lordships said further :

"It may be for the company to lay the materials before the Court ; but it remains for the plaintiff to satisfy the Court that the true inference from those materials is that the servants of the defendant company have not shown due care, skill and nerve."

It must be admitted that it is not easy to reconcile this decision with other pronouncements of no lesser authorities, to some of which reference has been made above, but the principle enunciated in it is there and must be applied. The result of the case law therefore seems to be that S. 76, Railways Act, does no more than take away from the plaintiff a burden which in any case lies upon the defendant under S. 106, Evidence Act, namely to prove facts which are within his special knowledge and adds no new burden on the latter; that it is for the defendant to place all material evidence, that may be available before the Court, and if there is failure on the defendant's part in this respect the plaintiff may ask the Court to presume that if produced such material would have gone against the defendant; and that upon such materials as may be produced by the defendant the plaintiff has to show, as all plaintiffs must, in order to establish a liability on the defendant, that there was want of diligence or that there was negligence on the part of the latter or his servants or agents, or, in other words, that the requirements of S. 151, Contract Act, have not been fulfilled.

Another question is: What is the standard of care that has to be taken by the bailee under S. 151, Contract Act. Very learned arguments have been addressed to us on both sides on this question. Lord Holt's classification of Bailments under six heads in the celebrated case of *Coggs* v. *Bernard* (9) and Storey's classification of them under three heads on the basis of the character of the trust reposed (see Story on Bailment, S. 2) would not help us here. As regards the amount of care required of bailees in English law it was said in the case of *Beal* v. *South Devon Railway* (10):

"For all practical purposes the rule may be stated to be that the failure to exercise reasonable care, skill and diligence is gross negligence. What is reasonable varies in the case of a gratuitous bailee and that of a bailee for hire..

From the former, is reasonably expected such care and diligence as persons ordinarily use in their own affairs and such skill as he has. From the latter is reasonably expected care and diligence, such as are exercised in the ordinary and proper course of similar business, and such skill as he ought to have, namely the skill usual and requisite in the business for which he receives payment. The Indian legislature in S. 151, Contract Act, makes no reference to the distinction between a gratuitous bailee and a bailee for hire, and, omitting all reference to skill, lays down for both one standard, namely, as much care as a man of ordinary prudence would take of his own goods in similar circumstances. The standard therefore must, while it is one and the same so far as it is a question of principle, cannot be formulated by an inflexible practical rule applicable to all cases.

To show what the standard ought to be, a number of English authorities have been cited before us on behalf of the appellant. These authorities it must be admitted are not always consistent, and moreover they have to be, if at all, relied on with great caution, in view of the difference that exists between the two systems of law. The case very strongly relied on behalf of the appellant is *Giblin* v. *McMullen* (11). The view of the facts taken in that case was that the precautions taken were not such as any reasonable man might not properly have considered amply sufficient. It has to be noted that that was a case in which plaintiff had put his debentures into a box which he kept with the bank as gratuitous bailees, and that box along with boxes of other customers was kept in a strong room in which the bank's own securities used to be kept in a box called the manager's box, and the cashier of the bank, against whom there had been nothing before, suddenly turned dishonest one day, and taking advantage of an opportunity which presented itself, abstracted the plaintiff's debentures. It was held on the facts that this opportunity could never have been prevented by the bank by taking any amount of pre-

9. (1704) 1 Sm L C 187.
10. (1864) 3 H & C 337.
11. 2 C P 317=5 Moore P C 434=38 L J P C 25 =21 L T 214=17 W R 445.

cautionary measures, and in any event of reasonably prudent man would ordinarily have thought of taking any greater precaution than what the bank had done.

In connexion with this question it has also been argued that the responsibility of the bailee ends with employing men in his service with reasonable care and if these servants eventually turn out to be negligent the bailee must be regarded as satisfying the requirements of S. 151, Contract Act. This matter does not seem to have been expressly provided for in the Act or discussed in any reported decision. But in our judgment, to hold that the bailee is not responsible for the negligence of his agents and servants, committed in the course of their employment, would be to reduce the bailee's liability to an absurdity. There is no question that under the English law bailees are liable for negligence on the part of their agents or servants committed in the course of their employment, about the use and custody of the thing bailed, but not on account of an unauthorized act done outside the course of their employment : *Sanderson* v. *Collins* (12) and *Cheshire* v. *Bailey* (13). In our opinion it was never intended that it should be otherwise under the law in this country. It has been argued on behalf of the appellant that S. 15, Trust Act, is worded very much in the same way as S. 151, Contract Act, and that it cannot be imagined that if a trustee employs a servant with reasonable care, and eventually through the negligence of that servant some loss is caused the trustee should be made liable. It would be sufficient for us to say that we do not see anything inherently wrong to make a trustee liable in such circumstances.

In a case of the present description therefore two questions primarily arise: 1st, what is the degree of care that the railway administration has taken with regard to all consignments generally which may be similarly placed; and second, what care has it taken with regard to the particular consignment. Each of these questions again has two branches, one with reference to the duty of taking all reasonable precautions to obviate the risk of loss, and the other with reference to the duty of taking all proper measures for the protection of the goods when such risk has already occurred. To deal with these questions we shall in the first place confine our attention to the first occurrence namely the fire of 21st March 1927.

Before dealing with the facts it is necessary to refer to an argument which the respondents have put forward, namely that the railway authorities have not dealt with them fairly and have shown considerable unwillingness to disclose the real state of facts in answer to their queries. We are not prepared to attach any importance to this matter because it is evident that at the time when these inquiries were made, litigation was in sight and it was only natural that the railway authorities should have felt an inclination to avoid being drawn into a controversy which might oblige them to make some sort of statemeut which might be construed as an admission on their part. (After examining the evidence in the case, his Lordship held that such care as would fulfil the requirement under S. 151, Contract Act, was not taken and that there was gross negligence on the part of the railway people to which the fire of that day must be attributed. The judgment then concluded). On the whole, we can see no reason to differ from the conclusions which the Subordinate Judge has arrived at in these cases. The appeals and the revision petition are accordingly dismissed. In the appeals the respondents will be entitled to their costs. In Appeal No. 49 of 1930, hearing-fee is assessed at three gold mohurs and in the other appeal, viz. Appeal No. 259 of 1929, hearing-fee will be according to scale. There will be no order for costs in the revision petition.

K.S. *Appeals dismissed.*

12. (1904) 1 K B 628=73 L J K B 358=90 L T 243=52 W R 354=20 T L R 249.
13. (1905) 1 K B 237=74 L J K B 176=21 T L R 130=53 W R 322=92 L T 142.

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MUKERJI AND NAG, JJ.

Sachindra Kumar Roy and *others* — Defendants—Appellants.

v.

Nabendra Kisore Roy — Plaintiff — Respondent.

Appeal No. 319 of 1929, Decided on 15th May 1933, from original decree of Sub-Judge, Noakhali, D/- 23-8-1929.

(a) Specific Relief Act (1877), S. 42 — Revenue Board refusing to undertake partition under Estates Partition Act — Right to partition not negatived and order not made without jurisdiction or ultra vires of statute —Declaration that estate is liable to partition cannot be granted by civil Court — Bengal Estates Partition Act (5 of 1897), S. 7.

An order was passed by the Revenue Board refusing to undertake partition of an estate under the Estates Partition Act. The right to partition as such was not negatived, nor was the order made without jurisdiction or ultra vires of the Act:

Held : that a suit for a declaration that the estate was liable to partition was not maintainable as that right was not disputed by the revenue authorities but only the expediency of the partition, and that the civil Court could not compel the revenue authorities to undertake the partition: *Case law referred.*

[P 158 C 2]

(b) Specific Relief Act (1877), S. 42 — Suit for mere declaration that certain order passed by Revenue Board is without jurisdiction is competent.

A suit for a mere declaration without any consequential relief, that certain order passed by the Revenue Board was without jurisdiction and ultra vires of the statute under which it was passed, is competent. [P 158 C 2]

(c) Bengal Estates Partition Act (5 of 1897), Ss. 7, 77 and 82 — Whether revenue authorities should or should not enforce partition is not question of title and jurisdiction of civil Court is ousted — Jurisdiction.

Broadly speaking, the provisions of the Estates Partition Act read together have purported to exclude the jurisdiction of civil Court from cases which involve questions of land revenue, questions of costs, and questions which require the exercise of discretion on the part of the revenue authorities, as regards the mode of partition and its details, and that in matters involving questions of title the jurisdiction of civil Courts is not ousted at all. While the question whether the estate is liable to partition under the Estates Partition Act involves a question of title, the question whether the revenue authorities should or should not enforce that right by undertaking such partition cannot be said to be a question of title. [P 159 C 1]

(d) Bengal Estates Partition Act (5 of 1897), Ss. 7 and 77—Conflict of jurisdiction between civil Courts and revenue authorities should be avoided—Jurisdiction.

In matters arising under the Estates Partition Act the jurisdiction of the civil Courts and the revenue authorities are in many instances concurrent, and a conflict of jurisdiction between the two should manifestly be avoided, and the authorities must necessarily have to act in such a way that the jurisdiction of each should be stayed or restricted by action already taken by the other. [P 159 C 1]

(e) Specific Relief Act (1877), S. 42 — Claim for declaratory decree is not matter of right.

Under S. 42 a claim for a declaratory decree is not a matter of right but rests with the judicial discretion. [P 161 C 1]

Naresh Chandra Sen Gupta and *Nagendra Chandra Choudhury*—for Appellants.

Panchanan Ghose, Sachindra Kumar Roy and *Durgadas Roy* — for Respondent.

Mukerji, J.—The plaint in this suit out of which this appeal has arisen was headed as

"under the provisions of the Civil Procedure Code, a petition praying for relief by way of a declaration cancelling the order of the Revenue Court that a revenue paying estate is not liable to partition."

The plaintiff is the owner of an eight annas share, and the defendants are the owners of the other eight annas share of an estate, bearing Towji No. 41 of the Noakhali Collectorate and named Kharija Taluk Gour Kishore Roy. The plaintiff applied to the Collector for partition of the estate under the Estates Partition Act (5 of 1897). To this the defendants objected on the ground of S. 7 of the Act, namely, that the lands of the estate had already been divided by private arrangement formally made and agreed to by all the proprietors, and each proprietor has, in pursuance of such arrangement, taken possession of separate lands to be held in severalty as representing his interest in the estate. The Collector and the Commissioner overruled the objection, but the Board of Revenue rejected the plaintiff's prayer for partition. The plaintiff then instituted the present suit with the following prayers : (a) For a declaration that the estate is liable to be partitioned, (b) that a decree may be passed against the defendants for the costs and (c) that any other relief may be granted which the plaintiff may be entitled to.

The Subordinate Judge has decreed the suit declaring that the estate is liable to partition under Act 5 of 1897. The defendants have then preferred this appeal. The estate admittedly consists of the following : (a) Two groups of tenancies, in respect of one group of which the plaintiff has granted mirash ijara potta to the defendants, and in respect of the other the defendants have granted mirash ijara potta to the plaintiff, (b) an osbat taluk, (c) certain nishkar and chakran lands and (d) some khas lands.

The Board of Revenue found as follows : As regards (a) they held that the proprietors were in separate posses-

sion of parcels in accordance with a private partition already made, and so if a partition under the Act was to be made S. 77 of the Act would apply and therefore the partition would have to conform to the private partition and it is only the private partition that would have to be confirmed. They held that as regards (b) and the chakran lands of (c) the partition would have to be regulated by S. 83, so that the whole might be assigned to one or other of the proprietors and they were apparently impressed with the agreement between the parties under which these items were to remain joint. And as regards the nishkar lands of (c) they held that, in the partition, S. 82 would apply and the lands would have to be kept joint. On these grounds the Board held that the partition would serve no useful purpose except in giving the shares separate towji numbers. They held therefore that "it would be an unjustifiable waste of labour to go on with the partition" and they accordingly directed that no partition should be made unless all the proprietors applied under S. 7.

The Subordinate Judge was of opinion that what had taken place between the parties was not a partition contemplated by S. 7 of the Act, because "lands" in S. 7 of the Act meant all the lands of the estate and here admittedly all the lands of the estate had not been partitioned privately ; that the agreement as regards the Oshat taluk and the chakran lands was only a temporary arrangement, which was not intended to operate for all time; and that, as the right to claim partition of an estate by a proprietor is an ordinary incident of proprietorship, the plaintiff was entitled to have the estate partitioned. He was also of opinion that in the state of feelings between the parties it was right that the responsibility for payment of revenue should be divided. He has held that S. 7 is no bar to a partition, and also that the provisions of S. 82 and S. 83 merely lay down the methods to be adopted in respect of lands coming within those sections and cannot opertate as a bar to partition In this view the Subordinate Judge has made a declaration that the taluk is liable to partition under Act 5 of 1897.

Now, S. 15, Civil P. C., of 1859 was in the same terms as S. 50, Chancery Procedure Act, 1852 (15 and 16 Vict. C. 86). As to the latter section it was held by Courts in England that it gave a right of obtaining a declaration of title only in those cases where the Court could have granted relief if relief had been prayed for: see *Rooke* v. *Lord Kensington* (1) and *Lady Langdale* v. *Briggs* (2).

In *Nilmony Singh* v. *Kally Churn* (3) and *Kathama Natchier* v. *Dora Singh* (4), their Lordships of the Judicial Committee expressed the view that S. 15 of the Code of 1859 must be governed by the same principles as those upon which the Court of Chancery proceeded in reference to the Chancery Procedure Act, S. 50. When the Code of 1859 was repealed by the Code of 1877, the provision as to declaratory decrees was transferred to the Specific Relief Act 1 of 1877, and the terms of the section were altered; in one direction they were made more comprehensive and in another direction more limited: see *Deokali Koer* v. *Kedar Nath* (5). It has been sometimes thought, relying upon the decision of the Judicial Committee in the case of *Fisher* v. *Secretary of State* (6) that a declaratory decree can be made independently of the provisions of S. 42, Specific Relief Act. In that case what happened was this. By the effect of Ss. 5 and 6, Madras Act 1 of 1876, the decision of the Collector in a case within his jurisdiction, whether for or against separate registration of a portion alienated from a zamindari, when once duly sanctioned as provided by the Act, could only be questioned in a civil Court. And under Ss. 7 and 8 of the Act the apportionment might be appealed from the Collector to the Board of Revenue and power was reserved to the Government in Council to order readjustment of separate assessment if fraud or material error appeared. The Government however had cancelled an order made and sanctioned under the first-mentioned sections. The plaintiffs in the suit prayed for a declaration that the order of the

1. (1856) 2 K & J 753=25 L J Ch 795=2 Jur N S 755=4 W R 829.
2. (1856) 8 De G M & G 391=26 L J Ch 27=2 Jur N S 982=4 W R 703.
3. (1875) 2 I A 83 (P C).
4. (1875) 2 I A 169 (P C).
5. (1912) 39 Cal 704=15 I C 427.
6. (1899) 22 Mad 270=26 I A 16 (P C).

Government directing the cancellation was beyond the powers of the Government to make, and was of no legal effect. Lord Macnaghten in delivering the judgment of their Lordships observed:

"Now, in the first place it is at least open to doubt whether the present suit is within the purview of S. 42, Specific Relief Act. There can be no doubt as to the origin and purpose of that section. It was intended to introduce the provisions of S. 50, Chancery Procedure Act 1882, (15 and 16 Vict. c. 86) as interpreted by judicial decisions. Before the Act of 1852 it was not the practice of the Court in ordinary suits to make a declaration of right except as introductory to the relief which it proceeded to administer. But the present suit is one to which no objection could have been taken before the Act of 1852. It is in substance a suit to have the true construction of a statute declared and to have an act done in contravention of the statute rightly understood pronounced void and of no effect. This is not the sort of declaratory decree which the framers of the Act had in their mind."

If these observations meant that a decree, merely declaratory, can be made independently of S. 42, Specific Relief Act, as has been understood in such cases as *Ram Chandra* v. *Secretary of State* (7) and *Ram Krishna* v. *Narayana* (8), the plaintiff gains very little; because in the first place the declaration which he has asked for and obtained is not a declaration of that character but a declaration that the estate is liable to partition; and secondly because the order of the Board of Revenue, against which the plaintiffs' attack is directed, is not an order passed in contravention of the statute, but intra vires the statute, being in exercise of the appellate powers conferred on the Board by S. 113 of the Act. On the other hand Sir Lawrence Jenkins, in delivering the judgment of the Judicial Committee in *Sheoparsan Singh* v. *Ram Nandan Prasad Narayan Singh* (9) has made it perfectly clear that so far at any rate as Courts in the mofussil are concerned their powers to make a declaration without more is derived from S. 42, Specific Relief Act. It may be conceded that cases may be imagined in which an act of an authority being in contravention of the statute it is enough for a party to have it pronounced void and of no effect, upon a true construction thereof. Such was the case in *Fisher* v. *Secretary of State* (6). Lord Macnaghten further observed in that case:

"But even assuming that the Specific Relief Act applies to such a suit as this, what is the result? What further relief can be required? If the so-called cancellation is pronounced void the order of the Government falls to the ground, and the decision of the Collector stands good and operative as from the date on which it was made."

From this point of view, if the plaintiff could show that the Board has acted without jurisdiction and its order was ultra vires the statute and has asked for a declaration of that character, omission of a prayer for a consequential relief would not per se have stood in the way of his getting such a declaration. But, as has already been pointed out, the plaintiff, in the first place, has not asked for such a declaration, and secondly the order of the Board of Revenue was not made without jurisdiction. The declaration which the plaintiff asked for and has obtained in this case, as already stated, is a declaration that the estate is liable to partition under the Estates Partition Act 5 of 1897. Such a declaration, in our judgment, is not permissible because his right to partition, as a right, has never been negatived by any body. And as a declaration which may be of assistance to him in getting a partition of the estate from the civil Court, a prayer for it would obviously be not maintainable for he has not asked for consequential relief in the shape of a prayer for partition. It is contended on behalf of the plaintiff as respondent that this declaration will enable him to get a partition from the Collector. We cannot see how that is possible, so long as the order of the Board of Revenue stands, as it must stand, in the present case. Rightly or wrongly the Board of Revenue has refused to undertake a partition of the estate under the Estates Partition Act and that order is binding on all subordinate revenue authorities.

It has however been argued before us that if the plaintiff obtains such a declaration from the civil Court, and armed with it approaches the revenue authorities, those authorities would be bound to rescind the order declining to make the partition, and would feel it necessary to proceed with the partition. Reference in this connexion has been made to S. 119 of the Act which specifies certain orders under the Act as

7. (1916) 39 Mad 808=31 I C 310.
8. A I R 1915 Mad 584=26 I C 883=39 Mad 80.
9. A I R 1916 P C 78= 33 I C 914=43 I A 91= 43 Cal 694 (P C).

being not liable to be contested or set aside by the civil Court, and it has been urged that this specific exclusion sufficiently indicates that all other orders under the Act may be so contested or set aside. And reliance has also been placed upon certain decisions which will be presently adverted to. It may be conceded at once that, broadly speaking, the provisions of the Estates Partition Act read together have purported to exclude the jurisdiction of civil Courts from cases which involve questions of land revenue, questions of costs, and questions which require the exercise of discretion on the part of the revenue authorities as regards the mode of partition and its details, and that in matters involving questions of title the jurisdiction of civil Courts is not ousted at all.

This however will not help the appellant, because while the question whether the estate is liable to partition under the Estates Partition Act involves a question of title, the question whether the revenue authorities should or should not enforce that right by undertaking such a partition cannot be said to be a question of title In matters arising under the Estates Partition Act the jurisdictions of the civil Courts and of the revenue authorities are in many instances concurrent, and a conflict of jurisdiction between the two should manifestly be avoided, and the authorities must necessarily have to act in such a way that the jurisdiction of each should be stayed or restricted by action already taken by the other. A right to have a partition from the Collectorate is not an absolute right. The Collector may, for any reason which appears to him good and sufficient, reject an application for partition (vide S. 22). The Commissioner has powers to put an end to proceedings taken to effect a partition or separation after an application for partition has been admitted: vide S. 112 (1) (a). On the other hand if by ordering a partition or effecting it the revenue authorities affect anybody's right or title, that person has his remedy in the civil Court. Similarly again, if the civil Court makes an order or decree for partition, that has to be taken note of and carried out by the revenue authorities provided of course that matters which are the exclusive concern of the revenue authorities are not affected. But it is not possible to hold that after the Board of Revenue, no matter whether their view of the facts or of the law was right or wrong, held that it would be an unjustifiable waste of labour to go on with the partition, a declaration by the civil Court that the estate is liable to partition under the Estates Partition Act would oblige them to alter their view.

Tajammul Ali v. *Musood Ali* (10) and *Qamar Hasan* v. *Abas Ali* (11), are cases in which the Collector overruling an objection to the effect that there was a previous partition under S. 7 of the Act had ordered a partition and such order had been confirmed by the superior revenue authorities and thereafter the orders of the revenue authorities were challenged in the civil Courts. What is relied upon in these cases is the fact that the suits were maintained. The other two cases relied upon are the cases of *Rupan Rai* v. *Subh Karan Rai* (12) and *Asman Singh* v. *Tulsi Singh* (13). Before dealing with these cases it may be pointed out that there is a divergence of judicial opinion on the question of the power of the civil Court with reference to partition of a revenue-paying estate. This has been pointed out by Chamier, C. J., in the second of the cases last mentioned in these words:

"According to the decision of the Full Bench in *Jogodishury Debea* v. *Kailash Chandra* (14) which has been followed in many cases in the Calcutta High Court, S. 265, Civil P. C. 1882, did not, and S. 54 of the present Code does not, prevent a civil Court from decreeing partition of a revenue-paying estate where separate allotment of the revenue is not asked for."

In the case of *Asman Singh* v. *Tulsi Singh* (13), the plaintiffs asked for a declaration as to the extent of their shares in the family property and such a declaration was given notwithstanding that there was no prayer for relief in the shape of partition. It was contended that the plaintiff could have claimed a decree for partition but had not done so and so the prayer for a mere declaration of shares should be refused. Chamier, C. J., observed:

"On the strength of these decisions (meaning the decision of the Calcutta High Court in the

10. (1910) 5 I C 776.
11. AIR 1924 Pat 594=78 I C 653=3 Pat 614.
12. AIR 1919 All 140=49 I C 567=41 All 207.
13. (1917) 2 Pat L J 221=39 I C 173.

case of *Jogodishury Debea* v. *Kailash Chandra Lahiry* (14) and other cases which are to the same effect, it is contended that the plaintiffs in the present case might have claimed a decree for partition of the family property. It appears however that the bulk of the family property consists of undivided shares in villages in which there is a large number of sharers who have no connection with the parties to the present case, and partition by metes and bounds between the parties to the present case cannot be made without a general partition of all the villages. It is obvious that it would be impossible to effect a partition in this case between all the sharers in the different villages. In similar circumstances in the United Provinces and other provinces where the Calcutta decisions are not approved a decree would be made determining the shares of the parties to the case and, if necessary, putting them formally into possession of those shares, and they would be left to obtain a partition of each village or mahal separately in the revenue Courts as and when they pleased. In the present suit as constituted it is not suggested that the plaintiffs have been dispossessed in any way and nothing more can be done than to determine the shares of the parties in the family property and declare that the plaintiffs are entitled to enjoy an eight annas share therein. The plaintiffs unequivocally intimated to their co-sharers that they desired to sever themselves from the joint family and are therefore entitled to enjoy their share separately: *Girija Bai* v. *Sadashiv Dhundiraj* (15). I am not prepared to hold that the maintenance of the present claim for a declaration of the shares of the parties in the family property is barred by S. 42, Specific Relief Act."

In the case of *Rufan Rai* v. *Subh Karan Rai* (12), it was held that where the whole of the property which is the subject-matter of a suit for partition consists of landed property assessed to revenue, the suit would be governed by the provisions of O. 20, R. 18, Cl. (1) and S. 54, Civil P. C., and all that the civil Court can do is to give a decree declaring the amount of the plaintiff's share as against the defendant and leaving the plaintiff to take any steps he may think proper for the actual partition of his share in the civil Court.

In our judgment these cases do not assist the plaintiff in the present case. The declaration concerned in the present case is not a declaration as regards the shares of the parties, armed with which the plaintiff can go to the revenue authorities and ask for a partition under the Estates Partition Act, whichever of the two divergent views may be taken of the powers of the civil Court with regard to partition of a revenue-paying estate. It is a declaration that the estate is liable to partition, a position which is not denied by the revenue authorities and it is only the expediency of the partition that is doubted by them. The civil Court cannot compel the revenue authorities to undertake the partition. And in the events that have happened the declaration which the plaintiff has obtained will be of no use to him in getting a partition under the Act from the Collectorate.

The result is that, in our opinion, the suit as framed was not maintainable. The appeal is allowed, and the decree made by the Court below being set aside it is ordered that the suit be dismissed with costs, leaving it open to the plaintiff to institute such other suit, if any, as he may be advised. No order for costs in this appeal.

Nag, J.—I concur in the judgment just delivered by my learned brother.

This in an appeal from the judgment and decree of the learned Subordinate Judge of Noakhali decreeing a suit for a declaration that a certain Kharija Taluk bearing Touzi No. 41 in the Noakhali Collectorate is liable to partition under the Estates Partition Act 5 of 1897. The facts which gave rise to the suit in question are as follows: It appears that the plaintiff-respondent and the defendants-appellants are each owner of 8 annas share of the Kharija Taluk. The plaintiff having applied to the Collector for partition of the Taluk under Act 5 of 1897 was successful up to the Commissioner but was unsuccessful in an appeal before the Board of Revenue preferred by the defendants, the Board having held that the partition would serve no useful purpose except in giving the share separate Touzi numbers and that this result could be better achieved if all the co-sharers jointly applied for partition under S. 7, sub-S. (1), Cl. (a), Estates Partition Act. On this the plaintiff instituted the present declaratory suit out of which this appeal arises. The plaintiff having succeeded in the suit the defendants have appealed. The Kharija Taluk comprises of certain lands and tenancies, namely (1) Oshat Taluk Pitambar Adhikari; (2) certain Nishkar, Chakran and Khash lands from which the proprietors derive no rent; and (3) two groups of tenancies in respect of which the parties have executed Mirash Ijara Pottas in favour of each other en-

14. (1897) 24 Cal 725=1 C W N 374 (F B).
15. A I R 1916 P C 104=37 I C 321=43 I A 151 =43 Cal 1031 (P C).

titling them each to sue for 16 annas rent in respect of the group of tenancies specified in the respective pattas. The rent of the Oshat Taluk is fixed in perpetuity, the proprietors deriving rent in proportion to their respective shares. The proprietors derive no rent, as we have already seen, from the Nishkar, Chakran and Khash lands which have all been kept in Ejmali. In view of the private partition of the groups of tenancies in respect of which there has been a mutual execution of Ijara Pattas the only effect of a partition under the Estates Partition Act would be a confirmation of the private partition and nothing else. The short point for consideration therefore is whether the aid of S. 42, Specific Relief Act, could be invoked in a case of this description with the object of nullifying the effect of the decision of the Board of revenue that no partition should be made unless all the proprietors conjointly act under S. 7, Estates Partition Act. There is no prayer for a consequential relief, and we are afraid that there could not be any such prayer in the suit in the very nature of things. Under S. 42, Specific Relief Act a claim for a declaratory decree is not a matter of right but rests with the judicial discretion of the Court. Having regard to the circumstances disclosed in the case we are not prepared to differ from the finding of the Board that S. 7, Estates Partition Act, should apply. Our attention has been drawn by the learned advocate for the respondents to S. 119, Estates Partition Act, and to the rulings reported in *Rupan Rai* v. *Subh Karan Rai* (12) and *Asman Singh* v. *Tulsi Sinyh* (13). None of the authorities cited has any application to this case; and as for the ruling reported in *Asman Singh* v. *Tulsi Singh* (13) it is, I am afraid, an authority for the proposition that the Calcutta High Court has uniformly taken a view on the subject which is contrary to the view sought to be enunciated by the learned advocate for the respondents (see *Asman Singh* v. *Tulsi Singh* (13).

Speaking generally, although the decision of a civil Court as to title or possession is always binding on the Revenue Court a conflict of jurisdiction between the two Courts should always be avoided. The appeal therefore must be decreed, and the decree of the Court below must be set aside, and the suit is dismissed with costs. No order for costs in this appeal.

K.S. *Appeal allowed.*

A. I. R. 1934 Calcutta 161

C. C. GHOSE, AG. C. J. AND
S. K. GHOSE, J.

Swadesh Ranjan Dutta — Accused — Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1101 of 1932, Decided on 29th March 1933.

Criminal Law Amendment Act (14 of 1908), Ss. 15, 16 and 17 – Notification declaring all associations having certain unlawful object is sufficient — Person making speech at meeting of such association is guilty under S. 17.

A general notification declaring all associations, by whatever name known or whether known by any distinctive name or not, which had the following objects or any one of them, namely, disobedience of laws and orders of Government, non-payment of taxes, boycott and picketing of liquor and foreign cloth shops, unlawful on the ground that they interfered with administration of law and order and constituted a danger to the public peace sufficiently complies with the terms of S. 16 read with S. 15. A person making a speech at a meeting of any such association assists in promoting a meeting of an unlawful association and is guilty under S. 17 though the speech is not violent.

[P 161 C 2! P 162:C 1]

Hemendra Kumar Das and *Priyanath Dutt*—for Petitioner.

N. N. Sircar and *Anil Chunder Roy Chowdhury*—for the Crown.

Order.—This rule must be discharged and for the following reasons: It appears that the petitioner before us was a member of an association known as the Karimganj Congress Association. The Government of Assam by a notification dated 5th February 1932 declared all associations unlawful within the meaning of Part 2, Indian Criminal Law Amendment Act (14 of 1908) by whatever name the associations might be known or whether they might be known by any distinctive name or not—which had the following objects or any one of them, namely, disobedience of laws and orders of Government, non-payment of taxes, boycott and picketing of liquor and foreign cloth shops—on the ground that they interfered with the administration of law and order and constituted a danger to the public peace. Subsequent to the issue of this notification a meeting was held within the compound of the

Karimganj Congress Office or nearabouts, to celebrate what is called the Gandhi day. The petitioner before us made a speech, a translation whereof has been read out to us. He has been convicted under S. 17 (2) of the said Act inasmuch as it was found by the Magistrate that he came within the mischief of the words of S. 17 (2) of the said Act, namely, he was assisting in the management of an unlawful association, or promoting or assisting in promoting a meeting of any such association. It is found by the Sessions Judge that there can be no doubt whatsoever that the petitioner did assist in promoting certain objects of the association which had been specifically mentioned as unlawful. We must take therefore as a fact, that he was concerned with promoting or assisting in the management of an association which had unlawful objects.

The main question which has been argued before us is that the notification, couched as it was in general terms, was not sufficient, having regard to the language of S. 16 of the said Act. If one turns to the words used in S. 15 it is by no means clear that the notification, worded in the manner in which it was done, was not sufficient compliance with the terms of S. 16 read with S. 15. In our opinion, there was sufficient compliance. If once that conclusion is reached, then there is nothing whatsoever in the point which has been raised, namely, that the notification itself was insufficient and that therefore the petitioner before us could not be hit by the terms of S. 17 (2) of the Act. In our opinion, there is nothing in the first point taken.

As regards the second point, it is difficult to interfere in favour of the petitioner having regard to the facts found by the learned Sessions Judge. His speech on the occasion referred to, may not have been specially violent. The question for decision is whether or not he was assisting in the management of an association the objects of which were unlawful or whether he was promoting a meeting of an association which had unlawful objects. There can be no doubt that he was assisting in the management of an unlawful association; at any rate, there is sufficient evidence that he was assisting in promoting a meeting of an unlawful association. If that is so, then there is very little to be said on behalf of the petitioner. The sentence has already been reduced by the Sessions Judge and we see no reason whatsoever for any further interference. The rule is therefore discharged. The petitioner who is on bail will surrender to his bail bond and serve out the remainder of the sentence imposed on him.

R.K. *Rule discharged.*

A. I. R. 1934 Calcutta 162

AMEER ALI, J.

Nagendrabala Dasee—Plaintiff.

v.

Panchanan Mourie—Defendant.

Original Suit No. 1813 of 1930, Decided on 15th May 1933.

(a) Decree—Execution—Sale of right, title and interest of widow—Whether widow's interest or entire interest is put up for sale—Tests mentioned—Property of so and so as widow sold means sale of only limited interest—Hindu Law, Widow.

The formula used in the order for sale proclamation, "right, title and interest of the widow" is ambiguous, i. e., may indicate either widow's interest or entire estate. To ascertain which of these two meanings was intended, the rule laid down is "What was liable to be sold and what in fact was sold?" The first test (except in its final stages) is a question of law. The second test is a question of fact. The principle is that, in order to determine the exact interest which passes at a sale in execution of a decree against a Hindu widow the test to be applied is whether the suit in which the sale was directed was brought against the widow upon a cause of action personal to herself or one which affected the whole inheritance of the property in suit. Where the property sold is referred to as the share of so and so "as widow," it can only have one meaning, i. e., limited interest: *Nature of forms of decree against widow discussed; Case law reviewed.* [P 164 C 1; P 165 C 1; P 169 C 1]

(b) Hindu Law—Widow—Decree against widow—She is neither trustee nor beneficiary—She is legal owner with limitations varying with circumstances.

It is not merely that the surviving wife may happen to fill (as she often does in England) two capacities, that of trustee and beneficiary, but she is a Hindu widow, a status which combines and comprises some of the elements of trusteeship and some of the elements of beneficial ownership. She is neither trustee nor beneficiary. She is legal owner but in accordance with circumstances and the nature of her actions the limitations on her legal ownership are made to vary. She is not a representative in the English sense. In a secondary sense she represents the reversion so that finality may be obtained in actions, brought during the widow's life. It follows, therefore that a decree obtained by a stranger against a Hindu widow is by no means comparable to a decree obtained against a trustee. The result is that the analogy of suits and decrees against trustees together with the paraphernalia of indemnity and subrogation is

not appropriate to proceedings against a Hindu widow. [P 168 C 1, 2]

H. D. Bose, B. C. Ghose, B. Bosu and *N. K. Ghose*—for Plaintiff.

S. N. Banerjee (Sr.) and *S. N. Banerjee (Jr.)*—for Defendant.

Judgment.—In this suit, the matter in issue is what was purchased at a sale held on 7th May 1893, in execution of a decree for costs dated 17th May 1891, that is to say before I was born. In one event I shall have to dispossess the present holders. That such a case can arise I regard as a blot on our legal system. The facts in outline are as follows:

The premises in question, now known as 12/1, 12/2, Umeshchandra Datta Lane, formed, at the date of sale (i. e., in 1893), the northern portion of 175, Maniktala Street. A man named Brahmabishnu Basak and his nephew, Jadunath Basak, were entitled to this property in equal shares. The property was undivided. Brahmabishnu Basak died before 1890, leaving a widow Kantamani. After his death, Kantamani filed a suit (Suit No. 61 of 1890) against Jadunath for the recovery of two promissory notes for Rs. 1,000, alleging that these two promissory notes formed part of the estate of her deceased husband and that the endorsements in favour of the defendant, which purported to appear therein, were not genuine. In the plaint Kantamani described herself as "the widow, heiress and "administratrix" to the estate of Brahmabishnu Basak deceased. The suit was tried on evidence and the claim was dismissed. By the decree, dated 17th May 1891, which is Ex. A, it was decreed

"that the suit is hereby dismissed and it is further ordered and decreed that the plaintiff do pay to the defendant his costs of this suit."

This decree for costs was assigned by Jadunath to one Satkarhi Pain. On 11th July 1891 Jadunath sold his half undivided share in the premises to the same Satkarhi for Rs. 3,500. The allocatur for costs was issued on 12th December 1891, amounting to Rs. 1,763-12-0. Application for execution was made by Satkarhi by a tabular statement, dated 27th May 1892. In this the property to be attached is described as "half share of plaintiff Kantamani as widow." On 13th July 1892, there was a prohibitory order attaching "half share of the plaintiff as the widow." On 1st June 1893, the order for sale was made and in this the property to be sold is described in the schedule as

"all that undivided half part or share of the said plaintiff Kantamani as the widow of Brahmabishnu Basak of and in the premises in question."

On 15th September 1893, the sale proclamation issued, which mentioned simply "the undivided half share of the plaintiff Kantamani in the following property." On 7th December 1893, the sale was held and one Pulinbihari Pain, brother of Satkarhi Pain, bought the property for Rs. 100. On 1st May 1894, by a conveyance of that date, Satkarhi Pain and Pulinbihari Pain sold their respective undivided half shares in the property to a lady, Manmohini Dasee, for Rs. 6,200. There is a covenant for title as regards Satkarhi Pain's half, but no covenant for title in respect of the share purchased by Pulinbihari Pain. On 1st July 1896, Manmohini Dasee sold one half, that is, Jadu's half bought from Satkarhi Pain, to Prankrishna Sen, the property still being undivided. There was a partition suit, being Suit No. 668 of 1896, and the southern half was allotted to Prankrishna Sen and the northern portion, that is to say, Kantamani's portion, was allotted to Manmohini and renumbered No. 12/1 and 12/2, Umeshchandra Datta Lane. On 2nd September 1897, Manmohini sold to Ramchandra for Rs. 3,000. On 21st March 1898, Ramchandra sold to Dharamdas Ghosh for Rs. 2,650. On 29th April 1898, he sold it to a lady named Dhanmohini Dasee for Rs. 3,778. In addition to the conveyance, there was a bond of indemnity in the sum of Rs. 5,000 in respect of title.

Dhanmohini carried out substantial repairs and alterations to the property, to which I shall again refer. She died in 1900, leaving, as far as I remember, a will. At any rate, the property descended to Ramchandra Ghosh and through him to Nistarini Dasee and through her to the three sons of Harasundari Dasee, Nagendra Mourie Atulkrishna Mourie, and Saratchandra Mourie. Nagendra Mourie died in 1930, leaving four sons, two of whom are minors. Atulkrishna Mourie is still alive. Saratchandra Mourie mortgaged his share on 5th December 1927 to Ratanlal Gupta. On 3rd January 1931 the property was put up for sale in the

mortgage suit and was bought by the defendant Charupatna Seal. On 29th September 1927 Kantamani died. On 9th February 1930 there was a letter of claim (the receipt of which has not been admitted) by her daughter Nagendrabala, the present plaintiff. On 27th August 1930 this suit was filed for recovery of the property on the ground that what had been bought by Bipinbehari Pain was only the "widow's interest" and nct the "entire estate." These expressions I retain throughout this judgment.

That such a question can at all arise is due to two causes: (a) In the decree, order for sale proclamation, etc., it has not been the practice to specify what is put up for sale, i. e.. whether a "widow's interest" or "entire estate"; (b) it has been assumed that the formula used in the order for sale proclamation, etc., "right, title and interest of the plaintiff" (even where described as widow") is ambiguous, i. e., may indicate either widow's interest" or "entire estate."

When, therefore, this ambiguity arises, it is necessary to ascertain which of these two meanings was intended. As early as 1876, in *Baijun Doobey* v. *Brij Bhookun Lall* (1) the rule was laid down in these terms by the Board. "What was liable to be sold and what in fact was sold ?" The first test (except in its final stages) is a question of law. The second test is a question of fact. The first test, as I have said, is mainly a question of law. There is a great deal of it. I propose first to mention, in order of date, the authorities cited (together with certain connected cases) and then to state in the form of propositions the effect of the authorities as I read them. We begin with *Katama Natchier* v. *Rajah of Shivagunga* (2): the judgment of Vice-Chancellor Turner at p, 605—nature and effect of decree against the widow in a suit in respect of the estate. *Nugenderchunder Ghose* v. *Kaminee Doseee* (3), rent accrued after death of husband personal, decree. Form of suit. Held that the decree against the widow does not affect the reversion. At p. 267, are observations in the nature of a proviso to the effect

"that the Board leave unimpaired the general rule that in a suit brought by a third person the object of which is to recover, or to charge an estate of which a Hindu widow is the proprietress, she will represent and protect the estate, as well in respect of her own as of the reversionary interest."

For purposes of convenience I will refer to these observations as "the proviso" to *Nugenderchunder* v. *Kaminee Dassee* (3)."

Bistobehari Sahoy v. *Baijnath Prasad* (4). There was a sale of "the right, title and interest" of the widow under what I refer to throughout as a "personal decree." It was held notwithstanding, that if the debt, upon which the decree was founded, be one for necessity a sale in pursuance of such decree would or might pass the "entire estate."

General Manager of the Raj Durbunga v. *Ramaput Sing* (5) Suit for rent which accrued, during the husband's lifetime. Held that, in such a case, the suit is really against the estate and the widow is in effect a representative. The decree is therefore against the estate and binds it. *Mohima Chunder* v. *Ram Kishore* (6). This was a case of rent accruing after the death of the husband and therefore similar to the case in *Nugenderchunder* v. *Kaminee Dossee* (3). There was a discussion as to necessity and it was held that necessity was not established. That being so, the decree was held not to bind the reversioner. The importance of the decision is twofold: (a) It shows that "necessity" and "representation" are independent. (b) It adopts and lays down as an affirmative proposition the proviso to *Nugenderchunder* v. *Kaminee Dossee* (3) at p. 260. *Baijun Doobey* v. *Brij Bhookun* (1). This was a decree for maintenance accruing after the death of the husband. There was therefore no question of necessity. There was a sale of the "right title and interest of the defendant." In this case at p. 139, the test which I have already mentioned was formulated: "What was liable to be sold and what in fact was sold ?"

Ramkishore Chuckerbutty v. *Kallykanto Chuckcrbutty* (7). This was a suit by a widow to recover portion of the estate of her deceased husband. It was dismissed with costs and the "right,

1. (1875) 1 Cal 133=2 I A 275 (P C).
2. (1863) 9 M I A 539 (P C).
3. (1867) 11 M I A 241 (P C).
4. (1871) 16 W R 49=7 Beng L R 213.
5. (1872) 14 M I A 605=10 Beng L R 294 (P C).
6. (1875) 15 Beng L R 142=23 W R 174.
7. (1880) 6 Cal 479=8 C L R 1,

title and interest" of the widow was put up for sale. Following "the proviso to *Nugenderchunder* v. *Kaminee Dossee* (3)," the Court held that, as the suit had been in regard to the estate, the decree for costs was therefore binding on the estate. *Jugul Kishore* v. *Jotenaro Mohun Tagore* (8). Decree for mesne profits and costs against a widow, one of the parties to a suit in regard to the estate. The "right, title and interest" of the widow was put up for sale and the question dealt with and determined was, what was sold. Judgment of Garth, C. J., is at p. 70 (of 11 *I. A.*). Ruling of Board (Sir Barnes Peacock) at pp. 73 and 74 (of 11 *I. A.*). The test laid down is as follows:

"There are many cases in which when the right, title and interest of the widow is sold, the whole interest in the estate passes, In other cases the whole interest does not pass. The case depends upon the nature of the suit in which the execution issues."

In other words, if it is a suit such as is referred to in "the proviso to *Nugenderchunder* v. *Kaminee Dossee* (3)" the entire estate passes. *Nanomi Babuasin* v. *Modhun Mohun* (9) and *Pettachi Chettiar* v. *Sangili Vira* (10). These cases related to a Hindu father's co-parcenary interest (assumed in this respect to be indistinguishable from a widow's interest). In each case the sale of the "right, title and interest" of the father is described as creating an ambiguity, to be resolved by the answer to the following questions:

"What the purchaser bargained and paid for,' 'Not what the Court could have sold but what was in fact sold ?" (Sir Barnes Peacock).

Dinamoni Chaudhurani v. *Elahudad Khan* (11). In this case the widow had wrongly defended a suit by a stranger in regard to property alleged by her to form part of the estate. Nevertheless the decree for costs against her was held to be binding on the estate. *Radha Kissen* v. *Nauratan Lall* (12). Judgment of Sir Asutosh Mookerjee at p. 519. The principal question in this case was one of necessity, the suit being for recovery of moneys lent to the widow. As I read the case (especially at p. 519), the question of necessity and the question of "prospective representation" are dealt with as distinct matters. By which I mean this that in a suit such as is referred to in "the proviso of *Nugenderchunder* v. *Kaminee Dossee* (3)" there is no question of having to prove necessity. Either the suit is one of the nature described or it is not.

Braja Nath Pal v. *Joggeswar Bagchi* (13). The matter in issue was as in *Jugul Kishore* v. *Jotendro Mohun Tagore* (8) what passed by the sale of the "right, title and interest" of a Hindu widow in execution of a decree for costs. At various places, at pp. 349, 350 and 351, Sir Asutosh Mookerjee referred to the merits of the widow's suit or claim, in contrast to the case in *Ramkishore Chuckerbutty* v. *Kallykanto Chuckerbutty* (7), where the claim was said to be unfounded. He compared the position of a Hindu widow to that of a shebait and later, at p. 352, he compared the position of a Hindu widow to that of a trustee. At p. 353, the test is laid down as follows:

"The principle is that, in order to determine the exact interest which passes at a sale in execution of a decree againt a Hindu widow * * * the test to be applied is whether the suit in which the sale was directed was brought against the widow upon a cause of action personal to herself or one which affected the whole inheritance of the property in suit."

That is to say the answer is to be found in the nature of the suit.

Veerabadra Aiyar v. *Marudaga Nachiar* (14). "Personal decree" for loans to the widow. If the decree is founded upon a debt incurred for necessity, the entire estate could have been sold. The question for decision is what was sold. *Risal Singh* v. *Balwant Singh* (15). Following the first case in this list *Katama Natchier* v. *Raja of Shivagunga* (2).

"A decree fairly and properly obtained in regard to the estate is, in the absence of fraud or collusion, binding on the reversionary heir."

The result of the above cases stated in the form of propositions appears to me as follows:

Proposition 1.—Debt of the husband. In a suit against a widow founded upon her husband's debt the widow represents her husband's estate. This is representation in the English sense or "retrospective representation."

8. (1884) 10 Cal 985=11 I A 66=4 Sar 553 (P C).
9. (1885) 13 Cal 21=13 I A 1=4 Sar 682 (P C).
10. (1887) 10 Mad 241=14 I A 84=5 Sar 38 (P C).
11. (1903) 7 C W N 678.
12. (1907) 6 C L J 490.
13. (1909) 9 C L J 346=1 I C 62.
14. (1911) 34 Mad 189=8 I C 1072.
15. AIR 1918 P C 87=48 I C 553=45 I A 168=40 All 593 (P C).

Rule. — The decree is against the estate.

Example.—General Manager of the Raj Durbunga v. *Ramaput Singh* (5).

Proposition 2.—Debt of widow. Suit against a widow on her own debt.

Rule.—Estate not liable.

Examples.—Mohima Chunder v. *Ram Kishore* (6) and *Baijun Doobey* v. *Brij Bhookun Lall* (1).

Exception to rule.—Necessity.

Examples.—Bistobehari Sahoy v. *Baijnath Prasad* (4), *Mohima Chunder* v. *Ram Kishore* (6) and *Radha Kissen* v. *Nauratan Lall* (12).

Proposition 3.—Claim in regard to estate. Suit against a widow "in regard to the estate," i. e., in which the

"widow is representing and protecting the estate in respect of the reversionary estate: *Mohima Chunder* v. *Ram Kishore* (6)."

Representation in a secondary sense or "prospective representation."

Rule.—Decree binding on reversionary heirs.

Examples.—Katama Natchier v. *Raja of Shivagunga* (2) and *Risal Singh* v. *Balwant Singh* (15).

Exception to rule.—Fraud and collusion.

Example.—Risal Singh v. *Balwant Singh* (15).

Proposition 4.—Claim for costs.

"Costs" constitute a debt created by the decree and which accrues at the date of the decree. A decree for costs is usually regarded as accessory and supplemental to the main decree. The debt in question may be incurred in a suit respectively of the nature described in propositions 1, 2 and 3. In suits of the nature described in propositions 1 and 2, there is no difficulty in formulating the rule, i. e., in the first class of case, the estate will be bound. In the second class of case, the estate will not be bound unless necessity is established. In suits of the class described in proposition 3 (the case now before us) the matter is more complicated. I believe however the rule to be analogous, the decree for costs being binding on the estate where the main decree is binding on the estate, i. e., in the absence of fraud or collusion. This proposition is not accepted by counsel for the defendants, who has contended that the conditions under which the estate can be affected by a decree for costs against the widow are more restricted.

He contended: (i) That there is a difference between the case of a suit by the widow and against the widow. (ii) That, in order to affect the estate, a suit brought by the widow must be shown to have been beneficial. (iii) Alternatively, that the estate will only be affected in circumstances under which in England costs of a trustee would be payable out of the estate. As regards point (1), (disregarding any special rule applicable to trustees in England suing without leave of the Court), it appears to me that, on principle, no logical distinction can be made between protecting the estate by attack and by defence, i. e., by suit to recover possession or resistance to a claim to possession.

As regards point (2), in support of which counsel for the defendant sought to introduce principles of "necessity," it appears to me firstly that such principles are inappropriate, e. g., how can the question of "honest enquiry" at all arise? Secondly, I find no trace of "necessity for necessity" in the authorities. In *Nugenderchunder Ghose* v. *Kaminee Dossee* (3), *Mohima Chunder* v. *Ram Kishore* (6) and *Radha Kissen* v. *Nauratan Lall* (12) the two matters necessity and "prospective representation" are treated as self contained and mutually independent. The question of representation need not be agitated i there is in fact necessity. If there is no necessity there remains the further question—was the suit of the nature described in proposition 3? In support of the third contention, counsel for the defendant relied upon certain observations of Sir Asutosh Mookerjee in *Braja Nath Pal* v. *Joggeswar Bagchi* (13). In this case, Sir Asutosh Mookerjee, before formulating (at p. 353) the test already quoted, compared the position of a Hindu widow to that of trustee under English law. He concluded (p. 353)

"that the position of a Hindu widow in respect of costs was not inferior to that of a trustee."

It is clear, from the guarded language used, that Sir Asutosh Mookerjee was well aware of the defects of the analogy. Others not so fully acquainted with the English system may however be misled, especially having regard to certain ex-

pressions used by Sir Asutosh Mookerjee on the previous page (352) in describing the position of trustees:

"The principle is that in cases of misconduct, where trustees are decreed to pay the costs of the suit, they cannot charge the expenses to the trust fund, on the ground that, as the misconduct was personal, the costs are personal also, and must be borne by them personally. Prima facie therefore where costs are given against parties who are trustees, they must be taken to have been given against them as trustees, and not as individuals. We may refer also in this connexion to the case of *Brigel* v. *Tug River Coal Co.* (16). There certain trustees had instituted an action in respect of properties which they held as trustees. The Court of first instance made a decree in their favour. The Court of appeal reversed the decision on the ground that the first Court had no jurisdiction to take cognizance of the suit and allowed costs to the defendants as against the plaintiffs. The question arose, whether this was a decree against the plaintiffs in their character as trustees, or against them personally. It was ruled that the decree must be taken to have been made against them as trustees, on the ground that their standing in the Court was as trustees and as they had no other standing, the decree could not be taken to have been made against them in their personal capacity."

In my view, the language used in the above-quoted passage is liable to perpetuate the misconception of the position of trustees prevalent in this Court. It has been, to my knowledge, the practice in suits by strangers against trustees to pass decrees against the defendants, "as trustees," "limited to the trust "estate," "with costs to come out of the estate" and so forth. I have myself done so. This miconception I believe to be due to two causes: (i) failure to distinguish between trustee and qualified owner and assimilation of trusteeship to shebaitship; (ii) failure to distinguish between two different classes of proceedings, i. e., between actions between stranger and trustee and actions in which the fund is before the Court and the beneficial interest represented, such as administration suits.

I will deal with the second point first. In England, as regards costs, different principles are applied in the two classes of prceedings mentioned. The matter I think is made most clear by two passages in Daniel's Chancery Practice and one authority. In Daniel's Chancery Practice, Edn. 8, Vol. 2, p. 1028, is the following passage:

The general rule, which gives the costs of the action to the victorious party, and throws them upon the unsuccessful party, applies equally to cases in which the parties are suing or defending in autre droit and to those in which they are sui juris. Therefore executors, administrators, trustees, or trustees in bankruptcy, instituting or defending, in those capacities actions against strangers to their trust, are subject to the same rules as to costs as they would be if they were suing or defending in their own right .... The question whether a party who sues, or defends in autre droit, and is unsuccessful, shall be reimbursed his costs out of the estate which he represents, or in respect of which he is a trustee, is a totally distinct one, and will be referred to hereafter, when we come to treat of cases in which costs are payable out of the fund which is the subject of litigation."

The chapter which relates to costs in a case where the fund is before the Court begins at p. 1054. Turning to p. 1065, which relates to this particular class of case, it reads

When it is said that personal representatives, and others bearing the character of trustees, are entitled to their costs out of the fund or estate which is the subject of the action, the rule must be understood as applying strictly between themselves and their cestuis que trust. In actions between them and those who are strangers to the trust the ordinary rules as to costs prevail; though if a trustee or personal representative institutes or defends an action in respect of his trust estate, he may reimburse himself out of that estate any sums he may have expended properly in such action."

Thus, in the first class of case, costs are regarded simply as charges and expenses incurred by the trustee, in respect of which (in accordance with the ordinary principles relating to indemnity) he may or may not be entitled to be indemnified. In the second class of case (as to which see R. S. C. O. 65, R. 1) generally speaking costs of the trustees are payable out of the fund in Court unless misconduct is established. The matter is made very clear by the judgment of Lindley, L. J., and Bowen, L. J., in *In re Beddoe*, *Downes* v. *Cottam* (17).

In the first class of case therefore the only way by which, in respect of costs, the trust fund may be made available to a stranger is through the trustee's right of indemnity by applying the principle of subrogation. For a short and clear discussion on this topic, see Brett's Leading Cases in Equity, pp. 207 and 211: see also *Mackintosh Burn Ltd.* v. *Shivakali Kumar* (18). The question of indemnity cannot be decided in the actual suit. It must be decided vis-a-vis the beneficiaries and, as will be seen in *In re England's Settlement Trusts*, *Dobb* v.

16. (1896) 73 Fed Rep 13.

17. (1893) 1 Ch 547=62 L J Ch 233=41 W R 177 =68 L T 595.

18. A I R 1933 Cal 668=60 Cal 801.

England (19), this is usually done upon originating summons. This authority will also illustrate the extreme strictness with which the English Courts allow the right of indemnity to be applied. In the notes, Section D to R. 1, O. 65 in the Red Book, the rule is stated in the following terms :

"If a trustee brings or defends an action unsuccessfully it is for him to show that the costs so incurred were properly incurred."

Returning to the first point and to the passage quoted from *Braja Nath Pal* v. *Joggeswar Bagchi* (13) at p. 352 the grounds of my criticism will, I think, already have become partially apparent. As I understand the English law it is erroneous, in connexion with actions by strangers against trustees, to speak of such actions or the decrees made therein as "personal" or as brought or made against them "as trustees and not as individuals" or in "the character of trustees," or in their "personal capacity." If an action is brought against *A B* in connexion with the trust, of which *A B* is the trustee, he is sued as legal owner. In such action, *AB* is trustee and nothing else. On the other hand, the decree is against him and no one else. In other words, in a suit of the nature referred to there is only one kind of suit and one kind of decree. There is no room for ambiguity. The only point of divergence is at a later stage, i. e., when *A B* claims the right to recoup himself out of the trust estate. I propose to avoid discussing the position of a shebait or the effect of a decree in a suit against a shebait, but, bearing the above principles in mind, I desire to refer shortly to the position of a Hindu widow. This appears to me as a matter of legal theory to present a striking contrast to the position of a trustee.

The difficulty for anyone unacquainted with the Hindu system is enhanced by the fact that the common English word " widow " is used as a technical term for the purpose of designating a legal person or describing a legal status. In England, the law has invented two owners or two kinds of ownership and two persons, trustee and beneficiary. In India, there is one person. It is not merely that the surviving wife may happen to fill (as she often does in England) two capacities, that of trustee and beneficiary, but she is a " Hindu widow," a status which combines and comprises some of the elements of trusteeship and some of the elements of beneffcial ownership. She is neither trustee nor beneficiary. She is legal owner, but in accordance with circumstances and the nature of her actions the limitations on her legal ownership are made to vary. She is not a representative in the English sense. In a secondary sense she represents the reversion so that finality may be obtained in actions brought during the widow's life.

It follows therefore that a decree obtained by a stranger against a Hindu widow is by no means comparable to a decree obtained against a trustee. Compare again the common case of a surviving wife in England, *A* who is trustee and also tenant for life with that of a Hindu widow *B*. In the first case, the decree obtained by a stranger will be against *A*, *A* having a mere right of indemnity. *A's* beneficial interest will be liable to execution under the decree. In the case of the Hindu widow, the decree will be against *B* either as qualified owner or full owner.

The result is that, in my opinion, the analogy of suits and decrees against trustees together with the paraphernalia of indemnity and subrogation is not appropriate to proceedings against a Hindu widow. It does not, of course, necessarily follow that similar principles will not apply. There is parallelism in law as well as in science. But I am not satisfied that it is so. The process of indemnity and subrogation has no place in the Indian system and it appears to me that the English rules have developed from and been built upon that process. The rigidity of these rules would, in my opinion, be hardly fitting in the case of a Hindu widow. Finally, it appears to me upon the authorities that once the main test is applied with the result that the suit is found to be one the result of which is binding upon the reversioners, there is no room for any further discussion of the question whether the expenses of the suit were or were not properly incurred. The first test therefore has been passed. In this case the Court could have sold the entire estate. I now come to the second test : "What did the Court in fact sell ?"

19. (1918) 1 Ch 24=87 L J Ch 72=117 L T 465

I have already mentioned in order of date the main facts on which I propose to base my decision, to the effect that what was sold was the " widow's interest." My reasons are as follows: First of all, I should mention that I have read the transcript of the judgment, upon which the decree of 1891 was based. Substantially the Court found the defence to be true and the claim false. This being the case the Court, had its mind been directed to the point, might well have considered it a suit, the costs of which should not be borne by the reversion. But I do not think the question was ever considered and I do not therefore rely upon the contents of the judgment.

The documents, on the other hand, do appear to me to indicate that what was sold by the Court was the " widow's interest." Under the Code of 1859, S. 259 the root of the trouble, see *Jugal Kishore* v. *Jotindro Mohan Tagore* (8), it is provided that the sale proclamation shall declare that the sale, "extends only to the right, title and interest of the defendant in the property specified therein." Personally I do not read this provision as meaning that the Court shall not indicate what is sold, e. g., " widow's interest " or " entire estate." But that apparently was the view taken. In 1882 the section was changed, and I should conceive, deliberately. The rules however of this Court had already been framed, and under O. 25, R. 7, it is still incumbent to state in the conditions of sale that only the right, title and interest, etc., is sold. The " ambiguity " was thus perpetuated.

Be that as it may, what was attached under the tabular statement in this case was described in these words " half-share of the plaintiff Kantamani as widow." In the prohibitory order and in the order for sale " half share of the plaintiff as widow." What did that mean? I can understand a decree being made against X " as widow " (I have already indicated my distaste for the adverb even in this connexion.) But when it comes to a document relating to sale and the property sold is referred to as the share of so and so " as widow," it seems to me that it can only have one meaning and I think that meaning was " limited interest." The whole case turns on that. (Taking into consideration the other circumstances, His Lordship held that the second test was not passed. The remaining portion of the judgment is not necessary for reporting.)

K.S. *Order accordingly.*

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Special Bench

LORT-WILLIAMS, M. C. GHOSE AND MCNAIR, JJ.

Molla Khan Kabuli—Accused.

v.

Emperor—Opposite Party.

Death Reference No. 13 and Appeal No. 408 of 1933, Decided on 6th June 1933.

(a) Criminal Trial — Questions put and extracts included from depositions during trial—Depositions must be included as part of record though not formally tendered as evidence—Evideuce Act (1872), S. 145.

If questions are put and extracts included from depositions, during the trial of a case, it must be obvious that that evidence has been admitted by the Judge and that it must form part of the record, whether technically speaking it has been properly tendered or not. [P 171 C 1]

(b) Criminal Trial — Even if prosecution and pleader for accused fail to probe into evidence, Court must do it so that intelligible story may be included in deposition.

If the Public Prosecutor and Pleader appearing for the accused cannot or will not probe thoroughly the evidence which is being given, so that an intelligible story can be included in the deposition, it is the duty of the Judge to do it, instead of leaving bits of evidence in the air, so to speak, so that High Court cannot make out from the record what it was that the witness was intending to say. [P 171 C 1]

(c) Criminal Trial—Trial of accused turning upon question of mistaken identity of accused—Test identification should be held.

Where the accused has raised from the very first moment that he was not the accused person and the question turns upon the mistaken identity of accused, a test identification must be held which is the only safe way of ascertaining whether the prosecution witnesses could be relied upon. [P 171 C 2]

(d) Criminal Trial—Trial by jury—Judge must guide jury and direct attention of jury to essential points—Criminal P. C. (1898), S. 297.

Whatever the conditions and the difficulties may be in this country, Judges, Advocates and Police must realize that in a trial where a man's life is in jeopardy, it is essential to take the greatest possible care to avoid mistakes being made. It is not sufficient for the Judge simply to point out this piece of evidence and that, this presumption and that, this bit of law and that. It is his duty to help and guide the jury to a proper conclusion. It is his duty to direct the attention of the jury to essential points. It is his duty to point out to them the weight to be attached to the evidence and it is his duty to warn them gravely about the responsibility which rests upon their shoulders in a trial of

this kind, and to impress upon them that if there is any doubt in their minds, they must give the benefit of that doubt to the accused.

[P 172 C 2]

J. P. Mitter and *Joy Gopal Ghose*— for Accused.

Nirmal Chandra Chakrabartty — for the Crown.

Lort-Williams, J. — The appellant Molla Khan Kabuli alias Munna Khan Kabuli alias Hamidullah was tried by the Additional Sessions Judge of the 24-Parganas and a jury on a charge under S. 302, I. P. C., and convicted by a majority of 7 to 2. The learned Judge accepted the verdict of the jury and sentenced the appellant to be hanged, subject to confirmation by this Court.

The case is somewhat unusual. On the evening of 15th October 1930 one Abdul Gani was in a Pan shop with a man named Hanif generally known as Mohammad Hanif. There was present in the Pan shop another Hanif called "Bara Hanif," apparently because he was bigger than the other Hanif. A man named Molla Khan Kabuli well-known in the neighbourhood, who used to hawk articles round the adjoining villages, came into the shop. He was known to Abdul Gani and had made improper overtures to him a few days before and had been refused. Abdul Gani and Mohammad Hanif left the shop and proceeded a little way when Molla Khan followed and passed them, waited until they came up and then stabbed Abdul Gani in such a way that it is clear that he intended to kill him. Subsequently, Abdul Gani was taken to the hospital and died. Bara Hanif ran after Molla who had disappeared up the road. He failed to catch him and gave up the chase. Abdul Gani's father was called and information was given to the police. They started an inquiry and examined about half a dozen witnesses. Search was made for the accused but he could not be found and the case was dropped. Subsequently, more than two years afterwards, information reached the police that this Molla Khan who had committed the murder was living in Peshawar. Information was sent to the police at Peshawar that

"an absconder Molla Khan Pathan now living with Nasher Khan Pathan at village Hoti in the District of Peshawar"

was wanted in a case at Calcutta. Whether any further description of the "wanted" man, beyond his name, was given to the Peshawar Police we do not know. However the police sent a man down to Calcutta who was charged with this murder. Directly he got here, he strenuously denied that he was Molla Khan or that he had ever been in Shyamnagar where the murder was committed and said that his name was Hamidulla and that he lived in a village near Peshawar. Subsequently, he was put on trial and a number of witnesses stated that they had no doubt that the man in the dock was the man who murdered Abdul Gani, and whom they had known quite well for a good many years. Abdul Gani's father Romzan said that he had known him for ten years selling fruits at Shyamnagar. Mohammad Hanif was called and said that he had no doubt that he was the man known to him as Mulla Khan who used to sell "hing" and dried fruits in the district. Their evidence was supported by Sheikh Banoo, and Thakur Prosad who was the owner of the Pan shop referred to, and also by Pir Muhammad. On the other hand, the accused called four witnesses from Peshawar who strenuously denied that the man in the dock was Mulla Khan and said that his name was Hamidulla, that he had never been in Shyamnagar, that all along he lived with his mother in a village called Hoti and within a few yards of the houses where these witnesses lived. They stated that they had seen him almost daily, at any rate for the last five or six years, that during this time he had never left Hoti and certainly he had never been to Calcutta.

The learned Judge in his letter of reference says that he is free to confess that had he been a juror, he should as two of them did, have given the accused the benefit of the doubt. It is not necessary for me to refer in any detail to the evidence which was given at the trial, because the whole case turns upon the question of identity. There is no doubt that Abdul Gani was attacked in the manner described by him and the witnesses, and by a person who was well-known to them, and as described by them. The whole question was whether the man in the dock was that man. In our opinion, this case was not at all satisfactory. The investigation and the trial were defective and slipshod, and marred by illegalities, and characterised

by a lack of thoroughness which is surprising, if not shocking, in a trial for murder. Even the record supplied to this Court is incomplete. The depositions before the Magistrate were used during the trial for the purpose of cross-examining the witnesses, and extracts from those depositions were put in evidence. Yet because the depositions were not formally tendered as evidence to the Court, they have not been included in the record. Such formality really amounts to absurdity. If questions are put and extracts included, from depositions, during the trial of a case, it must be obvious that that evidence has been admitted by the Judge and that it must form part of the record, whether technically speaking it has been properly tendered or not. The matter is of some importance in this case because the learned Judge has remarked upon the considerable discrepancies between the evidence given by certain witnesses to the police, and to the Magistrate, and at the trial. Yet we have not had a full opportunity of examining the different sets of statements so as to be able to form a clear opinion about whether the discrepancies are as important as the learned Judge says. He refers specially to the evidence of the witness Banoo. I, at any rate, have found some difficulty in appreciating that there is much contradiction in the statements which he gave. The difficulty is to understand exactly what the evidence means as it stands in the present record. That brings me to the second point of criticizm, that the evidence is badly translated. Much depends in this case upon accuracy about what exactly the witnessess said, whether they were talking of the present or the past. It is obvious from the translation which we have before us that the English words in the printed book are not the correct equivalents of what the witnesses said in their own language. Further a number of facts are left in uncertainty. If the Public Prosecutor and the pleader appearing for the accused cannot or will not probe thoroughly the evidence which is being given, so that an intelligible story can be included in the deposition, it is the duty of the Judge to do it, instead of leaving bits of evidence in the air so to speak, so that this Court cannot make out from the record what it was that the witness was intending to say. The learned Judge has referred to the police investigation in the following words:

"The investigation of the case was lax to a degree and Mulla Khan was not arrested till about two years later, and then on the information of a man who knew him, he may be inferred to have said in both Hoti and Shyamnagar, who was not examined as a witness."

And then the learned Judge goes on to refer to various defects in the investigation. We think the learned Judge's remarks are justified. It is difficult to speak in temperate language of the conduct of Police Officers who, in respect of a charge so serious as this, have dealt with the investigation in so careless a fashion. One of the main witnesses was not examined till two months afterwards, though he was living within a few yards of the thana. Another important witness was not examined till two years afterwards, actually the owner of the Pan shop opposite which this crime was committed and who was present when it was done. The facts about the two Hanifs have been so completely muddled by the police that it is difficult to know which witness we are dealing with at any moment, and it has enabled the defence to set up a plausible story that the actual Md. Hanif was never called into the witness-box, but somebody else. With regard to Banoo, whom I have mentioned already it is impossible to understand exactly from the record in the Sessions Court or from what he is reported to have said to the police and the Magistrate what was the evidence which he purported to give.

Directly the accused was brought from Peshawar, it must have been evident to everybody concerned that the trial would turn upon a question of mistaken identity. The accused raised this defence from the very first moment and before he had had any opportunity to get into touch with a pleader. If ever there was a case when it was essential that the strictest possible adherence to the regulations with regard to identification should be made this was one. Yet we are amazed to find that no attempt was made to hold a test identification, which was the only safe way of ascertaining whether the witnesses for the prosecution could be relied upon, when they said that they could identify this man, and not being satisfied with omitting this essential safeguard, the

police actually took the witnesses near to the hajat where this man was incarcerated, and there pointed him out to them as Mulla Khan who had been brought down from Peshawar. This was when the witnesses were in the Court Inspector's office from which the hajat could be seen. The witness Ramzan states that the office and the hajat are only separated by a rail. Such identification, of course, is utterly worthless. It is about as worthless as the identification of a man when he is in the dock. It may be that the police were anxious that there should be no mistake over the identification. It may be that they had no wish to folster up the prosecution case. But the point is, that it is much too dangerous to rely upon identification of this kind.

The learned Judge has remarked that in his view an important and material witness was withheld by the prosecution. This was the man who had informed the police about the presence of the absconder in Peshawar. The explanation given was that secret information was given to the police and doubtless in many cases it would be unsafe to expose the sources from which such information is obtained. But in this case the prosecution had to face the argument that if this witness was not called, the jury might presume that his evidence would not help the prosecution and the learned Judge has no doubt pointed that out to the jury. But in our opinion what he said was not anything like strong enough. This was a most important witness. If he were to be believed, he must have had knowledge of Mulla Khan both during the time when he was in Shyamnagar and during the time when he was in Hoti in Peshawar. He would have supplied the link which is so badly wanting in the evidence, and would have disposed of a great deal of the difficulty which has arisen. But not only was he not called, but a part of his evidence was allowed to go to the jury. Thus mistakes upon mistakes were made by those who were conducting the prosecution and by the learned Judge.

The statement that the man in Shyamnagar and the man in Hoti were the same person, possibly the most important sentence in the whole case was placed before the jury without calling the witness. It would have been most interesting and most important to know what was said by him to the police about the man whom he indicated as being in Peshawar. Whether this man has been arrested simply because his name is like that of the absconder, or because he resembled his description, we do not know; we are left completely in the dark. All that we know is, that a man named Mulla Khan was wanted, and the only evidence we have on the record is that this man at Peshawar is not known as Mulla Khan, but as Hamidulla. Of course the witnesses for the prosecution have now recognized him, but how could they fail to do so when he was pointed out to them by the police. In spite of all these defects, I am not at all sure that the jury would not have come to a proper conclusion in this case if they had been properly directed by the learned Judge. His charge was sketchy and unhelpful to a degree.

Whatever the conditions and the difficulties may be in this country, Judges, Advocates and Police must realize that in a trial where a man's life is in jeopardy, it is essential to take the greatest possible care to avoid mistakes being made. It is not sufficient for the Judge simply to point out this piece of evidence and that this presumption, and that, this bit of law and that. It is his duty to help and guide the jury to a proper conclusion. It is his duty to direct the attention of the jury to essential points. It is his duty to point out to them the weight to be attached to the evidence, and it is his duty to warn them gravely about the responsibility which rests upon their shoulders in a trial of this kind, and to impress upon them that if there is any doubt in their minds, they must give the benefit of that doubt to the accused. It may be said that the learned Judge has done all this, and if you search through the charge, you will find something said somewhere upon each of these matters. But that is not enough. It is the manner of saying it, the arrangement and the structure of his charge, which will make it either of value or valueless to the jury. As I have pointed out already practically the most important matter in this trial was the omission of a test identification which the learned Judge has not even mentioned. The second is the admission of

that most important piece of evidence of the absent witness.

The learned Judge has totally disregarded it. Finally, he has not made any real attempt to deal with the evidence of the witnesses, that is to say, to invite the jury's attention to the value of it and the weight which should be put upon it whether the witnesses' recollection after three years is to be relied upon, whether the witnesses from Peshawar are persons whose evidence can be relied upon, and matters of that kind. The learned Judge has failed to do these things and to give the jury any helpful guidance in coming to their verdict. The result was that by a majority of seven to two they found this man guilty. In our opinion, it is not safe to condemn a man upon a charge of murder upon such evidence as this, or in a trial conducted in this way and he ought to have been given the benefit of the doubt. We do not therefore confirm the sentence of death passed on the appellant; we allow the appeal, set aside the conviction and sentence and acquit the accused. The reference made by the Additional Sessions Judge is rejected.

M. C. Ghose, J.—I agree.

McNair, J.—I agree.

K.S. *Reference rejected.*

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Special Bench

MUKERJI, BARTLEY AND ROY, JJ.

Sadek Mandal—Accused—Appellant.

v.

Emperor—Opposite Party.

Death Ref. No. 23 of 1933, and Criminal Appeal No. 728 of 1933, Decided on 27th November 1933.

Criminal P. C. (1898), Ss. 303 and 307 — Verdict of jury under S. 304, I.P.C.—If Judge thinks verdict wrong and thinks it should be under S. 302 he must make reference to High Court under S. 307, Criminal P. C., and not question jury on question of intention—But he can question jury after explaining law to them if he wants to get special verdict as regards particular part of S. 304 under which jury finds prisoner guilty — General questions should be avoided—Penal Code (1860), Ss. 302 and 304.

If upon a verdict under S. 304, I. P. C., being brought in, a Judge thinks that the verdict is not correct, but that it should be under S. 302, I. P. C., and questions the jury to find out whether the question of intention has been duly considered, such questioning would not be warranted either by S. 303, Criminal P. C., or by rules contained in the High Court rules and circulars. If he disagrees with the verdict under S. 304, I. P. C., being of opinion that it should be under S. 302, I. P. C., his proper course would be to make a reference to the High Court under S. 307, Criminal P. C., and for that purpose it should be open to him to question the jury in order to find out their reasons for the verdict that they brought in. If while trying to get a special verdict as regards the particular part of S. 304, I. P. C., under which the jury desired to find the prisoner guilty a Judge comes to be of opinion that the jury have not properly understood the law as to the offence of culpable homicide not amounting to murder he would be justified in explaining that law to them again and indeed it would be his duty to do so. But such summing up will have to be confined to that offence only and the questions to be put to the jury should be carefully framed to elicit from them their special verdict only. General questions, the effect of which may be to enable the jury to travel out-side S. 304, I. P. C., should be avoided : *A I R* 1927 *Rang* 68 (*FB*), *Ref.*

[P 174 C 2; P 175 C 1]

Monindra Nath Mukherjee — for Appellant.

N. A. Khundkar—for the Crown.

Order.—This case is before us on a reference under S. 374, Criminal P. C., and an appeal by the prisoner Sadek Mondal who has been sentenced to death on a verdict under S. 302, I. P. C. The prisoner was charged with an offence under S. 302. The Sessions Judge in the course of his charge to the jury explained the offences of murder, culpable homicide not amounting to murder and greivous hurt, as he had to do. What transpired when the jury brought in their vardict would appear from the following record made by the learned Judge :

"The jury retired at 4-50 p. m. The jury returned at 5-15 p. m. To Foreman of the jury:

Q. Are you unanimous ?
A. Yes.
Q. What is your verdict ?
A. We find the accused Sadek Mandal guilty under S. 304, I. P. C.
Q. With what intention was the act committed ?
A. We have not considered the question of intention.
Q. With what knowledge was the act committed ?
A. We have not considered the question of knowledge.
Q. Would you care to be charged again in respect of the law ?
A. Yes.

(The jury is charged once again in respect of the law.)

The jury retired at 5-45 p. m. The jury returned at 5-52 p. m.

Q. Are you unanimous ?
A. Yes.
Q. What is your verdict ?
A. We find the accused guilty under S. 302, I. P. C."

The learned Judge has made a note that the questions which he put to the jury after the verdict had been brought in under S. 304, I. P. C., were asked by him in accordance with the instructicns laid down in the Rules and Circular Orders of the High Court Vol. 1 (Criminal) Chap. 1, R. 74 (b), p. 28. That rule is in these terms:

"The Sessions Judge shall invariably record their opinion whether the act by which death was caused was done with the intention of causing death, or of causing such bodily injury as was likely to cause death or with the knowledge that it was likely to cause death but without any intention to cause death or to cause such bodily injury as was likely to cause death. And in cases tried by jury they should be careful to obtain a specific verdict on these points."

As already stated, as the result of the questioning the learned Judge was able to get from the jury a fresh verdict, namely, one under S. 302, I. P. C. The question which has to be determined at the outset is whether the fresh verdict is one which may be regarded as a verdict obtained in accordance with law. Now, it must be conceded that when the jury brought in a verdict under S. 304, I. P. C., that was not an unambiguous or complete verdict, because the verdict did not indicate under which of the two parts of that section the case in their opinion fell. The ambiguity or incompleteness such as it was however was in respect of this matter only.

Under S. 303, Criminal P. C., therefore it was open to the learned Judge to put questions to the jury to ascertain what exactly their verdict was, but only to find out whether it was under the first or the second part of S. 304, I. P. C. And under the rule quoted above it was his duty to put such questions to the jury as would enable him to obtain specific verdict on the points enumerated in the rule. The rule comes under a heading—"remarks to be made in reference to convictions under S. 304, I. P. C."—and can not be used except for the purpose of recording a proper verdict under that section. The rule cannot possibly have any other meaning, for if it bears any other interpretation it would militate against S. 303, Criminal P. C., and so would be ultra vires the statute.

This being the position the question that has to be considered is, was the first question, which the learned Judge put to the jury, namely, "with what intention was the act committed?", a proper question which the Judge was entitled to put under the law? In our opinion it was not. The question, apart from being a leading one, presupposes that there was an 'intention' which formed an ingredient of the offence of which the prisoner was guilty, while it is true that for an offence of culpable homicide not amounting to murder intention is not a sine qua non. The question was not one which may be regarded as justified either by S. 303 of the Code or by the rule under which the learned Judge purported to act. The proper way to question the jury for the purpose of finding out under which part of S. 304, I. P. C. the prisoner was guilty was to put to them the elements enumerated in the rule, either one by one or as a whole, and to get their special verdict thereon. As the verdict under S. 302, I. P. C. was obtained as the result of questining which cannot be justified as being in accordance with law, we are unable to regard that verdict as one on which a conviction could be based. The learned Judge made it perfectly plain in his summing up that, in his opinion, the prisoner's intention was to cause death, though he very properly and fairly warned the jury that they were at liberty to come to a different opinion. In one part of his summing up he said :

"A person who inflicts an injury upon another which almost separates the head from the body and who inflicts another injury that cuts through a bone, can have but one intention, and a ruthless intention, that is, an intention to cause death. In my opinion, which you may neglect, to hold otherwise would be merely ridiculous. You however are the sole judges of the facts and I leave it to you."

If upon a verdict under S. 304, I. P. C. being brought in a Judge thinks that the verdict is not correct but that it should be under S. 302, I. P. C. and questions the jury to find out whether the question of intention has been duly considered, such questioning would not be warranted either by S. 303, Criminal P. C. or by the rule referred to above. If he disagrees with the verdict under S. 304, I. P. C. being of opinion that it should be under S. 302, I. P. C. his proper course would be to make a reference to this Court under S. 307, Criminal P. C. and for that purpose it would be open to him to question the jury in

order to find out their reasons for the verdict that they brought in. If while trying to get a special verdict as regards the particular part of S. 304, I. P. C. under which the jury desired to find the prisoner guilty a Judge comes to be of opinion that the jury have not properly understood the law as to the offence of culpable homicide not amounting to murder he would be justified in explaining that law to them again and indeed it would be his duty to do so. But such summing up will have to be confined to that offence only and the questions to be put to the jury should be carefully framed to elicit from them their special verdict only. General question, the effect of which may be to enable the jury to travel outside S. 304, I. P. C. should be avoided. We are of opinion that in the present case the questioning after the record of the verdict under S. 304, I. P. C. was not proper and that the second verdict under S. 302, I. P. C. therefore was not one on which a conviction could be based. We have also reasons to suspect that the jury had not applied their mind in understanding the law to be applied, and for that reason too their verdicts are not such as can be relied on.

Amongst the cases which the learned Deputy Legal Remembrancer has referred to in support of the procedure adopted by the learned Judge the one that has a resemblance to the present case is the case of *Emperor* v. *Nga Tin Gyi* (1). In that case in a High Court Sessions trial for murder the jury at first brought in a verdict of "culpable homicide not amounting to murder," the Judge then put questions to the jury to ascertain what degree of that offence they intended and their answer revealed the fact that they had not understood the law on the subject, the Judge then explained the law to them over again and ultimately they brought in a verdict of guilty of murder. On a reference under the Letters Patent it was held that the verdict of murder was proper and could be accepted. One main point of difference between that case and the present case is that in that case it was held that the questions that were put were such as could properly be asked. In our judgment the verdict of the jury on which the prisoner's conviction is founded cannot be acted upon. We accordingly, without expressing any opinion on the merits of the case, set aside the verdict and order that the prisoner be tried again.

K.S. *Retrial ordered.*

1. A I R 1927 Rang 68=99 I C 1013=28 Cr L J 213=4 Rang 488 (FB).

A. I. R. 1934 Calcutta 175

AMEER ALI, J.

Harnathrai Binjraj—Plaintiff.

v.

Churamoni Shah and *others*—Defendants.

Suit No. 1889 of 1932, Decided on 27th March 1933.

Letters Patent (Calcutta), Cl. 12 — Debt contracted outside jurisdiction—Assignment in Calcutta—Lease is generally granted — It should not be refused merely on suspicion—Civil P. C. (1908), S. 20.

In a suit by an assignee the assignment is a part of the cause of action and upon that cause of action leave is invariably granted. It is impossible before the hearing of the suit to decide whether an assignment is or is not bona fide and the Court will not be justified, on a mere suspicion that the assignor might not have acted in the ordinary way of business, in depriving the plaintiff of the right to bring to suit in the place where the assignment was made.

[P 176 C 2]

S. N. Banerjee—for Plaintiff.

A. K. Roy—for Defendants.

Judgment.—This is an application to revoke leave granted under Cl. 12 of the Charter in a case where the plaint disclosed or purported to disclose a part of the cause of action in Calcutta. Standing counsel for the applicant himself described it as a novel application. That in itself does not make it any the worse. In point of fact, this is the first application of the kind that I have known. The plaint is to recover the balance of an account due from the defendant Churamoni Shaha to Baijnath Jograj amounting to Rs. 11,762, both these persons or firms being residents of Bhagalpur and carrying on business at Bhagalpur and nowhere else. This debt was assigned by Baijnath Jograj, the creditor to the present plaintiffs, Harnathrai Binjraj, on 17th August 1932, the suit being brought on 23rd August 1932. The summons in the suit was served on 19th September 1932. Considerable correspondence took place between the attorneys for the parties between the date of the service of the summons and November 1932. This correspondence is annexed to a second affidavit on be-

half of the respondents to this application, the plaintiffs, which affidavit is objected to on the ground that it was filed so late as I think, January of this year. That, however, is the applicant's own fault, because the application having been made in December of 1932 it was not brought on until the other day. In those circumstances I allowed this second affidavit to be used. People who have Chamber applications and allow them to mature for several months, must take the risk of further affidavits being filed.

It is said that the members of the plaintiff firm the assignees, are also residents of Bhagalpur. That is stated in the affidavit in reply on behalf of the applicant, and although it has not been replied to, for the purposes of this application I shall assume that to be the fact. On the other hand, it is not denied that the plaintiff firm does carry on business in Calcutta. The argument in support of the application may be summarised as follows. That under Cl. 12 of the Letters Patent the Court has discretion to grant or refuse leave in a case where part of the cause of action arises in Calcutta and reference is made to a case in *Seshagiri Row* v. *Oskur Jung* (1). In that case, although it was not necessary for the decision of the Madras High Court, since it did not appear that any part of the cause of action had arisen in Madras, it was held that the question of convenience and prejudice was a matter which could and ought to be considered in granting or refusing leave. As regards the facts, it is suggested (and not without some reason) that this assignment was made not only in anticipation of the insolvency of the assignor firm which was imminent and has, I understand, supervened, but for the purposes of creating jurisdiction in Calcutta so as to put pressure on the defendant firm by compelling the latter to contest the suit in Calcutta where they have no business house or connexion. The latter point seems to me the more relevent to the application.

The first aspect of the matter is purely a matter, in my opinion, which must be gone into in the suit, and it is not possible for me in granting or refusing leave to investigate matters which must be and can only be investigated on evidence, although there may be grounds of suspicion. The second aspect of the matter is one which appeals to me far more, especially having regard to the fact that I have neither at the Bar or on theBench come across where assignments have been made away from the scene of action in order to get an advantage over the defendants. It has always been assumed however that in a suit by an assignee the assignment is a part of the cause of action, and upon that cause of action leave, as far as I know, has invariably been granted. For practical purposes it is impossible before the hearing of the suit to decide whether an assignment is or is not bona fide. I do not think that the Court would be justified, on a mere suspicion that the assignor might not have acted in the ordinary way of business, in depriving the plaintiff of the right to bring a suit in the place where the assignment was made, which right has always been recognised by this Court.

It might have been more satisfactory if the rule were otherwise i. e., that an assignee in taking an assignment of a debt should take such assignment with only such right of suing as the assignor had and could sue where the assignor could sue and nowhere else. I do see difficulties in the present system under which an assignor can create jurisdiction in any place where the Civil Procedure Code applies but I do not think it would be right for me to attempt to change it. In this case, even had I considered myself entitled to depart from the view taken by this Court there is in addition the fact that the defendant corresponded for a period of some months with the plaintiffs and resisted applications or took part in applications in Calcutta before taking out this application. That might have been an additional obstacle in the way. I dismiss the application but having regard to the nature of the case, I reserve the costs. Certified for Counsel.

R.K. *Application dismissed.*

1. (1907) 30 Mad 438=17 M L J 304.

A. I. R. 1934 Calcutta 177

MITTER AND HENDERSON, JJ.

Utanka Lal Mukerjee and *others* — Appellants.

v.

Proprietors, (firm) Nitai Chandra Seal and *others*—Respondents.

Appeal No. 365 of 1932, Decided on 14th June 1933, from original order of Sub-Judge, Burdwan, D/- 30th June 1932.

Contract Act (1872), S 251, Exception—Authority of partner to give release restricted—Debtor having knowledge of restriction cannot set up release by one partner as defence.

Where there is no agreement but the circumstances disclose that the authority of a partner to give released was restricted and the debtors had the knowledge that the authority of one partner was restricted, unauthorized discharge cannot be set up as defence. [P 178 C 2]

Kanaidhone Dutt, Jognneswar Majumdar—for Appellants.

Narendra Krishna Bose, Harendra Nath Mukerji and *Biswanath Naskar*—for Respondents.

Urukramdas Chakravarty — for the Receiver.

Mitter, J.—This is an appeal on behalf of the judgment debtors against an order of the Subordinate Judge of Burdwan dated 30th June 1932 by which he disallowed the objection of the judgment-debtors to the effect that the decree sought to be executed has been entirely satisfied. It appears that the respondents who carry on a business under the name and style of the late Netai Chandra (Charan) Seal and another obtained a decree against the judgment-debtors for a considerable sum of money. They proceeded to execute the decree in respect of the amount due after certain payments had been made by their application which was filed on 20th October 1930. The amount for which the decree was sought to be executed came up to about Rs. 12,772-14-0. The judgment-debtors objected to the execution on the ground amongt others that one of the partners, Nagendra Nath Sil, by accepting a sum of Rs. 3,000, gave a release in respect of the entire decretal amount. The case made by the judgment-debtors was that in the month of Aswin 1337 B. S. it was agreed in the presence of Nagendra Nath Sil and other partners that if the judgment-debtors paid a sum of Rs. 3,000, in a lump they would accept the decree in satisfaction of the dues of the defaulted kists. It was further agreed that in case the judgment-debtors paid in two instalments, one at the time and the other a year after then they should have to pay a sum of Rs. 4,000 before the decree could be entirely satisfied.

The case of the judgment-debtors is that it was in pursuance of this arrangement between all the partners that Nagendra gave a release after receipt of payment of a sum of Rs. 3,000. The Subordinate Judge has on the evidence come to the conclusion that this sum of Rs. 3,000 was paid to Nagendra and this finding has not been questioned in this appeal. But the Subordinate Judge has come to the further conclusion that Nagendra had no express authority to accept Rs. 3,000, in full satisfaction of the dues. It was contended before him that under the provisions of S. 251, Contract Act, Nagendra as a partner had authority to give the release and thereby bind the other partners or rather the firm. But this objection was over-ruled although the Subordinate Judge came to the conclusion that there was no fraud or collusion between Nagendra and the judgment-debtors and no such fraud has been established in this case. In this view the Subordinate Judge reached the conclusion that by payment of Rs. 3,000 to Nagendra Rs. 3,000 have been satisfied out of the dues under the decree but the balance under the decree still remained unsatisfied. He therefore, directed that execution should proceed for the balance. Against this order the present appeal has been brought and it has been contended before us that the Subordinate Judge has committed an error in law in holding that in the absence of fraud or collusion between one of the partners Nagendra and the judgment-debtors it was not open to Nagendra to give a release in respect of the balance so as to bind the firm. In support of this contention reliance has been placed on several authorities and in particular we have been referred to a passage in the well known text-book of Lindley on partnership, Edn. 9, at p. 203. The learned author states the position in law as follows:

"A covenant by one partner not to sue for a partnership debt does not amount to a release of that debt by the firm, although a covenant by all the partners not to sue would be equivalent to a release and a release by one partner operates as a release by the firm."

"This last proposition, viz. that a release by one partner is in point of law a release by all, is strongly illustrated by those cases in which attempts have been unsuccessfully made by one partner to set aside a release given by a co-partner without his consent."

Lord Lindley in support of this proposition cites authorities of English cases to which reference has been made in the text book. It can hardly be gainsaid that it is an accurate statement of law and that this was also the view taken in Indian Courts will appear from the decisions in the cases to which reference has been made, namely *P. L. A. Palaniappa Chetiiar* v. *V. L. A. R. Veerappa Chettiar* (1) and *Baikuntha Nath* v. *Hara Lal* (2). Perhaps the Subordinate Judge has somewhat broadly stated the law when he said that even in the absence of fraud and collusion it is not competent to one of the partners to give a release in respect of the partnership debts. But this case has to be decided on the evidence which has been adduced in this case to the effect that there was a meeting amongst all the partners when it was agreed that on payment of Rs. 3,000 in the lump they would accept the decree in full satifaction of their dues. This story of such an agreement amongst all the partners has not been accepted by the Subordinate Judge. It appears clear from the cross-examination of one of the judgment-debtors Satya Kinkar Mukherjee who is witness 1 for the judgment-debtors that Nagendra Babu sent word to him to come to al! the partners for the decree money. In this case no deed of partnership is forthcoming. But it appears clear from the statement of the judgment-debtors in the passage to which I have just referred that he knew that the partner's authority was restricted so far as the question of release was concerned,for, according to the case made by the judgment-debtors it appears clear that nothing could be settled with reference to the release except in the presence of all other partners and by consent of all the partners.

The case therefore falls within the rule of law which has been formulated by Sir Fredrick Pollock and Sir Dinshaw Fardunji Mulla in their well-known commentary on the Contract Act under S. 251 of the said Act in the passage to be referred to presently. Having regard to the fact, namely, that the judgment-debtors had the knowledge that the authority of one partner was restricted so far as the matter of release was concerned for otherwise there was no point in the meeting of all the partners for the consideration of this question it seems to us that the case falls within the exception of S. 251 of the Act which shows that if it has been agreed between the partners that any restriction shall be placed upon the power of any one of them, no act done in contravention of such agreement shall bind the firm with respect to persons having notice of such agreement; and as has been pointed out by the learned authors that it is obviously not just that a third person should be able to hold the firm liable for an act of one partner which he knew to be unauthorised; and such knowledge is necessarily conveyed by notice that the partner's authority is expressly restricted, in that particular, by the partnership agreement. As has already been pointed out there is no agreement in this case; but as the circumstance discloses that the judgment-debtor's (Satya's) own evidence shows that there was such restriction, and he knew of it. In this view the appeal fails and must be dismissed with costs. We assess the hearing fees at two gold mohurs which will be divided equally between the two sets of respondents, namely respondent 2 and respondents 1 and 3. The receiver respondent is not entitled to any costs.

Henderson, J.—I agree that this appeal must be dismissed.

R.K. *Appeal dismissed.*

1. A I R 1918 Mad 238=44 I C 466=41 Mad 446.
2. (1910) 9 I C 116.

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* A. I. R. 1934 Calcutta 178

NASIM ALI, J.

Abani Bilas Banerjee and *another*—Defendants—Petitioners.

v.

Kanti Chandra Sinha and *others*—Opposite Parties.

Civil Rule No. 1138 of 1933, Decided on 23rd November 1933, from decree of Second Court Munsif, Berhampur, (Murshidabad), D/- 18th May 1933.

*** Contract Act (1872), S. 25 (3)—Pro-note by sons for father's time-barred debt—Sons cannot be made personally liable—For per-**

sonal liability there would be no consideration.

Where the sons of a Hindu father execute a hand-note for their father's time-barred debt, the sons cannot be made personally liable, because under the law they were liable to the extent of the assets which have come into their hands; if the promise be to pay the debt personally, that promise would be without any consideration: *AIR* 1929 *All* 586, *Foll.* [P 179 C 2]

Rama Prosad Mukhopadhya — for Petitioners.

Panchanan Ghose—for Opposite Parties.

Order.—The facts which has given rise to the present rule are these. The plaintiff's father, the late Nabin Chandra Sinha, obtained a money decree against the father of the defendants on 20th February 1914. The said decree was put into execution but the execution case was dismissed for non-prosecution on 5th January 1933. Thereafter the decree-holder did not take any further step for the execution of the decree. The judgment-debtors that is the father of the defendants, died on 31st August 1925. Thereafter the eldest son of the judgment-debtor on 27th January 1927 executed a hand-note Ex. 1-A for Rs. 125 with the object of paying off the amount due for the decree mentioned above. The eldest son having died on 24th January 1930 the defendants executed hand-note Ex. (1) for Rs. 120 in full satisfaction of the decretal debt due from their father. The present suit has been brought to recover Rs. 150 on the basis of the hand-note Ex. (1)—Rs. 120 being the principal amount secured by the hand-note and Rs. 30 having been claimed as damages. The Small Cause Court Judge found that Ex. (1) is a genuine document that was executed by the defendants to satisfy the decretal debt due from their father and in view of the provisions of S. 25, Cl. 3, Contract Act, he has decreed the suit. The present rule has been obtained on the ground that Ex. (1) on which the suit is based being without consideratien is not enforcible in law. It is contended by the learned advocate for the petitioners that Ex. (1) does not contain a promise to pay but that it simply shows an acknowledgment of a debt due from the father which was already barred. In my judgment the words "*chahibv matra dibar angikare*" in the beginning of the Ex. (1) and "*yai handnote likhiya dilam*" towards the end of Ex. (1) should be read together and in this view there cannot be any doubt that there was a distinct promise to pay the amount in writing and signed by the defendants as contemplated by Cl. 3, S. 25, Contract Act. The defendants are therefore liable to pay the money secured by the handnote.

The next question however that arises for consideration is whether this liability is a personal liability or liability extends only to the extent of the assets which have come into their hands from their father. In my judgment the defendants cannot be made personally liable, because under the law they were liable to the extent of the assets which have come into their hands. Consequently if the promise was to pay the debt personally, that promise would be without any consideration, or in other words there would be no consideration for making a promise to pay the debt personally. This view is supported by the decisisn of the Allahabad High Court in the case of *Asa Ram* v. *Karam Singh* (1).

The result therefore is that the decree of the trial Court is varied to this extent that the defendants would not be personally liable for the decretal amount but the plaintiff will be entitled to realise the decretal amount from the assets, if any, in the hands of the defendants which they have inherited from their father. In view of the facts and circumstances of this case, I make no order as to costs in this rule.

R.K. *Decree varied*

1. AIR 1929 All 586=119 I C 109=51 All 983.

A. I. R. 1934 Calcutta 179

MITTER AND HENDERSON, JJ.

Mahomed Ali Haidar Khan and *another*—Plaintiffs—Appellants.

v.

Upendra Nath Ghose and *others*—Defendants—Respondents.

Appeal No. 249 of 1929, Decided on 22nd May 1933, from original decree of 2nd Court Sub-Judge, Sylhet, D/- 27th March 1929.

(a) Civil P. C. (1908), S. 11—Ex parte decree—Matter taken on appeal—Ex parte defendant having opportunity to contest appeal—Ex parte character is lost.

Although a decree may be ex parte at its inception it loses the ex parte character when the matter is carried in appeal to the High Court

and the ex parte defendant has an opportunity of contesting the appeal and does contest it.
[P 183 C 1]

(b) Civil P. C. (1908), S. 11—Directly and substantially in issue—Raising of express issue is not necessary—Decision by necessary implication is sufficient.

In order to sustain a plea of res judicata it is not necessary that an issue should have been expressly framed on the question. It is enough if the matter was in issue in substance and the matter in controversy in the subsequent suit has been decided in the previous suit either expressly or by necessary implication; because the application of the rule of res judicata by the Courts in India should be influenced by no technical considerations of form but by matter of substance within the limits allowed by law: *A I R* 1916 *PC* 78 and 12 *Ben L R* 304 (*PC*), *Rel on.*
[P 185 C 2; P 186 C 1]

Basak, Priya Nath Dutt, Satindra N. Roy Chowdhury and *Gobinda Chandra Dutt*—for Appellant.

Brojolal Chakrabarty, Satindra Nath Mukerji, Poresh Lal Shome, and *Hemendra Kumar Das*—for Respondents.

Mitter, J.—A short statement of the facts which have given rise to this litigation will explain the points for determination involved in this appeal.

The case as stated in the plaint is that there was a permanently settled estate known as taluk Rai Gouhari Sing in the district of Sylhet, that a separate account was carved out of the same and was known as Kharija Hishya No. 113 and was possessed by the plaintiffs' father Muhammad Ali Amzad Khan, that the residuary Mahal which was described as Mahal No. 47031-1, taluk Rai Gourhari Sing No. 1, was purchased at a sale for arrears of Government revenue on 8th January 1892 by one Kashi Nath Ghose, the father of defendants 1, 2 and 3, now dead; that the said Kashi Nath sold some lands in chaks and four annas share of the rest of the land of the said residuary mahal to one Nobo Kumar Das, defendant 4 in this suit; that disputes arose between Kashi Nath and Ali Amzad Khan regarding the lands of the residuary mahal; that the dispute was settled by a Nirupanpatra which was duly executed by the plaintiffs' father and Kashi Nath Ghose and defendant 4 on 19th Bhadra 1302 corresponding to 4th September 1895; that the dispute was settled in this way, namely that 350 hals of land of Sch. 2 to the plaint out of the lands of Sch. 1 to the plaint which consists of 1350 hals would be confirmed as appertaining to the separate account No. 113 owned by the plaintiffs and besides this an eight annas share of the thousand hals of lands of Sch. 3 to the plaint which are included in the 1350 hals of Sch. 1 with the revenue of Rs. 15 would be owned and possessed in absolute right by the plaintiffs' father with his sons and grandsons in succession, with power to make all sorts of transfer by gift and sale, etc., and the other eight annas share would be owned and possessed in the same manner by Kashi Nath and defendant 4 as appertaining to their auction purchased Mahal.

It was further alleged in the plaint that the dispute having been settled between plaintiff's father and Kashi Nath and defendant 4 in accordance with the Nirupanpatra the plaintiff's father continued to possess the land in Sch. 2 and an eight annas share of the land in Sch. 3 while Kashi Nath and defendant 4 possessed the remaining eight annas share of Sch. 3; that while plaintiffs and Kashi Nath and defendant 4 were in such possession of Sch. 3 lands respectively, the Government offered obstruction to their possession in respect of Sch. 3 lands and Kashi Nath and defendant 4 brought a suit numbered 33 of 1904 in the Court of the Subordinate Judge of Sylhet against the Secretary of State for India claiming sixteen annas of the lands of Sch. 3 and impleaded Moulvi Amzad Khan, father of the plaintiffs, as a defendant in the suit, that the plaintiffs father in order to oppose the improper claim of the plaintiffs to eight annas share of Sch. 3 belonging to him took adjournment in the said suit for filing a proper defence, but before he could do so he was attacked with serious illness and after taking several adjournments for filing the written statement he died without being able to file any.

It is further stated in the plaint that as the plaintiffs were minors at the time of their father's death the management of the estate which they inherited from their father was placed in the hands of the Court of Wards of the Province of Assam and one Mr. Lidiward was appointed as Manager of the plaintiffs' estate by the Court of Wards; that the said Kashi Nath Ghose and defendant 4 substituted the present plaintiffs as heirs of their father and applied for the appointment of Mr. Lidiward as guardian

ad litem of the plaintiffs who were defendants in the said suit, but the appointment of Mr. Lidiward was unlawful as he did not express his consent to act as guardian in the said suit for the present plaintiffs, that Mr. Lidiward did not file any written statement on behalf of the plaintiffs in the present suit or take any other steps to protect their interest, that taking advantage of this circumstance Kashi Nath and defendant 4 during the local investigation in the said suit No. 33 secretly and fraudulently pointed out to the investigating Amin 60 hals of land of Sch. 4 appertaining to the present plaintiffs' separate account No. 113 as being included in the land in dispute in the said suit No. 33, that Kashi Nath died during the pendency of suit No. 33 and defendants 1, 2 and 3 were substituted as his heirs on the record of that suit; the said suit was decreed after contest against the Government and ex parte against the plaintiffs in the present suit; that the claim of Kashi Nath and defendant 4 in respect of the land of Sch. 4 to the present plaint was decreed on 18th June 1909 in favour of defendants 1 to 4 upon a declaration that 60 hals of land of Dag No. 1 of Sch. 4 and 200 hals and 4 kedars of land of dag No. 2 of Sch. 4 in all 260 hals and 4 kedars of land appertained to the residuary mahal No. 1 taluk Rai Gourhari Singh.

The plaint further recites that according to the Nirupanpatra, the sixteen annas of land of dag No. 1 of Sch. 4 appertained to plaintiffs' separate account No. 113 and an eight annas share of the land of dag No. 2 of Sch. 4 appertain to the original mahal to which the plaintiffs as heirs of their father, have maliki right; that in execution of the said decree in suit No. 33 defendants 1 to 4 in collusion with defendant 5 the Alinagar Tea Coy., Ltd., have dispossessed the plaintiffs from the sixteen annas share of dag No. 1 and from eight-annas share of dag No. 2 of Sch. 4 and are wrongfully possessing the entire land of Sch. 4; that the decree in suit No. 33 is wholly illegal, fraudulent and deceitful. The plaint next recites that plaintiff 1 attained majority on 10th February 1921 and plaintiffs' estate was released from the management of the Court of Wards on 27th February 1922; that subsequently plaintiff 2 attained majority on 13th January 1924, that plaintiffs first came to know of the said decree in suit No. 33 in the month of August 1923. In para. 18 of the plaint it is stated that the bar of limitation to the suit is removed by the circumstance that plaintiffs came to know of the fraudulent decree in the suit No. 33 in August 1923 and the present suit was instituted on 26th February 1924. On these pleadings the relief sought in the suit against defendants 1 to 5 has been ranged under four heads, (1) that it may be declared that the decree in suit No. 33 is fraudulent and ultra vires and not binding on the plaintiff, (2) that their title may be declared to the sixteen annas land of dag No. 1 and eight annas share of the land of dag No. 2 of Sch. 4 and khas possession thereof may be given to the plaintiffs, (3) that a decree for mesne profits may be passed and (4) decree for costs may be given.

In addition to the five defendants the Secretary of State for India in Council has been impleaded as defendant 6 and the relief prayed against the Secretary of State is in the alternative that if for any reason the plaintiffs cannot get relief against the other defendants a decree may be passed for recovery of the sum of Rs. 35,676-4-0 as damages. This relief is based on the allegations in paras. 13 and 15 of the plaint. The substance of those allegations is that the plaintiffs believed that it was for the protection of the Government's interest that the Court of Wards conducted by the Government wilfully refrained from taking any steps in suit No. 33 to protect the interest of the plaintiffs and the Government not having taken any necessary step in the said suit to protect the interest of the plaintiffs they are liable in damages. Para. 17 of the plaint states that notice of this suit was given to the Government under S. 80, Civil P. C., within the time prescribed by law.

Defendants 1 to 3, defendant 4, defendant 5 and the Secretary of State have filed separate written statements. The defences of defendants 1 to 5 in so far as is material to the controversy in the present appeal are: (1) plaintiffs' claim is barred by res judicata, (2) the land of dag 1, Sch. 4 in suit is not included in the separate Hishya No. 113 or in the boundaries of Sch. 2 of the plaint, (3)

plaintiffs' predecessor not having done the acts which he had promised to do as consideration for the Nirupanpatra the contract was not acted upon and the plaintiffs' predecessor cancelled it by subsequent acts and therefore plaintiffs cannot get any benefit on the basis of the said Nirupanpatra, (4) that during local investigation in suit No. 33 Kashi Nath and defendant 4 did not fraudulently cause any land of separate account of 113 to be included in the lands in dispute in that suit, (5) the suit is barred by limitation, (6) the decree in suit No. 33 is neither fraudulent nor ultra vires, (7) that there was no fraud on the part of the Court of Wards in not filing a written statement in suit No. 33, (8) that in appeal against the decree in suit No. 33, by defendants 1 to 4 the plaintiffs were made respondents and they appeared through the Manager of the Court of Wards; that execution proceedings were taken by the defendants in the presence of the plaintiffs who appeared through the Court of Wards and that in such circumstances it cannot be said that the Court of Wards did not take proper steps to protect the interest of the plaintiffs.

The Secretary of State supported the defence of the other defendants and contended that the Court of Wards never refused sanction to any steps necessary to preserve the interest of the plaintiffs and that Government was not responsible when the manager of the Court of Wards acted bona fide. On these pleadings several issues were framed by the Subordinate Judge. They are to be found at pp. 48 and 49 of the Paper Book. The Subordinate Judge has come to the conclusion that the suit is barred by the principles of res judicata by reason of the decision in Suit No. 33 of 1904. He has also found that there was no fraud in obtaining the decree in suit No. 33 and that the said decree is binding upon the plaintiffs. He has also reached the conclusion that the Nirupanpatra was never acted upon. He finds also that plot No. 1, Sch. 4 of the plaint was included in the Nirupanpatra and was outside the boundaries of separate account No. 113. He has also found that there was no negligence on the part of Government and the Court of Wards and that the plaintiffs' father deliberately abandoned his claim in the Nirupanpatra as he did not want to throw away any money and that the plaintiffs had no title to any of the two plots in suit. In view of these findings the suit was dismissed against defendants 1 to 5 as also against the Secretary of State.

Against this decree of dismissal the present appeal has been brought by the plaintiffs. By a petition put in this Court the plaintiffs have withdrawn their appeal against the Secretary of State and nothing further need be said regarding the claim against the Secretary of State beyond this that the appeal will be disposed between the plaintiffs and the Secretary of State in terms of the said petition. Several contentions have been raised in this appeal on behalf of the appellants. We will notice them in the order in which they have been argued.

It has been contended in the first place that the Court below was in error in holding that the suit is barred by the principles of res judicata by reason of the decision in Suit No. 33 of 1904. With regard to this plea a discrimination has been made in argument between the 60 hals of land of Sch. 4 (dag 1) and the 8-annas share of 200 hals of land mentioned in Sch. 4 (dag 2). It is conceded on behalf of the appellant that the decretal lands of Suit No. 33 of 1904 include the lands of Sch. 4. This is also the finding of the Commissioner who was appointed for local investigation in the present suit as also of the Court below. In suit No. 33 of 1904 the father of the present plaintiffs was the proforma defendant and the Secretary of State was the principal defendant and Kashi Nath and after his death defendants 1, 2, 3 and 4 were plaintiffs. The suit was for a declaration of title to two plots of land consisting of 150 and 600 hals respectively. The plaintiffs in that suit (Kashi Nath and defendant 4 in the present suit) asked for a declaration of their title to 16 annas of the said 750 hals on the basis of their purchase at the sale for arrears of revenue in 1892. They recited the Nirupanpatra of 19th Bhadra 1302 B.S. in para. 9 of the plaint and stated that defendant 2 (father of the plaintiffs in the present suit) not having done any act in accordance with the Nirupanpatra the said deed had become inoperative and that the plaintiffs of that suit (Kashi Nath and defendant 4

of this suit) were the entire proprietors of the disputed lands: see p. 66, part. 2.

In order to avoid the plea of res judicata with reference to the 60 hals of dag 1, Sch. 4 lands the argument for the appellants is put in this way: the schedule to the plaint at p. 71, part 2 clearly discloses that the land of separate account No. 113 was excluded from both the plots claimed, for on the boundaries of both the plots lands of hishya No. 113 of Mauza Tilakpur were mentioned. This plaint was served on one Amzad Ali Khan, father of the plaintiffs, in this suit. He did not file any written statement nor did the Court of Wards which took charge of his estate after his death do so. At the time of the local investigation the plaintiffs in suit No. 33 showed the lands of 113 as being included in the suit and this was done in the absence of plaintiffs' father and the Court of Wards. It is said that as the decree against the plaintiffs' father, or rather the plaintiffs represented by the manager of the Court of Wards, was an ex parte decree, the decree could only be res judicata in respect of the lands claimed in the plaint although the Court may have gone out of its way and declared the plaintiffs in that suit to be entitled to a decree in respect of lands outside the claim, and reference is made in support of this view to a passage in the Rt. Hon'ble Sir Dinshaw Mulla's Commentary on the Civil Procedure Code, see p. 42, under the heading ex parte decree (9th Edn.). The accuracy of this statement of the law must be conceded, but there are two answers given by the respondents to this contention of the appellants: (1) that although the decree was ex parte at its inception it lost the ex parte character when the matter was carried in appeal to the High Court and the Court of Wards had opportunity of contesting the appeal and did contest it, (2) that there is no foundation for the argument that lands of separate account 113 were surreptitiously introduced as forming lands claimed in suit No. 33 at the time of the local investigation. As we shall show presently the respondents have succeeded in establishing both these positions.

With regard to the first position taken up by the respondents in support of the plea of res judicata with reference to the 60 hals of land of dag 1, Sch. 4, the respondents point out that the decree in Suit No. 33 of 1904 which was ex parte against the Court of Wards at its inception lost its ex parte character as the matter was carried in appeal to the High Court by Kashi Nath's sons and the present defendant 4 against that portion of the decree which went against them and the estate of the plaintiffs was represented by the Manager of the Court of Wards in the appeal, but it did no more than adopt the argument employed on behalf of the Secretary of State who was defendant 1 respondent 1 in the said appeal. The Government filed a cross appeal on the ground that the plaintiffs in that suit had not proved that mouza Ghanashyampur appertained to the residuary estate purchased by Kashi Nath Ghose but the cross appeal was not pressed and was dismissed. The plaint in Suit No. 33 expressly excluded the lands of separate account No. 113 from their claim as on the boundaries of the disputed lands of that suit were described the lands of separate account No. 113: (see schedule of the boundaries at p. 71, part II, Ex. 12). If during local investigation the boundaries of the disputed lands were enlarged by including lands of separate account No. 113 and a decree was given in respect of lands within those enlarged boundaries there was nothing to prevent the Court of Wards from taking a ground to this effect by way of cross-objections in the appeal before the High Court and contending that the decree in Suit No. 33 in so far as it included the lands of separate account No. 113 could not be sustained as it was outside the claim of that suit and that the decree was in excess of the claim but nothing of the kind was done. The judgment of the High Court is to be found at p. 163, part II and has been marked as Ex. 10. It would have been much easier for the Court of Wards to prove the fact of the enlargement of the boundaries then than it can be now when twenty years have nearly expired from the date of the decree of the High Court which was passed on 4th August 1913. The decree in Suit No. 33 of 1904 was liable to correction by the High Court and if the plaintiffs or the Court of Wards which represented their estates did not impeach the decree of the first Court in Suit No. 33 on that ground

I do not see how it is possible for the plaintiffs to avoid the plea of res judicata and re-agitate a question which has become final after the decree of the High Court.

There is also no substance in the case made by the appellants that plot No. 1 Sch. 4 which really appertained to the plaintiffs' separate amount was fraudulently included in the claim of Suit No. 33 at the time of the local investigation. It is true that at the time of the local investigation the defendants pointed out the land up to the corrected eastern boundary of kitta chitlia, i. e., the western thak line on the west as the land in Suit No. 33 of 1904 as they claimed Ghanashyampur lands as appertaining to the residuary estate and Ghanashyampur was bounded on the west by kitta chitlia. They did not however get a decree in respect of this land nor could they get a decree in respect of the land of the separate account which they had not claimed in the plaint. The defendants also attempted to take possession of the land lying between the two thak lines in execution of the decree but they failed to do so on opposition by the Government as well as by the Court of Wards. If one turns to Ex. J-2 the certified copy of the thak map of mouza Tilakpur, part 2, one would see at a glance the land about which there was dispute between the parties in the course of the execution. That land is between the corrected thak line which is shown between station No. 54 to station No. 78 and northwards towards the west and the cancelled thak line between station 54 passing through station Nos. 64, 103, 130, 141, 159, 165 to 169, towards the east. In execution of that decree the defendants who were the decree-holders in Suit No. 33 were claiming lands between the corrected thak line to the west and the cancelled thak line towards the east of the corrected line. It will appear from Ex. L a certified copy of objection filed on behalf of the Court Wards in execution case No. 38 of 1914, that their objection was that the plaintiffs decree-holders in Suit No. 33 had not got a decree for the lands situate between the two thak lines in the Commissioner's map and that their claim in respect of the said land had been dismissed and that therefore they could not get possession of the said land. (see p. 184 part II). This objection was allowed by the Subordinate Judge who stated in his order dated 9th December 1926 that

> "the west boundary line is the line which demarcates the two mouzas Tilakpur and Ghanashyampur and this line nad been definetly fixed by the judgment and decree of the original Court which has been upheld by the Hon'ble High Court and that is the line which has been shown in the map prepared by the civil Court Amin in the suit."

In order to understand as to why the thak line of mouza Tilakpur, touzi No. 47031 was corrected reference must be made to a few documents. It would appear from a comparsion of the certified copy of the wazibularz of mouza Tilakpur (pp. 16 and 20, part II) and map No. 7, Ex. Z (2) that the boundary of mouza Tilakpur, second part, towards the east was mouza Ghanashayampur from stations 54 to 179 in the thak map Ex. Z-(2). There is a note in the wazibularz

> "that the boundary of the hill adjoining the mouza was given by guess and on inquiry at the time of fixing the mounds the said boundary was not found and there being dense jungle, the possessors having stated that they were unable to identify the said boundary after cutting the jungle, therefore according to the order of the Superintendent of Survey dated 24th September last the map has been corrected by excluding some land, i. e., the inacessible jungle land as part of the hill."

This accounts for the corrected thak line of mouza Tilakpur, part II. It has already been pointed out that the dispute in the course of execution was not regarding the inclusion of any lands of separate account Chitlier (Ex. 7, p. 21, part. 2) but with regard to the lands between the two thak lines; it was nowhere stated in the proceedings regarding execution that any lands of the separate account Chitalier had been included in the decree. It has been said on behalf of the appellant that this point could not be raised in execution proceedings as the execution Court could not go behind the decree but one fails to understand why the fact could not be mentioned in the said execution petition that the decree-holders were claiming possession of lands between the two thak lines contrary to the decree but further the decree itself has given more lands to the decree-holders than were claimed in the plaint. It is true that they mignt have been told that the Court in execution could not consider this objection but there was nothing to

prevent them from stating the same in the execution petition if in fact the lands of the separate account had been included in the decree which was sought to be executed. The decree-holders claimed lands up to the corrected thak line towards the west between mouzas Ghanashyampur and Tilakpur, but as a result of the execution they got delivery of possession up to the cancelled thak line. So the decree-holders got something less than they were entitled to on the basis of the corrected thak line as shewing the boundary between Ghanshyampur and Tilakpur so that far from getting possession on the basis of the decree of any land of mouza Tilakpur which consisted of chittas Chitley and Bhanubil they get something less of the lands of Ghanshyampur as bounded by the corrected thak line. It is also a circumstance of very great significance that the idea of introducing the allegation in para. 9 of the plaint to the effect that during local investigation in Suit No. 33 the defendants secretly and fraudulently pointed out to the investigating Amin sixty hals of land of Sch. 4 was conceived after notice under S. 80, Civil P. C., was given to the Secretary of State prior to the institution of the suit.

In that notice (which is to be found at p. 212, part 2) it was stated that the plaintiffs were interested in eight annas share of the entire 260 hals of land and not a sixteen annas share of the 60 hals of dag No. 1, Sch. 4 on the footing that they were separate account lands. It has been rightly pointed out on behalf of the respondents by Mr. Chakravarty that things grow as time goes on and this idea of surreptitious inclusion of separate account lands in Suit No. 33 has grown after the issue of notice under S. 80. We are of opinion therefore that the allegation in para. 9 of the plaint has not been established. It follows that the special ground on which the appellants sought to avoid the plea of res judicata with reference to dag No. 1 Sch. 4 to the plaint must fail. Now to take the common ground on which the appellant sought to avoid the plea of res judicata with reference to both the dags of Sch. 4: It is said that although it was asserted in Suit No. 33 of 1904 that there was an agreement with Moulvi Ali Amzad Khan, the ancestor of the plaintiffs, that he would get eight annas share of the land of Sch. 3 to the plaint which include the lands of Sch. 4 now in dispute in the event of his paying the costs of the suit and also performing other acts, the agreement had become inoperative and the father of defendants 1 to 3 and defendant 4 had become sixteen annas owner of Sch. 3 lands. Yet as there was no issue joined on the same and there was no no finding with reference to this agreement the question of the validity of agreement or Nirupanpatra cannot be said to have been finally decided in suit No. 33. It is now however firmly established that in order to sustain in a plea of res judicata it is not necessary that an issue should have been expressly framed on the question.

It is enough if the matter in controversy in the subsequent suit has been decided in the previous suit either expressly or by necessary implication; Kashi Nath and defendant 4 could not have obtained a decree for the sixteen annas share of the 260 hals of lands now in dispute, unless the Court reached the conclusion that the Nirupanpatra had become inoperative and that Moulvi Amzad Ali Khan had no title to the eight annas share as the Nirupanpatra was not acted on. Neither the plaintiffs' father Amzad Ali nor the Court of Wards which managed the estate of plaintiff's father ever controverted the allegation regarding the Nirupanpatra made in the plaint. The plaintiffs' father took several adjournments for filing the written statement in the suit of 1904, but died before he could file any. The decree in favour of the plaintiffs for the entire sixteen annas share could not be sustained unless the question with regard to the Nirupanpatra not having been acted on was decided in favour of the plaintiffs in that suit and against Amzad Ali Khan, defendant 2 in that suit. It has been laid down by their Lordships of the Judicial Committee in the case of *Sooriomonee* v. *Sadananda* (1), that it is not necessary to constitute a matter "directly and substantially" in issue that a distinct issue should have been raised upon it; it is sufficient if the matter was in issue in substance. It has also been recently

1. (1874) I A Sup Vol 212=12 Beng L R 04=20 W R 377 (P C.).

pointed out by their Lordships of the Judicial Committee of the Privy Council that the application of the rule of res judicata by the Courts in India should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law: see *Sheoparsan Singh* v. *Ramnandan Prasad Narayan Singh* (2).

The matter of the Nirupanpatra has once been decided and cannot be agitated again. Amjad Ali Khan by failing to deny the allegation that the Nirupanpatra had not been acted on could not have successfully claimed that it had not been litigated and determined against him, nor can his successors do so now. Another minor ground was taken for the purpose of avoiding the plea of res judicata and it was said on behalf of the appellant that the plaintiffs were minors at the time of their father's death during the pendency of Suit No. 33 and they were represented in the suit by Mr. Lidiward who was not described as Manager of the Court of Wards as the statute requires and therefore there was no proper representation of the minor plaintiffs in that Suit No. 33. In support of this view reference is made to Ss. 51 and 64, Court of Wards Act, and it is said that the notice of suit should have been served through the Collector and if that had been done the manager would have appeared to defend the suit. There is no real substance in this objection. It seems to us that the manager of the Court of Wards did not appear in the suit apparently because Amzad Ali who was alive for a long time after the institution of the suit and took several adjournments to file a written statement and did not file any. A certain amount of discretion is given to managers of Court of Wards to defend a suit and in view of the fact that Amzad Ali did not file any written statement during his life-time the manager might have thought that there was no necessity to controvert the allegation regarding the Nirupanpatra made in the plaint of Suit No. 33. We are of opinion that there was proper representation of the minor by the manager of the Court of Wards and although the manager did not appear in the suit he appeared in the course of the proceedings in the appeal. This ground also fails.

In view of our finding that the suit is barred by the principle of res judicata it would have been sufficient to dismiss plaintiffs' suit on the ground of res judicata and to affirm the judgment of the Court below but as the question regarding the merits of the plaintiffs' suit has also been debated before us we propose to record our findings on the same, in view of the frequent pronouncement of their Lordships of the Judicial Committee that fragmentary decisions are most inconvenient and tend to delay the administration of justice. In the case of *Jagan Nath Rao* v. *Rambharosa* (3), Sir George Lowndes in delivering the judgment of the Privy Council said this:

"It has been repeatedly pointed out by this Board that it is a duty of the Courts below to pronounce their opinion on all the important points in an appealable case and that a failure to do so not infrequently necessitates a remand with the consequence of heavy additional costs."

(His Lordship then discussed the merits of plaintiff's suit and concluded.) It is clear from this reply of Ali Amzad Khan and his subsequent conduct in not filing the written statement in Suit No. 33 of 1904 where it was distinctly asserted in the plaint that the Nirupanpatra had not been acted upon by Ali Amzad Khan, that Ali Amzad abandoned whatever right he had under the Nirupaupatra. With regard to the Nirupanpatra the Subordinate Judge has come to the conclusion that it was not entirely without consideration as Amzad bore the costs of defending the accused in forest cases and that the consideration was not unlawful as the law of Chmaperty does not apply to India. But he held at the same time that title never passed to Ali Amzad under the Nirupanpatra as the said document was not acted upon as the intention of the parties was that title should not pass unless the expenses of the litigation were borne by Ali Amzad Khan. The correspondence to which we have referred supports this view of the Subordinate Judge and we agree with him. It is argued that plaintiffs are willing to offer all the expenses now and to get back the property of plot 2, Sch. 2.

The difficulty is that rights of the third parties have intervened and the Allinagar Tea Co., have purchased the

2. AIR 1916 P C 78=43 I A 91=43 Cal 694=33 I C 914 (P C).

3. AIR 1933 P C 33=60 I A 49=29 N L R 94=141 I C 520 (P C).

property in dispute. The precise nature of the Nirupanpatra was ambiguous and oral evidence was rightly admitted to explain contemporaneous treatment by the parties. On all these grounds the appeal must fail. Besides we have held already that this part of the claim is also barred by res judicata. In this view the plaintiffs have failed to make out the title to Dag No. 2, Sch. 4 also. The result is that the appeal fails and must be dismissed with costs; payable to the respondents other than the Secretary of State. The costs other than hearing-fee to be paid to defendant 5. The hearing-fee to be divided in the following proportion, 1/6th to defendants 1 to 3, 1/6th to defendant 4, 2/3rds to defendant 5. As against the Secretary of State the appeal will be disposed of in terms of the petition of compromise.

Henderson, J.—I agree and have little to add. The appellants' case with regard to plot 1 is briefly as follows: This plot is included in their estate covered by separate Account No. 113; it was not really covered by the plaint in Suit No. 33 of 1904; but the plaintiffs in that suit managed to get it incorporated in the decree. In order to establish that this plot forms part of the estate covered by separate Account No. 113 the appellants rely upon the map Ex. 3 and the report of the Commissioner. The map is said to have been made by one Swarup Chandra Deb who is dead. I am not at all satisfied that it was made in the ordinary course of zamindari business. It was proved by Ganga Gobinda Dhar, a retired Naib of the estate, who was examined on commission. Swarup was not even a regular Amin of the Estate and there is nothing to show why it was thought necessary to have this survey done. Ganga Gobinda merely says that he used it according to requirements. It might have been considered necessary to have a map made in connexion with the execution of the Nirupanpatra. But it is apparent from the deed that this map had nothing to do with that transaction. On the other hand, even if it is admissible in evidence, it has no probative value.

The learned Subordinate Judge has rejected the report of the Commissioner for cogent reasons. I would now like to refer to two matters in connexion with the evidence on which the respondents rely to disprove the appellants' claim. In the first place this claim was never asserted in the notice which the appellants served on the Secretary of State as a preliminary to the institution of the present suit. The claim there made was that this plot also is covered by the Nirupanpatra; this is a most damaging admission and shows that the present case is an afterthought. In the second place the case of the respondents is supported by the map prepared by T. C. Nundy, a responsibie Government Officer. The disputed plot is included in plot C of that map. That map was prepared in connexion with a dispute pending between Government and the appellants' estate. But the point to be noticed now is that at that time the present claim was not even advanced.

Mr. Chakrabarty argued that even if the appellants can establish their title, the present suit is barred because the matter should have been agitated in connexion with an objection made in connexion with the execution proceedings under S. 47, Civil P. C. The learned Subordinate Judge overruled this contention. In my judgment he was right. The objection referred to arose in the following way: The plaintiffs in Suit No. 33 were only partially successful; but in execution proceedings they attempted to get possession of the land with regard to which they had failed. The Court of Wards on behalf of the appellants' estate objected and were successful. Now that is a matter which was properly dealt with under S. 47. But supposing that the Court of Wards had gone on to say that the plaintiffs in that suit had managed to get a decree for land not covered by the plaint and objected that possession ought not to be delivered, they would have been told that it was not open to the executing Court to go behind the decree.

R.K. *Appeal dismissed.*

A. I. R. 1934 Calcutta 187

MITTER AND MCNAIR, JJ.

Secy. of State—Defendant—Appellant.

v.

Dhirendra Nath Roy and *others*—Plaintiffs—Respondents.

Appeal Nos. 77 and 84 of 1929, Decided on 29th November 1933, from original decrees of First Court Sub-Judge, Pabna, D/- 10th October 1928.

(a) Civil P. C. (1908), S. 80—Suit claiming lands as part of permanently settled estate from defendant on ground of dispossession—Defendant claiming settlement under Secretary of State—Plaintiff has cause of action against Secretary of State for impleading him.

Where plaintiff sues for a declaration of title to land which he claims as part of permanently settled estate from defendant on ground of dispossession, but the defendant claims settlement under Secretary of State, there is cause of action for the plaintiff against the Secretary of State for impleading him in the suit. And a notice which says that the cause of action and reliefs are described in the annexed copy of plaint which forms part of the notice, though defective in form, is substantial compliance of S. 80.

[P 189 C 1]

(b) Limitation Act (1908), S. 22—Proper but not necessary party impleaded as defendant to ensure against further litigation—S. 22 has no application and suit can proceed even though such party is impleaded after expiry of limitation period.

When a suit can be, and is, constituted without joining certain persons as parties, and they are subsequently added as parties for the benefit of the defendants to ensure them against further litigation, the suit should proceed though they are added as parties after the expiry of the period of limitation and the Court should award such relief as may be given in the suit as framed: to such a case the provisions of S. 22 do not apply: *Case law reviewed.* [P 190 C 1]

(c) Adverse Possession—Essentials.

In order to have effective adverse possession, it must be adequate in continuity, in publicity and in extent: 27 *Cal* 943 (*P C*), *Rel on.*

[P 192 C 1]

Sarat Chandra Basak, Rupendra Kumar Mitter, Jatindra Nath Lahiri, Krishna Kamal Maitra and *Rabindra Nath Chowdhury*—for Appellant.

Sarat Chandra Roy Chowdhury, Surendra Nath Basu (*Sr.*) and *Hemendra Chandra Sen*—for Respondents.

Appeal No. 77

Mitter, J.—The suit out of which these two appeals arise was brought by the plaintiffs for recovery of possession of certain lands described in Schedule Ga to the plaint, as appertaining to five Mauzas of their permanently settled estates Kismatpara, Majpara, Purbapara, Tarat Kandi and Srirampur. The principal defendant to the suit, viz., the Maharaja of Natore, is the proprietor of two Mauzas, Deara char Tarapur and Deara char Bhowanipur, situated somewhere to the north of the five Mauzas of the plaintiffs. The predecessors of defendant 1 took settlement of char Tarapur some time in the year 1868 and of Char Bhowanipur some time in the year 1869.

It appears that after the institution of the suit one of the pro forma defendants was transferred to the category of plaintiffs. He is the Maharaja of Kasimbazar and it is said that his interest in the five Mauzas is four annas. The defendant did not dispute the title of the plaintiffs to the five Mauzas. The only questions in dispute was as to whether the lands in suit appertained to the five Mauzas as depicted in the Revenue Survey Map of 1854-1855. The suit was decreed originally partially by the Subordinate Judge on 30th May 1921. Against that decision an appeal was taken to this Court and the decree of the Court below, in so far as it dismissed the plaintiffs' suit, with respect to lands other than those claimed by the defendants as part of their Deara char Bhowanipur, on the ground that the plaintiffs had no cause of action, was set aside by this Court and a decree in favour of the plaintiffs was given declaring their title to such lands. The case however in so far as it related to the other lands, that is, the lands which are claimed by the defendants as a part of Deara Char Bhowanipur, was remanded to the Court below, in order that the Secretary of State might be made a party to the suit, after service of notice on him under S. 80, Civil P. C., and the Court was directed to consider the questions raised in the case including that of adverse possession of the defendants and the right of the plaintiffs to obtain khas possession as against the tenants defendants and then dispose of the case accordingly. The case went back on remand and the Subordinate Judge has now decreed the suit in respect of the lands claimed by defendant 1 as appertaining to Deara Char Bhowanipur which fall within plaintiffs' Revenue Survey Mauzas Purbapara, Tarat Kandi and Srirampur and also for the lands which fall outside the Deara Char Bhowanipur but are within the Revenue Survey boundaries of Tarat Kandi and Srirampur. The plaintiffs' claim for khas possession as against the tenants defendants was dismissed and it was held that they were not entitled to get khas possession but possession through tenants defendants. The Secretary of State was not held liable for any cost.

Against this decree of the Subordinate Judge dated 10th October 1928 two appeals have been preferred, one by the

Secretary of State for India in Council, the number of the appeal being 77 of 1929 and the other by defendant 1, the number of the said appeal being 84 of 1929. On behalf of the Secretary of State, the learned Senior Government Pleader has raised substantially two questions: (1) that the notice under S. 80, Civil P. C., was defective and consequently his argument was that the suit should be dismissed as against the Secretary of State; and (2) that the claim as against the Secretary of State was barred by the Statute of Limitation. So far as the first ground, viz., the defect in the notice, is concerned it is said that the notice is defective as it does not state the cause of action as against the Secretary of State and secondly, as it does not seek for any relief against the Secretary of State. It appears however that the notice which is to be found at p. 100 of the paper-book, in Appeal No. 77 of 1929, states that the Secretary of State will be made a defendant in the suit in respect of the cause of action and the reliefs which are fully described in the annexed copy of the plaint which forms part of this notice. In the plaint the plaintiffs recite that they claim the disputed lands as a part of their permanently settled estates and they allege that the cause of action in the suit arose when the plaintiffs were dispossessed of their lands some time in the year 1911 by defendant 1. So far as they seek a declaration of their title to the lands, which is now the matter in controversy in this appeal, they certainly had a cause of action as against the Secretary of State. The notice may be defective in form but we are of opinion that there was substantial compliance with the provisions of S. 80 of the Code. This ground therefore which is taken on behalf of the Secretary of State must fail.

The next ground taken is with reference to the plea of limitation and it is said that on the face of the plaint the suit is barred against the Secretary of State, for according to the admitted case of the plaintiffs the dispossession was in the year 1911 and the Secretary of State was not brought on the record till 17th March 1927, more than sixteen years after the alleged dispossession and it is contended that the Subordinate Judge should have dismissed the suit against the Secretary of State, because on the face of the allegations in the plaint the suit is barred by limitation. To this the plaintiffs-respondents reply by saying that the Secretary of State was not a "necessary" party to the suit but was merely a "proper" party and that the presence of the Secretary of State was necessary for the purpose of effectually and completely disposing of the matter in controversy between the parties. The argument of the plaintiffs-respondents is that as their suit is based on dispossession by trespass of defendant 1 who claims a settlement under the Secretary of State, it was not necessary for the plaintiffs to implead the Secretary of State and that the Secretary of State was really joined as a party to the suit for the benefit of the defendants and in such circumstances the Secretary of State canot be regarded as a necessary party, consequently the provisions of S. 22, Lim. Act did not apply. Reliance is placed in support of this view on a decision of Sir Charles Farran, C.J., of Bombay in *Kashi* v. *Sadashiv* (1) In that case the facts were tnat the plaintiff brought a suit in ejectment against the trespasser who claimed title under a settlement from another person and it was held that:

> "If the plaintiff, in an ejectment suit, can make out a legal title to the land, he is entitled to maintain a suit against the person in actual juridical possession of such land for its recovery without making the person under whom the latter claims to hold, a party to the suit."

A similar view has been taken in other cases which have been cited at the bar, where the distinction between a "necessary" and a "proper" party has been made: see *Pandu Vithoji* v. *Goma Ramji* (2) and *Pateshro Partap Narain Singh* v. *Rudra Narain Singh* (3), which was carried in appeal to His Majesty in Council and the decision on this point seems to have been affirmed by their Lordships of the Judicial Committee, *Imdad Ahmad* v. *Pateshri Partap Narain Singh* (4). It is contended in view of these authorities that a distinction must be drawn between a case where a necessary party has been added after

1. (1897) 21 Bom 229.
2. AIR 1919 Bom 84=50 I C 765=43 Bom 472.
3. (1904) 26 All 528.
4. (1910) 32 All 241=6 I C 981=37 I A 60 (P C).

the period of limitation and the case where a proper party has been added after the said period. We are of opinion that this is a well founded distinction and the contention of the respondents must prevail. The true rule in cases of this kind is that when a suit can be, and is, constituted without joining certain persons as parties, and they are subsequently added as parties for the benefit of the defendants to ensure them against further litigation, the suit should proceed though they are added as parties after the expiry of the period of limitation and the Court should award such relief as may be given in the suit as framed: to such a case the provisions of S. 22, Lim. Act do not apply. In support of this view, reference may be made to a number of decisions of different High Courts in India: *Guruvayya* v. *Anant* (5) and *Pateshri Partap* v. *Rudra Narain* (3), which has already been referred to: *Hazari Mal* v. *Bhamani Ram* (6); *Thakurmani* v. *Dai Rani Koeri* (7); *Annamalai* v. *Murugappa* (8); *Virchand* v. *Kondu* (9) and *Sabduralli* v. *Sadashiv* (10). There is, it must be recognized, some amount of conflict in some of the cases but the preponderance of authorities is in favour of the view which we have taken. The contrary view was taken in *Mathewson* v. *Ram Kanai* (11) and *Shivubai* v. *Shiddeswar* (12).

It appears to us therefore that in the present case the suit could be proceeded against defendant 1, in the absence of the Secretary of State for India. The plaint as framed, was for the recovery of possession against defendant 1 on the ground that he was a trespasser. Defendant 1 set up the contention that he was holding the lands in question under a settlement from the Government and in order that the question of revenue as between him and the Secretary of State might be decided once for all, the Secretary of State was added as a party to the suit under the direction given by the High Court when directing a remand. It has been therefore strenuously contended on behalf of the Secretary of State by the learned Senior Government Pleader that the Secretary of State is interested and very vitally interested in the question as to whether the lands form a part of the plaintiffs' permanently settled estate or are outside such estate so as to be liable to be assessed to separate additional revenue in view of the provisions of Act 9 of 1847. It is no doubt true that the Secretary of State is interested in this question but it was not necessary for the plaintiffs to have the question determined in the presence of the Secretary of State, for all, that they, the plaintiffs wanted was that they should recover possession from defendant 1 on the ground that the lands form a part of their permanently settled estate. In a suit as against the lessee who has dispossessed the plaintiffs, it is not necessary for the purpose of the plaintiffs that the lessor should be a party to the suit. It is true that if the lessor is not made a party the decision as against the lessee will not in any way bind the lessor. But the lessor becomes a proper party in view of the final settlement of the question as between the lessor and the lessee, with regard to the possible question of abatement of revenue which the lessee, defendant 1 has to pay to the Secretary of State for this temporarily settled Mauza char Bhawanipur.

It is also a significant circumstance that the plea of limitation was not taken by the Secretary of State. We are not unmindful however of the provisions of S. 3, Lim. Act and although the question of limitation was not set up, there was nothing to prevent the Secretary of State from urging that plea if proper materials were put before the Court. But we find the somewhat indifferent attitude of the Secretary of State in this behalf, an attitude which has rightly been commented upon by the learned Subordinate Judge. The question of limitation is raised at the instance of defendant 1. He claims that as the suit is barred by limitation as against the Secretary of State, for the suit was in time admittedly against defendant 1 as it was instituted in the year 1920, it

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5. (1904) 28 Bom 11.
6. (1908) 30 All 538=1908 A W N 246=5 A L J 554.
7. (1906) 33 Cal 1079.
8. AIR 1914 Mad 272=22 I C 826=38 Mad 837.
9. AIR 1915 Bom 272=31 I C 180=39 Bom 729.
10. AIR 1919 Bom 135=51 I C 223=43 Bom 575.
11. (1909) 36 Cal 675=1 I C 626.
12. AIR 1921 Bom 152=61 I C 590=45 Bom 1009.

should also be held to be barred against the lessee of the Secretary of State, viz. defendant 1. We have given our reasons for coming to the conclusion that the Secretary of State might be a proper party for the effectual and complete determination of the question in controversy in the present suit, more particularly for the purpose of the determination of the question of revenue as between defendant 1 and the Secretary of State for the benefit of defendant 1. In such circumstance, we are of opinion that the suit, although, on the face of it, was instituted beyond 12 years, as against the Secretary of State, from the date of dispossession, as alleged in 1911, it is not really barred as against him in the circumstances in which the Secretary of State was added as a party in 1927. This disposes of the contention of the appellant Secretary of State on the question of limitation.

The learned Senior Government pleader next bases a further contention on the ground of adverse possession for more than the statutory period. With regard to this contention it is to be noticed that this plea was not also put forward by the Secretary of State who was merely content with his defence on the ground of defective notice under S. 80, Civil Procedure Code, and want of cause of action. But as this question of adverse possession has also been relied upon by the appellant in the other appeal, it will be better to deal with this question when taking up the other appeal. On the question of title, although the Secretary of State was served with the amended plaint along with the notice under S. 80, Civil P. C., where the plaintiffs distinctly set forth their claim based on the lands being part of their permanently settled estate, there was no traverse of the same by the Secretaray of State. The learned Government pleader realises that difficulty but he points out, however, that although there was no traverse of the position in connexion with the title taken up by the plaintiffs, in the written statement of the Secretary of State, the Secretary of State did not admit the correctness of the map which was prepared in his absence by the Commissioner who made the local investigation in this case, and he draws our attention to a notice which was given by the Government pleader of Pabna which is to be found at p. 119 of the Part 1 of the paper book in Appeal No. 77 of 1929. That notice is to the following effect:

"Defendant 33,. that is the Secretary of State, for the purposes of the suit only hereby admits the several facts respectively hereunder subject to the qualifications and limitations, saving all just exceptions as to the admissibility of any such facts or any of them, as evidence in the suit; provided that the admission is made for the purpose of this suit only and is not an admission to be used against the defendants on any other occasion or by another person than the plaintiffs."

The facts admitted, which are to be found at p. 120, were these: (1) that Basanta Babu has made a local investigation in this case; this fact was admitted without any qualification or limitation: (2) that Basanta Babu filed the local investigation map; this fact was admitted with this qualification or limitation that the accuracy or correctness of the map was not admitted: and the third fact that Basanta Babu filed a report of his local investigation was admitted with the qualification that the accuracy of the facts stated in the report was not admitted. But no endeavour whatever was made by the Secretary of State to get an order for a fresh local investigation from the Court below. If the Secretary of State was earnest in this behalf it is naturally to be expected that he should have pressed the position which he had taken by the notice which was filed on 12th September 1928, and asked that a local investigation might be made. It has been found by the Commissioner that the lands in suit fall within the Revenue Survey map of the mauza which is admittedly within the permanently settled estate of the present plaintiffs and which will appear from an admission made in the course of the trial, and that position was not really controverted even by defendant 1 in the suit nor was there any serious attempt made before us to show that the result of the local investigation was in any way incorrect. The Subordinate Judge has discussed this question and has summarized his conclusion in these words, at p. 134, line 30 of the paper book:

"It is now crystal clear from the delineation that the disputed land is the area of the Revenue Survey map which is covered by the Deara map also."

So far as the question of title is concerned, having regard to the course of

pleadings and the result of the local investigation, we are satisfied that the Subordinate Judge has come to a right conclusion.

Appeal No. 84 *of* 1929.—We take up now appeal No. 84. The main contention which has been raised before us is based on the question of adverse possession, viz., on the question that the plaintiffs' right to the permanently settled estate, in so far as the disputed lands are concerned, has been extinguished by adverse possession for more than the statutory period, on behalf of the Government and on behalf of the lessee of the Government. It becomes necessary, therefore, to examine carefully the evidence which has been furnished to establish adverse possession. The burden of proof was undoubtedly on defendant 1 to establish that there has been adverse possession as to extinguish the title of the plaintiffs. In order to have effective adverse possession of that kind, as has been pointed out by their Lordships of the Judicial Committee in the Privy Council in *Radha Moni Debi* v. *Collector of Khulna* (13). adverse possession must be adequate in continuity, in publicity and in extent. (After examining the evidence His Lordship held that the title of the plaintiffs has not been shown to have been extinguished by adverse possession either on behalf of the Government or by the lessee of the Secretary of State, nor his title has been extinguished by the adverse possession of defendant 1, as defendant 1 waived his right by the compromise decree of 1898 and to that extent undoubtedly he was bound. The judgment then concluded). Therefore, we are of opinion that the Subordinate Judge has come to a correct conclusion in the case. It has already been pointed out, and it requires no further repetition, that the Secretary of State has not raised the defence of adverse possession which is pleaded on behalf of the defendants. Having regard to all these circumstances we are of opinion that both the appeals fail and are dismissed with costs to the plaintiffs-respondents only, the hearing-fee in No. 84 being assessed at five gold mohurs.

McNair, J.—I agree.

K.S. *Appeals dismissed.*

13. (1900) 27 Cal 943=7 Sar 714 (P C).

A. I. R. 1934 Calcutta 192

MUKERJI AND S. K. GHOSE, JJ.

Sree Sree Goddess Pitha Kali Matha Thakurani—Plaintiff—Appellant.

v.

Surendra Nath Tagore and *another*—Defendants—Respondents.

Appeal No. 97 of 1929, Decided on 28th June 1933, against original decree of Sub-Judge, Rajshahi, D/- 21st December 1928.

(a) Landlord and Tenant—Burden of proof — Land assessed to revenue — Zamindar claiming such land as part of his zamindari must show not only geographical limits but also that they were sometimes assessed to revenue.

Where certain lands were not assessed to revenue when the zamindari was so assessed, the zamindar claiming that the lands were a part of his zamindari must show not merely that the lands are situated within the geographical ambit of his zamindari but also that they were at some time or other assessed to revenue [P 195 C 1]

(b) Record of Rights — Robokari going to root of case though not conclusive against persons not parties is important evidence.

The Robokari is a very important piece of evidence which though it is not conclusive against the zamindars because their predecessors were not parties to the proceedings in which it was made, if it strikes at the root of the case and supports the tenant's case as to revenue-free title to the hilt. [P 195 C 1]

(c) Bengal Tenancy Act (1885), Ss. 106 and 109 — Prayer for declaration in suit under S. 106 is not barred under S 109.

A declaration, by itself, being outside the scope of a suit under S. 106, a prayer for such a declaration made in a suit under S. 106 cannot be barred under S. 109. [P 197 C 2]

(d) Civil P. C. (1908), S. 11—Competency of first Court is to be looked to.

For the purposes of res judicata it is the competency of the Court of first instance that has to be looked to. [P 198 C 1]

(e) Limitation Act (1908), Art. 120 — Suit for declaration relating to entry in Record of Rights and not for possession—Art. 120 applies—Time begins to run when entry injures plaintiff.

Where a suit is not for recovery of possession on a declaration of title or on a declaration that the entry in Record of Rights is wrong, but for a declaration relating to an entry in the Record of Rights, Art. 120 applies and time begins to run only when the entry injures the plaintiff. [P 198 C 1]

(f) Specific Relief Act (1877), S. 42, Proviso—No consequential relief necessary — Suit for mere declaration is competent — Court should shape declaration as justice of the case requires—Practice, Relief.

Where the plaintiff do s not stand in need of any consequential relief, a suit for a mere declaration is not incompetent. Courts have ample inherent powers and indeed it is their duty to shape their declarations in such a way that they may operate to afford the relief which the justice of the case requires. [P 198 C 2]

Jatindra Mohan Chaudhury and *Amarendra Mohan Mitra*—for Appellant.

S. C. Basak, *Rajendra Bhusan Bakshi* and *Bijali Bhusan Sanyal*—for Respondents.

Judgment.—The lands which form the subject-matter of this suit were recorded in the finally published C. S. Khatians of 1917, No. 632 of Mauza Kaligram or Kaligaon, No. 186 of Mauza Gopalpur and No. 123 of Mauza Kaya, as appertaining to a debuttar in the name of Sree Sree Iswar Peeth Kali Mata Thakurani, who, represented by her shebait, is the plaintiff in this suit. In the Khatians the plaintiff's interest has been recorded as that of a permanent tenure-holder within Touzi No. 141 of the Collectorate of Rajshahi of which the defendants are the present proprietors the tenure being described therein as rent-free tenures for which certain cesses only were payable. In 1915 objection had been taken on behalf of the plaintiff under S. 103-A, Ben. Ten. Act, on the ground that the tenures did not lie within Touzi No. 141 but were Nishkar (revenue-free) lands comprised in Touzi No. 47-B of the B Register; but this objection had been overruled. Subsequently in November 1917 an application for correction of the entry was made under S. 106, Ben. Ten. Act; but eventually on 23rd July 1919 it was allowed to be withdrawn "with permission to bring a fresh suit." On the basis of the entries in the Khatians a Suit No. 2276 of 1921 was instituted by the defendants in the Court of the Munsif at Nowgaon in which cesses were claimed for the years 1324 to 1327 B. S. The shebait took the same plea as he had taken in the proceedings under S. 103-A, Ben. Ten. Act. This suit was decreed by the Munsif on 6th May 1922 and this decree was affirmed on appeal by the Subordinate Judge of Rajshahi on 19th June 1926. A second appeal subsequently preferred to the High Court was also dismissed.

On 22nd December 1927, the present suit was instituted on the allegation that the lands constitute a debuttar which goes by the name of Debuttar Kasba is a Nishkar (revenue-free) mehal included in Touzi No. 56-B of the Rajshahi Collectorate and never appertained to a rent-free mehal within Touzi No. 141, that the plaintiff's title had been affected by the decree in the suit to which reference has been made above and that the plaintiff apprehended injury if the said decree was executed. The cause of action was put down as having arisen on 6th May 1922, the date of the decree of the trial Court in Suit No. 2276 of 1921. The prayers in substance were:

Ka.—For a declaration that the plaintiff has Siddha Nishar (valid revenue free) title in the lands of Khatians Nos. 632, 186 and 123 of Mauzas Kasba, Gopalpur and Koya, the said lands constituting Mehal No. 56-B of the Rajshahi Collectorate.

Kha.—For a declaration that the cess-decree in Suit No. 2276 of 1921 dated 6th May 1922 which had been upheld by the Subordinate Judge and by the High Court was a nullity.

Ga.—For a permanent injunction against the defendants restraining them from executing the said decree.

The contesting defendant, who, at the time, was solely interested in Towzi No. 141, took various pleas on the merits and in bar. The Secretary of State who had been impleaded as a defendant did not appear. The Subordinate Judge dismissed the suit. The plaintiff has then preferred this appeal. It would be convenient to deal with the merits first. On the merits the respondent's contention is that the lands are rent-free lands forming a part of the zamindari Towzi No. 141. So far as the lands of Khatians Nos. 123 and 186 are concerned, namely, those of Mauzas Kaya and Gopalpur, the appellant has really no case. Neither of these two Mauzas find mention in the Robokari of the Collector of Rajshahi (Ex. 10) dated 1846 (=1252 B. S.) which forms the sheet-anchor of the appellant's case. It is only the case as regards the lands of Khatian No. 632, that is to say, the lands of Mauza Kasba, which we have to consider in this appeal.

The robokari was in connection with a resumption proceeding held under Regn. 2 of 1819 and Regn. 3 of 1828. The proceeding related to about 25 thousand bighas of land lying in 50 mehals in all. One of these mehals was Debuttar Kasba, Pargana Kaligaon, consisting of 413 bighas 9 Ch. of land. It appears that at that time Government attempted to resume the lands of all these mehals and assess them to revenue

and that the plaintiff's predecessor Raja Ananda Nath Roy contested the proceedings upon various grounds. The robokari shows that the Collector's decision was as follows: Item 1—13 mehals were claimed as mal and included within the zemindari, and this was found to be so. Item 2.—5 mehals had already been resumed. Item 3.—Separate investigation was pending as regards 10 mehals. Item 4.—1 mehal was unfit for resumption as the area was less than 50 bighas. Item 5—13 mehals were proved to be revenue-free by productions of sanads. Item 6.—8 mehals were proved to be debuttar mehals of different deities. Out of these 8, three were found to be the debuttar of Peeth Kali Thakurani of Kaligaon and it was also found that her Debsheba was carried on out of the income of these three mehals. No sanad was forthcoming in respect of any of these mehals. "Mouzah Kashba Pargana" Kaligaon "413 B. 9C.," was one of the e three. The Collector observed as follows:

"Though the defendant has not been able to file any document or sanad for proving that the 8 mehals mentioned in para. 6 containing an area 3,127 bighas 5 cottahs and 12 chittaks of land are revenue free and though from inquiry in the Collectorate Sherista no evidence of the registration of 1 kheraj sanads in respect of these can be found: but it appears from the report of the Collectorate record officers that in the year 1208 209 B. S. Taidads numbering 60,000 were filed in this Collectorate. Of the same, 16,500 were registered. And the rest of the Taidads having been worm-eaten were put in a tin box under orders of the authorities of the Board of Revenue. Further when the Khas Deputy Collector was established in the Sub-Division, out of the said worm-eaten Taidads those, which were intact, were taken into the said Khas Deputy Collectorate and there they were soaked in oil and again they were taken back to the Collectorate and so they were entirely destroyed. Therefore because of such carelessness of the Sherista, there cannot be any objection to the registration of the Sanads. Specially, the Tappes and Parganas, in which all these Debattar lands are distributed were zemindari properties of the defendant's ancestors from long before the possession of the Government. Even after the possession of the Government, though these Tappes and Parganas were sold at auction and passed into the possession of others, still no doubt arises about the aforesaid Mehals comprising the lands in claim having been uniformly (torn) and possession as Debatt r (torn and illegible) by (torn) and afterwards by the defendants. Under these circumstances, under the provision of S. 2, Regn. 19 of 1793, the claim of the Government to these lands cannot be valid. Specially from the investigation robakari of the Deputy Collector it appears that the images and sheba of all the Gods in whose names properties were given as debuttar are in existence."

On these grounds the Collector dismissed the claim of the Government in respect of the 39 mehals, including Mahal Debuttar Kashba Pargana Kaligaon, 413 bighas 9 C. It appears from the Robakari itself that it was forwarded to the Revenue Commissioner, as, under the regulation final orders had to be passed by the Roard of Revenue, but it is not known what other or subsequent orders may have been passed. It is in evidence however and that is not disputed, that the lands were never afterwards resumed by Government or assessed to revenue. The Subordinate Judge was of opinion that "the robakari does not help the plaintiff in any way." In our judgment the learned Judge was entirely wrong in taking such a view. The defendants' predecessors, it is true, were not parties to the resumption proceeding. But the fact is proved that after elaborate investigations which the Regulation 2 of 1819 contemplates and which as the robakari shows, were held, the Collector did not think fit to assess the lands to revenue. The learned Judge was of opinion that this fact does not show that the lands were revenue free, and the reason he gave for this conclusion is in these words:

"The robakari does not show that the lands are revenue-free: all that is meant is that the Government did not think them fit for assessment of revenue; they might be rent-free, as is really the case It appears from the robakari that the predecessor-in-interest of the plaintiff was the original owner of zamindari No. 141 and the defendants' predecessor came to be the owner of the estate at some subsequent time. During the time of the former, some lands including the lands of Kasba were set apart for the worship of various idols. When thus the zemindari was purchased by the defendants' predecessor the plaintiff's predecessor continued to hold the above lands as debuttar under them. From these facts it cannot be held that a revenue-free property was created for the lands in suit."

We are of opinion that the learned Judge has misunderstood the Robakari altogether. According to the Robokari the lands were exempted from assessment not because they had been already assessed but because a Lakheraj title was found in favour of the plaintiff's predecessor. This title was claimed on the ground that they constituted the debuttar lands of Peeth Kali Thakurani for which no rent had to be paid, and it was alleged that this debuttar was

covered by a sanad which had existed, but was not forthcoming then. On the facts the Collector was prepared to accept the case of the plaintiffs' predecessor that the sanad must have been lost or destroyed because he observed in the Robokari:

"Therefore because of such carelessness of the sheristha there can be no objection to the registration of the sanads."

He found further that though the Tappes and Parganas, which had been zamindari properties of the plaintiffs' predecessors from long before the advent of the Government had subsequently passed on to the defendants' predecessors, the lands constituting the debuttar which had never been assessed had all along remained in the possession of the plaintiffs' predecessors. Once it is taken, as it must be taken, that these lands were not assessed to revenue when the zamindari was so assessed, the position becomes perfectly clear, because in that case the defendants who are proprietors of the zamindari never obtained settlement of the lands. If it is claimed by the defendants that the lands were a part of their zamindari, Touzi No. 141, as they claim that they are, they have to show, not merely that the lands are situate within the geographical ambit of their zamindai but also that they were at some time or other assessed to revenue. But any such supposition is demolished by the Robokari. The Robokari therefore is a very important piece of evidence, which though it is not conclusive against the defendants because their predecessors were not parties to the proceedings in which it was made, strikes at the root of the defendants' case and supports the plaintiffs' case as to revenue-free title to the hilt. The Record of Rights having recorded the lands as a rent-free tenure under the zamindari, there is a presumption of which the defendants are entitled to the benefit. But the Robokari, in our judgment, sufficiently rebuts and nullifies that presumption.

To destroy the probative value of the Robokari several matters were put forward in the Court below and they apparently weighed with the Subordinate Judge. In the first place it was urged that as under Regn. 2 of 1793 the Collector had to send the Robokari to the Board of Revenue and as the Robokari itself shows that he had sent it to the Commissioner, no reliance should be placed upon the Robckari for it might be that those authorities did not approve of the decision contained in it. This argument is at best a supposition; and such a supposition seems to us to be entirely unjustified because in no subsequent document in which anything was said about the revenue-free character of the lands, no other order of any superior authority, but it is the Robokari itself that has been referred to. Reliance was in the next place placed upon the remarks in the Thak map (Ex. A A) and its corrected copy (Ex. B B) of 1853-54.

The remarks are couched in words the meaning of which it is not quite easy to understand, but it would be a substantially correct appreciation of their effect to say, as the learned Subordinate Judge has said, that some lands of kasba lying within 70 chaks were at first separately measured and shown on the map as appertaining to a debuttar mehal of Iswar Kali Thakurani, but it was subsequently ordered that inasmuch as the lands of the said 70 chaks had been confirmed as mal lands by a decision under Regn. 2 of 1793 the said 70 chaks were to be taken out of the map; and that accordingly a fresh map was prepared not showing the said 70 chaks separately. In these remarks it was stated that the first survey was cancelled because the lands were of kamtaidad (short of the requisite area). This expression has been sought to be explained on behalf of the respondent by reference to a copy of an order dated 19th September 1854 which they have produced in this Court. As the remarks on the maps which are illegible at places closely follow the words of this order and can be better read with its assistance we have looked into it. The order states that on the map first prepared and bearing date 30th April 1854 the 70 chaks were separately measured and shown as debuttar lands of the goddess Iswar Kali Thakurani. Then it states that as under the decision under Regn. 2 of 1819 surveys of lands of kamtaidad were cancelled and it was considered unnecessary to survey such lands separately and thought proper to keep such lands along with mal lands, consequently the said 70 chaks of land were not to be shown separately in the map

but were to be shown along with the mal lands of the respective mehals. This direction appears to have been carried out and a fresh map was prepared not showing the 70 chaks.

We are unable to read the observations as in any way affecting the rights of the plaintiffs' predecessors : the correction, as far as we can gather, was made in accordance with some rule, order or procedure under which lands of kamtaidad (less than 50 bighas in area) though revenue-free were not to be separately shown in the thak. Why this rule order or procedure should have been applied to these lands of which the area in the aggregate was 413 B 9 C is a matter which we do not understand. But whatever that might be, we cannot possibly read the remarks in the thak maps as suggesting that there was some other order of some competent authority in the proceedings under Regn. 2 of 1793 which varied the Robokari or that the lands which had till then been revenue-free were by reason of the correction made in the thak map thenceforth become only rent-free. It should be noted here that there is nothing to show that the plaintiffs' predecessors were parties to the order under which the correction was made or that the said order was passed in their presence or with notices to them. It is true that the signatures of some persons who purport to have been their agents are to be found on the corrected copy of the map. But from those signatures no admission on their part can possibly be inferred, because the same signatures also appear on the map first prepared and may have been copied into the corrected map, which was not a new map in any sense but only a copy of the old one with the chaks removed from it.

As against these matters which the defendants have put forward to destroy the effect of the Robokari the plaintiff has produced the copy of the B. Register of revenue-free lands kept under Ss. 9 and 10 of Act 8 of 1876. This copy shows that in Estate No. 56-B which is the estate in which the lands are claimed to lie the plaintiffs' predecessors had 136 ac. 1 r. 24 p. =413 b. 9 C of revenue-free lands of Debuttar Kasba. To discredit this entry two objections have been taken. It has been said that plaintiff's predecessor is described in it not as shebait but as proprietor; but this objection, in our opinion, has no substance because the lands are described as Debuttar Kasba and that is enough. Another objection urged is that the property is designated in the entry as Mohisnoti. This objection also is not of any substance because Mohisnoti appears to have been the first of several mouzahs named in the Robokari and it may have been copied into the register as a comprehensive word indicative of all the mauzahs. That the entry relates to the lands of the debuttar concerned is a matter about which there can hardly be a doubt: the name Debuttar Kasba is there and the area exactly tallies. The Subordinate Judge is of opinion that this entry in the B Register entry (Ex. 15) should not be relied on as there are certain mistakes in Col. (e). The mistate however is not of a vital character as it consists only in a slight misappreciation of the exact words of the Robokari, in that it is said in this column that the claim of the Government for resumption in Suit No. 288 of 1839 (which was the suit to which the Robokari relates) was dismissed on the finding that the lands were valid lakheraj because the sanads were found to be binding and the lands were valid lakheraj; whereas in reality no sanad was filed so far as Debuttar Kasba was concerned but it was held, in effect, that there had been a sanad but it was not forthcoming because it may have been lost or destroyed.

The Subordinate Judge has found, and with this finding we agree, that the cess return submitted by the defendants or their predecessors and the cess valuation roll prepared in 1903 on the basis thereof Peeth Kali Debuttar was not mentioned as a rent-free estate under touzi No. 141. The learned Judge however was not inclined to place any reliance on this omission, and has said: "There may be various reasons why the debuttar was not shown in the return." We are not prepared to agree in this remark. In our opinion, the omission appears to be a very important piece of evidence and requires a cogent explanation. We do not think we can hold, on the collection papers such as have been filed on behalf of the defendants, that actual realisation of cess by them from the plaintiff has been proved thereby;

for that much more satisfactory documentary evidence was necessary. These collection papers have been prepared with an imaginary rental allotted to the lands and as showing that cesses had been amicably realised on the basis of such rental. It is admitted now that no rent was ever realised. It is not unlikely that the revenue officers in preparing the Khatians were misled by these collection papers. Nor again, are we prepared to regard the non-production of the plaintiffs' collection papers in respect of the debuttar as "very suspicious," as the learned Judge seems to have thought because we do not find how those papers could have thrown any light on the questions with which we are concerned. The Subordinate Judge has commented adversely against the plaintiff for not producing the chitta of Debuttar Kasba which he admittedly has in his possession. The learned Judge thinks that the chittas would have been a material piece of evidence, and has observed thus:

"This paper should have been produced to show the nature of the plaintiff's title and the description of the debuttar given in it, i. e., whether it is Siddha Lakheraj or not."

We are unable to appreciate the force of this observation. The plaintiff's possession is admitted—a matter on which the chitta would have been relevant. A description of the debuttar given in the chitta would hardly have been of any use to the plaintiff, and there is no reason to imagine that not having paid any revenue or rent for it at any time, any entry should have been made in it which might be read as an admission derogatory to a revenue-free title. The plaintiff has proved that in two years at least i. e.. 1912 and 1914, cesses in respect of touzi No. 56-B along with cesses due on other estates were paid by him direct to the Government. It has been argued that receipts of such payment for other years have not been produced; but this argument is of no weight, because if there is a touzi No. 56 B. cess in respect of it must have been realised all through and from none else than the plaintiff who is the recorded proprietor of that tauzi. (His Lordship then discussed evidence and concluded that the plaintiff's revenue-free title to the lands of khatian No. 632 or such of the said lands as still belongs to him, must be held to have been established.) The other objections which the defendants have also taken to resist the decree asked for in this case will have to be considered now.

The first objection is on the ground of S. 109, Ben. Ten. Act, as it stood before the amendments of 1928. The suit under S. 106, Ben. Ten. Act, was instituted upon the allegation that Mauza No. 106 Kaligaon was really a revenue-free debuttar mehal not included in Touzi No. 141, which is the zamindari of the defendants, but in Touzi No. 47-B of the B Register; and it was prayed that on a declaration being made to that effect Khatian No. 632 might be corrected by deleting No. 141 and inserting 47 B in its place and by making other alterations which would show that the superior interest belonged not to the defendants but to the King-Emperor on declaration of the Niskar Debuttar interest. Now the present suit in which it is alleged that the plaintiff has a revenue-free title to the lands inasmuch as they are included in Touzi No. 56 B of the B Register, in our opinion, cannot be regarded as a suit concerning a matter which was the subject of the suit under S. 106, Ben. Ten. Act, because in that suit what was alleged was that the lands were included in another revenue-free touzi, namely, No. 47 B of the said Register. It is true that the declaration as regards the lands constituting a revenue-free debuttar which was asked for in that suit was similar to the declaration prayed for in the present suit, but in that suit the said declaration was only asked for as prefatory to the real relief claimed, namely, the correction of the record. A declaration, by itself, being outside the scope of a suit under S. 106, a prayer for such a declaration made in a suit under S. 106, cannot bar a similar prayer in any subsequent suit. We are of opinion therefore that S. 109, Ben. Ten. Act, does not operate as a bar to the maintainability of the present suit.

The next ground urged is that the suit is barred by the principle of res judicata by reason of the fact that in Rent Suit No. 2276 of 1921 the plaintiff's defence, which is substantially his ground of action in the present suit, was overruled. That suit was instituted and tried in the Court of the Munsif, in which Court the present suit having regard to its valua-

tion could not have been entertained. The Subordinate Judge has held that the suit has not been over-valued and has given adequate reasons for such a conclusion. Nothing has been shewn to us on which we can dissent from this view which he has taken. And for the purposes of res judicata it is the competency of the Court of first instance that has to be looked to. We think we must hold that the ground as to res judicata fails.

Thirdly, it has been argued that the appeal is imperfectly constituted as the Secretary of State, who was made a party to the suit in the Court below, has not been impleaded as a respondent in the appeal. The Secretary of State did not appear in the Court below and we are not satisfied that he was a necessary party in the sense that in his absence the suit could not proceed. Lastly, it has been contended that the suit is time-barred, because the plaintiff if he wants to have a declaration relating to an entry in the Record of Rights must come within six years from the date of its final publication. The Subordinate Judge held that the suit was within time as it was instituted within 12 years from the date of the final publication. Possibly, such a view could be taken if this were a suit for recovery of possession on a declaration of title or on a declaration that the entry was wrong. The present suit not being a suit of that description the learned Judges view cannot be upheld. At the same time we are of opinion that so long as the entry did not injure the plaintiff he need not to have come to Court at all. It was really the decision of the trial Court in Suit No. 2276 of 1921 which was pronounced on 6th May 1922 that afforded the plaintiff a cause of action. As the plaintiff instituted this suit within six years of that date, the suit, in our judgment, was laid in time, Art. 120, Sch. 1, Lim. Act, being the article applicable to it.

The question then arises, what relief is the plaintiff entitled to in this suit. There are no averments in the plaint, nor has anything been established, such as would justify a declaration being made against the validity of the decree in Suit No. 2276 of 1921. It was a contested decree based on proper materials: the khatians on the basis of which the claim was made in the suit were challenged but the challenge failed on the merits. It is clear therefore that a declaration against the validity of the decree is not possible. It follows from this that the permanent injunction that has been asked for restraining the defendants from executing the decree must also be refused. Indeed no such injunction could under any circumstances be any longer issued, because the decree has already been realized. But the plaintiff, in our judgment is entitled to the declaration he has asked for as regards the lands being revenue-free and such other declarations as would make the said declaration of his title effective. It has been contended on behalf of the defendants that if only declaratory reliefs are granted the suit would offend against the proviso to S. 42, Specific Relief Act. But it does not appear to us that the plaintiff stands in need of any other consequential relief. Where such is the position a suit for a mere declaration is not incompetent. Courts have ample inherent powers and indeed it is their duty to shape their declaration in such a way that they may operate to afford the relief which the justice of the case requires.

Our order therefore is that the appeal be allowed, that the decree of the Court below dismissing the suit be set aside and that a decree be passed in plaintiff's favour declaring that the lands covered by Khatian No. 632 of Mauza Kaligaon No. 166 constitute a revenue-free debuttar of Iswar Peeth Kali Thakurani included in Towzi No. 56 B of the Rajshahi Collectorate, and that the defendants as proprietors of Towzi No. 141 of the said Collectorate are not entitled to realize any cess in respect of these lands. The rest of the plaintiff's claim in the suit should be dismissed. The appellant will get his costs in both the Courts, pleader fee in the Court below being assessed at Rs. 150 and hearing-fee in this Court at 10 gold mohurs.

R.K. *Appeal allowed.*

A. I. R. 1934 Calcutta 198

COSTELLO AND M. C. GHOSE, JJ.

Parbati Dasi—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1012 of 1932, Decided on 15th May 1933.

(a) Calcutta Suppression of Immoral Traffic Act (13 of 1923), S. 8—Carrying on profession of singer and dancer by woman does not necessarily connote business of prostitution.

The carrying on of the profession of a singer or dancer by a woman does not necessarily and of course connote the busines of prostitution.

[P 200 C 2]

(b) Calcutta Suppression of Immoral Traffic Act (13 of 1923), S 8—S. 8 is wide enough to apply to any person either stranger or relative of woman brought for immoral purpose—It is immaterial whether woman brought is minor girl or woman.

The language of S. 8 is fairly wide and would apply to any person either a stanger or a relative of a woman provided the alleged offender had brought a woman or girl to Calcutta with a view of her doing the things mentioned in the section. The question of the woman or girl is not material. This section is wide enough to include any case of bringing or causing to be brought any woman to Calcutta for immoral purposes.

[P 201 C 1]

(c) Criminal Trial — Evidence of previous conviction should not be allowed except in exceptional circumstances.

It is contrary to the elementary principles of British Criminal Jurisprudence that any evidence of a previous conviction should be allowed to be adduced in the course of a trial save in a few well defined and exceptional circumstances.

[P 202 C 1]

Probodh Chandra Chatterjee and *Bireshwar Chatterjee*—for Appellant.

A. S. M. Akram—for the Crown.

Costello, J.—This is an appeal against the conviction of one Parbati Dassi who was sentenced to one year's rigorous imprisonment by the Chief Presidency Magistrate of Calcutta for an offence under S. 8, Calcutta Suppression of Immoral Traffic Act 13 of 1923. It appears that Parbati Dassi is the mother of a girl named Lakshi. They came together from Rangoon to Calcutta, arriving in this city on 12th July 1932. The prosecution was the outcome of certain investigations made by the police in consequence of an anonymous letter received by them in which it was stated that there was a girl named Lakshi, aged about 13, living with her mother Parbati and carrying on the business of prostitution at a house No. 219, Bow Bazar Street. On receipt of that letter which was addressed to the Deputy Commissioner of the Detective Department of the Calcutta Police, and dated 3rd August 1932, an Inspector proceeded to No. 219, Bow Bazar Street, which is a three storeyed building at about 3 p. m., on the afternoon of the 3rd August last. That house appears to be occupied by a certain number of women who are prostitutes, but there also reside a number of perfectly respectable and ordinary people. The Inspector proceeded to a room on the first floor of the house and found the door bolted from inside. As soon as he knocked at the door he heard sounds as if somebody jumping out of a window from inside the room. After an interval of two or three minutes the door was opened by the present accused Parbati Dassi, and a man named Nabin Chandra Sarma was also discovered inside the room. Parbati when questioned as to the whereabouts of her daughter Lakshi, replied that she had sent her to a friend. The Inspector immediately afterwards got information from a man Gour Mohan Seal that some one jumped out of the window of a room on the first floor of the house. The Inspector then traced the girl to an adjoining Basti and took charge of her and had her brought to the police office. She was later medically examined and according to the report of the Police Surgeon it was found that she was probably between 16 and 17 years in age, but might have been somewhat older.

After further investigation the mother Parbati Dassi was put up for trial upon a charge of having brought her daughter, the girl Lakshi, to Calcutta from Rangoon with a view to her carrying on the business of a prostitute. The defence set up by Parbati was that her daughter was of some repute as a musical artist and that she had come to Calcutta for the purpose of getting employment, she having previously had various engagements in Rangoon. The accused woman put in a written statement which formulated her defence as follows:

"I am innocent of the charge against me. Miss Shorabjee, the former proprietress of the Pearl Talkies, Calcutta, who is also interested in several of them in Rangoon, informed my daughter Lakshi at Rangoon that she had arranged a good job for her in the New Pearl Talkies at Dharamtolla Street, Calcutta. My daughter came down to Calcutta in July last. I accompanied her. She entered into a contract of service with the aforesaid Cinema Company from 10th July 1932 and since then she has been giving performances as a dancer and songstress in different cinemas in Calcutta. I did not bring her to Calcutta for the purpose of prostitution or for any other immoral purposes. She was already an artist of renown in Rangoon having had connexions with several local shows and she has also established her reputation in Calcutta. It is absolutely untrue that the two prosecution witnesses, Sudhir and Gopal, ever

came to visit her at 219, Pow Bazar Street or that I ever introduced them to my daughter. She is nineteen and has attained majority."

The reference to the two prosecution witnesses in this written statement relates to the evidence given by the two young men mentioned, which was to the effect that they had sexual intercourse with this girl for a monetary consideration. Now it is clear that the girl after her arrival in Calcutta did succeed in obtaining a succession of professional engagements. It was stated in the written statement as we have seen that Lakshi had some kind of recommendation or at any rate was acting upon a suggestion from a Miss Shorabjee who was a former proprietress of the New Pearl Cinema in this city. The girl Lakshi was in fact given an engagement by the New Pearl Talkies Cinema to give performances as a dancer and singer from 16th July to 23rd July 1932 ; that is to say a week's engagement for which she drew a salary of Rs. 125. That seems to indicate that the girl must be an artist of some merit. Then from 3rd September to 7th September she had another engagement with the same cinema. From 19th September till the 23rd she had an engagement at a cinema known as the Ruby Cinema and for that five days' engagement she was paid Rs. 75. Then on 1st October under a contract in writing made a day or two before, she commenced an engagement which in the first instance was to last until the end of the year 1932 at a salary of Rs. 300 a month. Having regard to these facts it seems to me tolerably clear and indeed beyond doubt that this girl Lakshi was a skilled and attractive performer as a singer and dancer who had already made good in her profession. The fact that she obtained an engagement so soon after her arrival in this city and the fact that she was receiving a salary of Rs. 300 a month, would as I have said indicate that she must be an artist of some merit.

The learned Chief Presidency Magistrate in the judgment by which he convicted Parbati of an offence under S. 8, Act 13 of 1923 (B. C.), after referring to the engagements which I have mentioned remarked:

"It is true that she has a certificate from Rangoon as to her dancing and singing abilities. But the fact remains that hers is a dual calling. It is perfectly obvious that her profession as a cinema actress does not militate or clash with her other less reputable calling. S. 8 of the Act requires proof of intention that the girl was brought into Calcutta for the purpose of prostitution."

The learned Chief Presidency Magistrate is quite right in pointing out that S. 8 requires proof of intention, but with considerable regret I find myself unable to agree with the reasons given by the learned Magistrate for coming to the conclusion which he did that such proof had been fully established by the prosecution. It is always a matter of some regret when one finds oneself unable to confirm a decision given by such a careful and competent Magistrate as the present Chief Presidency Magistrate. But he says:

"In this connexion it should be noted that the accused did not bring her daughter to Calcutta by previous contract or agreement with any cinema. Miss. Shorabji who is said to have recommended her, has not been called as a witness. It is clear that the accused brought her daughter to Calcutta for purposes of gain. She is being exploited both ways, both as a cinema actress and a woman of the town. It is precisely to suppress this sort of exploitation of human flesh and blood that the Immoral Traffic Act was devised. Another circumstance worth noting is that the girl is not a cinema actress but only a singer and dancer who performs in cinema theatres. It is well known that singing and dancing constitute the advertisement side of the trade of prostitution."

I think it is perhaps a little unfortunate that any observation should be made either by the learned Chief Presidency Magistrate or by anybody else which in substance is to the effect that a female professional dancer or singer must necessarily and invariably be a person of loose moral character. It may be that actresses and actors in this country are still regarded as being persons who are not respectable just as in England in the middle ages they were deemed to be rogues and vagabonds but it does seem to me even so that it is carrying the matter a little too far to suggest that the carrying on of the profession of a singer or dancer by a woman does necessarily and of course connote the business of prostitution. However, be that as it may, the learned Chief Presidency Magistrate seems to have taken the view that the mother of this girl brought her daughter to Calcutta for a two-fold purpose, namely, that the daughter should get an engagement in her more reputable profession and also derive profit from

carrying on the other business which the learned Chief Presidency Magistrate refers to as rather "the less reputable." We have come to the conclusion that in the circumstances of this case the prosecution have not sufficiently established and beyond reasonable doubt established "proof" of "intention" which the learned Chief Presidency Magistrate himself realised to be a necessary ingredient in the offence charged. It is of importance to bear in mind all or rather the precise material words of the section with which we are now concerned. S. 8 runs as follows:

"Any person who brings or attempts to bring or causes to be brought into Calcutta any woman or girl with a view to her carrying on, or being brought up to carry on, the business of a prostitute, shall be punished"

It is manifest that that section is aimed primarily at the class of persons who may be described as professional procurers 'a person who traffics in women and girls.' The language of the section now is fairly wide and would apply to any person either a stranger or a relative of a woman provided the alleged offender had brought a woman or girl to Calcutta with a view or her doing the things mentioned in the section. It it important to observe in connection with this section that the question of the woman or girl is not material. This section is not like others ections of this act or those of the Indian Penal Code which are framed for the protection of minor girls. This section, is wide enough to include any case of bringing or causing to be brought any woman to Calcutta for immoral purposes. But in fact the police in the present case as a primary step caused this girl to be medically examined with a view to ascertaining what her age was. That seems to indicate that they proceeded in the first instance on the assumption that this was a case of a minor girl. This is not the fact, for as I have already said according to the medical evidence this girl was above the age of sixteen.

Now the defence amounts to this: that the mother and the daughter came from Rangoon together and the mother was desirous that her daughter should carry on the profession of a dancer and singer. (After considering the evidence His Lordship held that the prosecution ad not succeeded in establishing that the mother brought the girl to Calcutta, still less that the mother brought the girl for the purposes mentioned in the section. The judgment then proceeded,) It follows therefore that this conviction ought to be set aside. There is another matter however which of itself in my opinion would be a ground for setting aside the conviction. It appears that there was a suggestion made by the police or by those who conducted the prosecution that the girl and her mother left Rangoon because they were likely to fall foul of the Rangoon police and that that is why the girl and her mother decided to come to Calcutta seeking fresh fields for carrying on of the business of prostitution.

In all the circumstances of the present case that appears to be a theory not warranted by the facts as proved in the proceedings before the learned Magistrate. It is the fact that the girl did start to carry on the profession of an actress at the New Pearl Cinema. Now when the girl herself gave evidence on behalf of her mother in support of the defence which had been put forward, certain questions were put to her in cross-examination, which were obviously designed to bring to the notice of the Court, or at least insinuate that the mother had been in trouble with the police in Rangoon. Those questions were clearly intended to suggest that the mother had already been exploiting her daughter for immoral purposes in Rangoon and in that connection had been convicted of a criminal offence. The answers given by the girl in the course of the cross-examination are as follows:

"I have been living with my mother all along. I lived at 239-39 Street, Rangon, with her. I cannot say that my mother was fined Rs. 50 On my return from cinema I learnt that she was fined Rs. 50. I cannot say that it was under the Burma Brothels Act. It was a year after that that we came to Calcutta."

It is quite obvious that Lakshi was cross-examined as to whether or not her mother had been proviously convicted for an offence of a kind involving sexual immorality on the part of Lakshi. It is clear that a suggestion was made to the effect that the present accused had been convicted under the Burma Brothels Act. It seems to me a little difficult to understand that how it was

that the learned Chief Presidency Magistrate permitted a cross-examination in any such lines. The cross-examination was in my opinion wholly irregular and the girl ought not to have been asked questions intended to elicit the fact, if it was a fact that her mother had to her discredit a previous conviction. It is contrary to the elementary principles of British Criminal Jurisprudence that any evidence of a previous conviction should be allowed to be adduced in the course of a trial save in a few well defined and exceptional circumstances. For the reasons already given however we are of opinion that on the actual merits of the case it is extremely doubtful to say the least of it whether the matter falls within terms of S. 8, Act 13 of 1923 at all. That being so we think that the accused must at any rate be given the benefit of such doubt. The conviction and sentence must be set aside and the accused Parbati Dassi released.

M. C. Ghose, J.—I agree.

K.S. *Conviction set aside.*

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MITTER AND HENDERSON, JJ.

Latifannessa Bibi and *others*—Appellants.

v.

Abdul Rahaman and *others*—Respondents.

Appeal No. 11 of 1930. Decided on 13th July 1933, from original decree of Sub-Judge, Dacca, D/- 9th September 1929.

(a) Partition Act (1893), S. 4—Members need not trace descent from common ancestor—If related in blood and living in one house, it is sufficient—S. 4 applies even to Mahomedans.

The word "family" includes not merely a body of persons who trace their descent from common ancestor, but also a group of persons related in blood who live in one house or under one head of management. S. 4 is of general application and Mahomedans are not excluded from the benefit of it : 7 *I C* 118 ; *A I R* 1930 *Mad* 561 ; 30 *All* 324 (*F B*) and *A I R* 1928 *Cal* 539, *Rel on.* [P 203 C 2]

(b) Partition Act (1893), S. 4—Son-in law is not ordinarily member of the family.

Ordinarily a son-in-law would not be regarded whether with reference to a Hindu family or a Mahomedan family, as a member of the family. Although sometimes, a son-in-law who actually resides in the family of his father-in-law for a number of years and has practically taken up his home with his father-in-law is regarded as a member of the father-in-law's family. [P 204 C 2]

(c) Partition Act (1893), S. 4—Member need not constantly reside in the house.

It is not necessary, in order to become a member of the undivided family within the meaning of the Act, that he should be constantly residing in the house. [P 203 C 2]

Sen Gupta, Urukramdas Chakrabarty and *Asaduzzaman*—for Appellants.

Prokash Chandra Pakrashi and *Birendra Nath Ghose*—for Respondents.

Mitter, J.—This is an appeal by the defendants from a final decree in a suit for partition passed by the Officiating Subordinate Judge of Dacca on 9th September 1929. It appears that after the preliminary decree an application was made by one of the defendants for sale of the property in suit in accordance with the provisions of S. 4, Partition Act (Act 4 of 1893). The application of the defendants for invoking the principles laid down in the Partition Act, and directing the sale of the property in accordance therewith, was rejected by two orders of the Court dated respectively 12th March 1928 and 26th June 1929—orders Nos. 109 and 144 of the order sheet at pp. 4 and 11 of the paper book. After the rejection of the application under S. 4 the Court appointed a Commissioner to effect the partition and the Commissioner submitted his report and the final decree was passed on the date already mentioned. Against that decree the present appeal has been brought. It should be observed here that the Court proceeded to direct partition by the Commissioner notwithstanding the protest of the defendants whose application under S. 4 had been rejected.

In the present appeal the defendants have put forward the same cententions which they had raised before the Subordinate Judge and contend that in view of the provisions of S. 4 of Act 4 of 1893 the Subordinate Judge should not have proceeded to direct any partition but should have proceeded in accordance with the provisions of S. 4. In order to understand the contention so raised by the appellants a few facts should be stated. It appears that one Shamsuddin had a dwelling house in the town of Dacca comprising two plots of land which are described in Schs. 1 and 2 of the plaint. Shamsuddin died leaving him surviving two sons Ahamad Hossain and Taleb who is defendant 3 in the present suit and a daughter Nazib-

unnessa. Ahmad had a daughter Azgari who was defendant 4 in the present suit and has died after the institution of the suit. The plaintiff is the husband of Azgari. Defendant 1 in the present suit is one Aftabuddin who is the son of Najibunnessa. Defendant 2, Fatima, is the daughter of Najibunnessa. Aftabuddin died after the suit and his heirs have been substituted in his place. Now, it appears that Shamsuddin conveyed by a Hebabil-ewaj the whole of the Sch. 2 lands to his wife Mashbi Bibi and 12 annas share of Sch. 1 property to his son Taleb and 4 annas of the same to Najibunnessa. Taleb, after the death of his mother Mashbi Bibi became entitled to the entire 16 annas of Sch 2 property. On 8th Baisakh 1327 B S. corresponding to some time in April 1920 the plaintiff purchased an eight annas share of both schedule lands from Talab Hossein and commenced a suit for partition of the dwelling house which admittedly consists of these two schedules on the strength of his purchase.

Defendants 1 and 2 inherited about 3 annas' odd share of plot 1 from their mother Najibunnessa and they also purchased certain shares of both the plots from defendant 3 Taleb, some time in Baisakh 1327 B. S. The plaintiff's purchase was in the name of his wife Azgari. The partition suit was dismissed in the first instance. An appeal was taken to this Court and this Court came to the conclusion that plaintiff's purchase was for himself and that his wife was really a benamdar for him. The High Court set aside the decree of the Subordinate Judge dismissing the plaintiff's suit and directed that a preliminary decree for partition be made and remitted the case to the Subordinate Judge for making the final partition in the suit. This was by a decree of this Court passed by B. B. Ghose and Roy, J., on 21st June 1927.

After the case was sent back applications were made, as has already been stated, by the defendants for taking proceedings under S. 4, Partition Act (4 of 1893) as their contention was that the plaintiff was a stranger to the family. This contention was negatived by the Subordinate Judge by the two orders to which reference has already been made. The grounds on which the orders were made were that neither the plaintiff nor the defendants were members of an undivided family. Both were strangers and purchasers from the same person and as both parties should be considered to stand in the position of strangers to the family dwelling house in suit, the Partition Act has no application. It was further stated that the share of the dwelling house sold by defendant 3 to the plaintiff was sold with the express object that the plaintiff might continue to live there as before. Another ground on which the decision of the lower Court was rested was that having regard to the fact that the dwelling house appeared to be a big one which could conveniently be partitioned amongst the cosharers, S. 4 should not apply and a direction was given to partition the property. It has been argued in support of this appeal that the conclusion of the Subordinate Judge that the defendants are strangers and are not members of an undivided family qua the dwelling house, cannot be sustained. The word "family" has been construed liberally in previous decisions both of this Court and of the other High Courts in India, and the word has been held to include not merely a body of persons who trace their descent from a common ancestor but also a group of persons related in blood who live in one house or under one head of management: see the case of *Khirode Chandra Ghosal* v. *Sarada Prasad Mitter* (8), a decision of Mookerjee and Carnduff, JJ., which so far as this Court is concerned seems to be the leading authority. It was pointed out in that case that the elements which must co-exist to attract the operation of S. 4, Partition Act are: (1) that the dwelling house should belong to an undivided family; (2) that the share thereof should have been transferred to a person who is not a member of such family, and (3) that the transferee should sue for partition. And it was further held in that case that the word "family," as used in the Partition Act, ought to be given a liberal and comprehensive meaning to which we have just referred.

It is not necessary to constitute an undivided family the same case points out, that the members of the family should constantly reside in the dwelling house nor is it necessary that they

1. (1909) 7 I C 436.

should be joint in mess and a recent decision of the Madras High Court has gone to the length of holding that even if the members of the family are divided in status, the Act will have application: see the case of *Sivaramayya* v. *Venkata Subbamma* (2) where it was held that

"where a purchaser of a share in a dwelling house from a member of a Hindu family, whose members although divided in status, occupy the house in common, sues for partition of the house against the members of the family, a member of the family, who is a defendant in the suit, is competent to apply for the benefit of S. 4, Partition Act."

The question as to what the words "member of an undivided family" within the meaning of the Partition Act mean was also considered by a Full Bench of the Allahabad High Court [*Sultan Begam* v. *Debi Prasad* (3)]. Sir John Stanley, the Chief Justice, pointed out that the section of the Partition Act was of general application and that Mahomedans, which the parties in the present case are, are not excluded from the benefit of S. 4, Partition Act and proceeding further the learned Chief Justice pointed out that the words "undivided family" must be taken to mean undivided family qua the dwelling house in question and to be a family which owns the house but has not divided it. The view taken in the Calcutta case referred to and by the Allahabad Full Bench has not been dissented from in any subequent case. On the other hand, Mukerji, J., in the recent decision which has been reported in the unauthorized reports and which arises from an appeal from an Appellate Decree No. 1601 of 1925, decided on 5th January 1928 has given the word "family" the same meaning as has been given in the earlier Calcutta case and in the Allahabad Full Bench case: see *A.I.R.* 1928 *Cal.* 539: *Nil Kamal Bhattacharjee* v. *Kamalaksha Charan Bhattacharjee.*

The principles being well established, we have now to examine the facts of this case in order to see whether the Subordinate Judge was right in excluding the provisions of S. 4, Partition Act. It has been sought to be argued on behalf of the respondents that the plaintiff was not a stranger at all within the meaning of the Act and that he was a member of the undivided family of which Shamsuddin was the common ancestor. It is difficult to accept this contention, for he was a son-in-law of Shamsuddin's son Ahmed. There is evidence in this case which has been referred to in the course of the argument that he was in Goverment service and had really been living not as a member of Shamsuddin's family; of course, occasionally he used to go to his father-in-law's place. Ordinarily a son-in-law would not be regarded whether with reference to a Hindu family or a Mahomedan family, as a member of the family. Sometimes, a son-in-law who actually resides in the family of his father-in-law for a number of years and has practically taken up his home with his father-in-law, is regarded as a member of the father-in-law's family, as is pointed out in *Gobinda Rani Dasi* v. *Radha Ballabh Das* (4). The evidence here discloses that that was not the case with the plaintiff here. On the other hand, there is at any rate, evidence to show that shortly before the institution of the suit the plaintiff was, as a matter of fact, driven out of this family and that he was not a member of the family at all. We have therefore no doubt that the plaintiff is a stranger and that consequently so far as the Subordinate Judge has held that the plaintiff is not a member of the undivided family, his conclusion seems to be right and we are in agreement with him.

Then arises the other questions, namely, as to whether the defendants are members of the undivided family, *qua* the dwelling house. It appears that defendant 1 was the son of Najibunnessa the daughter of Shamsuddin. He is a sharer in whatever property was gifted away by Shamsuddin in favour of his mother to which he succeeded by right of inheritance. He is a member of the undivided family, *qua* the dwelling house which has descended to him partly by right of inheritance and partly on the ground of purchase from defendant 3. Great stress has been laid on behalf of the respondents on the circumstances disclosed in the evidence that Aftabuddin who was in Government service in Calcutta had never been in the disputed dwelling

2. AIR 1930 Mad 561=126 I C 593=53 Mad 417.
3. (1908) 30 All 324=1908 A W N 126=5 A L J 352 (F B).
4. (1909) 7 I C 118.

house. We are unable to accept this view. Aftabuddin was certainly in possession of the property and it is not necessary, in order to become a member of the undivided family within the meaning of the Act, that he should be constantly residing in the house. It is not likely that after Aftabuddin had succeeded to the inheritance he should not go to the dwelling house to which he succeeded; as he was in Government employ naturally he could not be in the dwelling house all the time. We are satisfied on a consideration of the entire evidence that Aftabuddin and after him his heirs were members of the undivided family within the meaning of S. 4 and that a case has been made out by the appellant for the application of S. 4, Partition Act.

The result is that the decree of the Subordinate Judge should be set aside and he is directed to proceed with the case and apply the principles of S. 4, Partition Act, and direct the sale of the property in accordance therewith. It appears to us that the appellant might have moved the High Court for the setting aside of the orders made on the two dates to which reference has been made, namely, 12th March 1928 and 26th June 1929. If they had succeeded all these costs of the Commissioner would not have been thrown away. In these circumstances, the appellant must bear the costs of the Commissioner, namely, Rs. 418-14-0 (rupees four hundred and eighteen and annas fourteen only) as also the costs for stamps, namely, Rs. 37-8-0 (rupees thirty-seven and annas eight only) and the payment of these costs will be a condition precedent to the reopening of the inquiry under S. 4, Partition Act. These sums must be paid within a month of the arrival of the record in the Court below. If these sums are not paid within the time aforesaid the appeal will stand dismissed with costs. The appellant is entitled to his costs of this appeal. We assess the hearing fee at three gold mohurs.

Henderson, J.—I agree.

R.K. *Decree set aside.*

A. I. R. 1934 Calcutta 205

MITTER AND M. C. GHOSE, JJ.

New Birbhum Coal Co. Ltd.—Decree-holder—Appellant.

v.

Surendra Nath Laik and *others*—Judgment-debtor—Respondents.

Appeal No. 83 of 1932, Decided on 28th April 1933, from Original Order of Sub-Judge, Asansol, D/- 10th October 1931.

(a) Civil P. C. (1908), O. 21, R. 66—Court should settle value of property sought to be sold as accurately as possible from materials available on record even if judgment-debtor does not appear.

In execution proceedings, it is the duty of the Court to settle the value of the property sought to be sold as accurately as possible, for the misstatement of the value of the property is calculated to mislead possible bidders and to prevent them from offering adequate prices or from bidding at all. Merely because the judgment-debtors do not appear it does not relieve the Court from ascertaining the true value from such materials on the record as are available. [P 207 C 2]

(b) Civil P. C. (1908), O. 21, Rr. 66 and 90—Judgment-debtor having notice of value in sale proclamation not taking steps to have it rectified—Objection taken but subsequently withdrawn — Sale cannot be set aside on ground of misrepresentation of value.

Where a judgment-debtor having notice of the statement of value in the sale proclamation lies by and does not take any steps to have the sale preclamation rectified but takes an objection to such an undervaluation which he subsequently withdraws he cannot complain after the sale, that there was misrepresentation of value and the sale must be set aside on that ground: 12 *Mad* 19 (*P C*), *Rel on*; 40 *Cal* 635 (*P C*); 20 *All* 412 (*P C*), *Dist.* [P 208 C 2]

S. M. Bose, *Prokash Chandra Mitter*, *Ambicapada Choudhury* and *Bhabesh Narain Bose*—for Appellant.

Sarat Chandra Roy Choudhury and *Purna Chandra Chatterji*—for Respondents.

Mitter, J.—This is an appeal on behalf of the decree-holder auction purchaser against an order of the Subordinate Judge of Asansol dated 10th October 1931 by which he set aside a sale of certain coal lands in execution of a decree.

I cannot say that I have found this case free from difficulty or that my opinion has not been in suspense during a considerable part of the argument. For a long time during the course of the argument I had reflected whether I should be justified in upholding an execution sale which has fetched a very inadequate price, but after full consi-

deration of the evidence and the authoriti·s I have come to a conclusion satisfactory at least to my own mind. I am constrained to arrive at the conclusion that the sale must be upheld and the order of the lower Court set aside for. reasons which are detailed below:

It appeais that on 1st August 1904 a lease was granted by the New Birbhum Coal Co., who are the appellants before us to the Laiki in respect of certain coal lands. A suit was brought by the Company against Jugal Kishore, widow of one of the Laiks and Ashutosh, Surendra and Fakir Laiks for recovery of the royalty. In 1923 the judgment-debtors brought a suit (No. 79) against the decree-holders for Rs. 2,80,240 for damages for extracting fire clay. On 21st September 1926 the Company obtained decree in their suit. On 4th Jauuaiy 1927 there was a compromise between Jugal Kishore and the Company in Suit No. 79. It is necessary to refer to this suit as it is one of the contentions of the judgment-debtors that feelings were considerably strained between the Company and the other Laiks for their not joining in the compromise in the damage suit and the Company wanted to get hold of the leased lands by fraudulent means by suppressing the sale proclamation and other sale processes, a matter to which I shall return hereafter.

On 6th June 1927 the first application for execution was made but was struck off. On 7th July 1927 a fresh application for attachment and sale of immovable properties was made, and the order-sheet of 25th July records that the writ was served. On 29th July the judgment-debtor wanted time to object. On 8th August 1927 the decree-holder applied for issue of the sale proclamation. The judgment-debtors objection to attachment was numbered as Case No. 61. On 7th January 1928 the objection of the judgment-debtor to the attachment which was numbered as Execution Case No. 61 was dismissed. The Court on the same date directed the issue of notices under O. 21, R. 66. On 2nd April 1928 notice under O. 21, R. 66 for settlement of price in the sale proclamation was directed to be issued. On 14th May 1928 the order-sheet records that notice was served. On 26th April 1930 the proclamation of sale was issued. On 23rd May a vernacular newspaper known as the Burdwan Bani which contained advertisement of the sale was sent to the judgment-debtor; a fresh proclamation was directed to issue on the 5th September, and on 26th September 1930 Burdwan Bani was sent to the judgment-debtors. A third proclamation of sale was issued on 3rd September 1930 fixing the sale for 5th January 1931.

On 22nd December 1930 the judgment-debtors applied to stop the sale on the following amongst other grounds (i) the attachment not effected, (2) sale proclamation not served, and (3) the valuation given in the sale proclamation excessively low. On this a proceeding is started and on 23rd December 1930 the Nazir's report is submitted regarding the attachment (P. II, p. 66) and on 5th January 1931 the judgment-debtors' objection regarding the stopping of the sale is heard and the clerks of the execution department were heard and examined.

On 6th January 1931 the judgment-debtors put in a petition in which they waive the irregularities in the service of the writ of attachment and sale proclamation, and on this the sale is adjourned to 2nd March, and on 2nd March an application for adjournment of sale for a month is refused and the adjournment is granted till 6th March 1931 and on 6th March 1931 the sale was held and the leasehold property was purchased by the decree-holder Company On 31st March 1931 the judgment-debtors made the application to set aside the sale under O. 21, R. 90, Civil P. C., on several grounds which are detailed at p. 74 of the paper-book. It is only necessary to refer to four of them for the purposes of the present appeal. The sale is attacked on the ground amongst others: (i) no attachment of the properties in accordance with law; (2) for that the properties have been grossly undervalued in the sale proclamation and that by itself is an irregularity sufficient to set aside the sale; (3) for that there was no proper publication of the sale proclamation; (4) for that there was no service of notice under O. 21, R. 66 of the Code and that these irregularities have led to extreme inadequacy of price, i. e. to substantial injury within the meaning of O. 21, R. 90. The decree-holder company on the other hand maintained that the processes of attachment and

the notice under O. 21, R. 66 and the sale proclamation were duly served, that there has been waiver of irregularities even if there are any, and there has been no substantial injury, and evidence was led in respect of the respective contentions of the parties.

The Subordinate Judge reached the following conclusions: (1) that there was no attachment of the property, (2) that the sale proclamation were not duly published, (3) that the judgment-debtors have not waived their right to impeach the sale on the ground of fraud, (4) that the valuable property has been sold for Rs. 7,000, a grossly inadequate price, and the petitioners have sustained substantial injury as the result of material irregularity and fraud and set aside the sale. Against this order the decree-holders have brought the present appeal and Mr. S. M. Bose, the learned counsel appearing for them, has in an able argument challenged both the conclusions of law and fact reached by the Subordinate Judge. (After examining the evidence, His Lordship held that attachment was effected and that notice under O. 21, R. 66 for settlement of price in the sale proclamation was served. The judgment then proceeded). The next and most important irregularity complained of and that which appeared to me of some difficulty is that the gross undervaluation in the sale proclamation was itself evidence of fraud and is sufficient to vitiate the sale if it has led to substantial injury. So far as the value of the property is concerned, I agree with the Subordinate Judge that at the lowest computation its value cannot be less than Rs. 12,000 and it may be much more. There is no doubt therefore that there has been substantial injury.

The question is whether this irregularity had led to substantial injury. There is no direct evidence in this case that this irregularity had led to the low price fetched at the sale. The judgment-debtors respondents have relied on the decision of their Lordships of the Judicial Committee in the case of *Sadatmant* v. *Phul Koer* (1) in support of the contention that this understatement is more than a mere irregularity in the ordinary sense of the term and by itself is sufficient to vitiate the sale. On the other hand the case of Sadamant has been distinguished on the ground that the judgment-debtor in that case had no notice of the gross undervaluation, whereas in the present case the judgment-debtors had full notice of the undervaluation, and while they raised objection on this score they ultimately withdrew the same. On the same ground the decision of the Judicial Committee in the case of *Krishna Prasad* v. *Moti Chand* (2) to which the attention of the learned counsel for appellant was drawn by me, is sought to be distinguished. I think the present case is distinguishable from the two cases on this ground. It appears, in the case last cited that the judgment-debtor was dead and although the decree-holder applied for issue of notice on the heir of the deceased judgment-debtor nothing was done. The permission to bid was obtained by the decree-holder on the day of the sale and on that day the property was purchased for an extremely inadequate value, and further as appears from p. 144 of the report,

"that it does not appear that any of the proceedings in the attachment was served on any person representing the infant."

In the case of *Sadatmant Khan* (1) also all the proceedings were taken behind the back of the judgment-debtors and it was held that the sale could not stand. It is much to be regretted that the Subordinate Judge, when he settled the sale proclamation, did not care to notice the statement in the petition for execution that the judgment-debtors have a right to receive annually from the decree holder the sum of Rs. 1,222-6-0 on account of Mouzas Belrui and Lalbazar and this itself would have shown that the value of the 16 annas of the property, eight annas of which was sold, would be about Rs. 24,000 and the value of the eight annas would be Rs. 12,000. In these proceedings it is the duty of Subordinate Court to settle the value of the property sought to be sold as accurately as possible, for the misstatement of the value of the property is calculated to mislead possible bidders and to prevent them from offering adequate prices or from bidding at all. Merely because the judgment-debtors do not appear it does not relieve the Court from

1. (1898) 20 All 412=25 I A 146=7 Sar 380 (P C).

2. (1913) 40 Cal 655=19 I C 296=40 I A 140 (P C).

ascertaining the true value from such materials on the record as were available. The Court had this statement of of the decree-holders themselves before it and if it had paid slight attention to it the value would not have been stated at the low figure at which it was put by the decree-holders. Such a misstatement of value where the discrepancy between the real value and that statement of value in the sale proclamation is glaring is calculated to excite suspicion of something wrong with the title and so to deter biddings. It is desirable to draw attention to what was said in *Sadatmant* case (1). Their Lordships said:

"It is something more than the kind of irregularity which is commonly alleged, for it is a misstatement of the value of the property which is so glaring in amount that it can hardly have been made in good faith and which, however it came to be made was calculated to mislead possible bidders and, to prevent them from offering adequate prices or from bidding at all;"

and I would have affirmed the order of the Subordinate Judge if it could be shown that this order was made without notice to judgment-debtors and behind their back. A different situation arises however when the judgment-debtors having had notice of the statement of value in the sale proclamation lie by and do not take any steps to have the sale proclamation rectified and the principle of the cases to which I will refer presently becomes applicable. It was open to the judgment-debtors to move the High Court against the ex-parte order under O. 21, R. 66 and to get the Court to fix the proper price and to state the same in the sale proclamation, but nothing of the kind was done and in my opinion this is a circumstance which renders it difficult for the judgment-debtors to contend that the sale should be set aside on the ground of the misrepresentation of value in the sale proclamation. In a case where a judgment-debtor had notice of a misdescription in the property advertised to be sold their Lordships of the Judicial Committee said this:

"It would be very difficult indeed to conduct proceedings in execution of decrees by attachment and sale of property if the judgment-debtors could lie by and afterwards take advantage of any misdescription of the property attached, and about to be sold, which he knew well but of which the execution creditor or decree-holder might be perfectly ignorant that they should take no notice of that and allow the sale to proceed and then come forward and say that the whole proceedings were vitiated. This in their Lordships' opinion cannot be allowed: see *Arunachellam* v. *Arunachallam* (3)."

This principle applies also to the case where the misrepresentation in the sale proclamation is regarding the value of the property. The judgment-debtors after raising objection to the undervaluation afterwards withdrew the same as appears from the order sheet and in such circumstances they cannot be permitted to complain after the sale that there was misrepresentation of value and the sale must be set aside on that ground. For the foregoing reasons I would allow the appeal and hold that the order of the Subordinate Judge should be set aside and the sale confirmed. We are not prepared however to allow any costs to the decree-holder company seeing that if they had seen the proper value put in the sale proclamation perhaps all these protracted proceedings would not have taken place and seeing further that they had purchased at an inadequate price and they would not be any loser if they have to bear the costs of this litigation. Let the records be sent down as speedily as possible.

M. C. Ghose, J.—This is an appeal by the decree-holder, the New Birbhum Coal Co. Ltd., in a case of setting aside an auction sale in Court. The facts in brief may be stated: The decree was obtained in September 1926, the case having been brought in 1922. The present application for execution was brought on 7th July 1927 praying for attachment and sale of the property in dispute. The judgment-debtors raised varicus objections and carried the matter twice in appeal to the High Court with the result that the sale was not held till 6th March 1931 when the decree-holder company purchased the property in auction. Thereafter on 31st March 1931 the judgment-debtors applied under O. 21, R. 90 to set aside the sale. The learned Subordinate Judge has set aside the sale. Hence the appeal by the decree-holder auction-purchaser.

The learned Court below found that the decree-holder fraudulently suppressed the attachment notice and sale processes and by reason of such fraud the property was sold at a very low price causing substantial injury to the judgment-

3. (1888) 12 Mad 19=15 I A 171=5 Sar 265 (P C).

debtors. In appeal it is urged that the findings of the learned Subordinate Judge are erroneous. The decree was obtained against one Jugal Kishori Debi as well as the judgment-debtors. It was argued on behalf of the judgment-debtors that the decree-holder company having compromised the case with Jugal Kishori Debi are trying to have the petitioners' interest in the property by means fair or foul. The learned Subordinate Judge accepted this allegation. It is urged on behalf of the appellant company that the learned Subordinate Judge made a wrong conclusion and thereby prejudiced himself in the consideration of the evidence, that there is nothing on the record to show that the decree-holder company is actuated by any malicious or unfair motives against the judgment-debtors. It is urged that they only wanted to execute their decree and in proof of their fairness, on 8th October 1931, during the hearing of the present case in the Court below, they filed an application stating that they were ready and willing to give up the property purchased in the execution case if the money due to the decree-holder be paid by the judgment-debtors. I am of opinion that it is right to discard all allegations of bad motives and fairly consider the evidence of both sides.

In order to bring about the sale three processes were necessary: (1) a process of attachment of the property; (2) a notice under O. 21, Rr. 66 and (3) a sale proclamation. All the evidence was fully read and commented upon by the learned advocates of both sides. (After discussing the evidence His Lordship held that the attachment and sale proclamation were duly served. The judgment then proceeded). The last and most important argument on behalf of the judgment-debtors is that their valuable property was stated by the decree-holders to be worth only Rs. 2,000 and that this under valuation has led to a low bid and the judgment-debtors have thereby suffered substantial loss.

It is admitted by the learned counsel for the appellant that the value stated in the sale proclamation was too low. He urged however that there was another bidder besides the decree-holder at the auction and the decree-holder purchased the property at Rs. 7,000 which having regard to all the circumstances was not a low bid. It is urged on behalf of the judgment-debtors that the Court below should have ascertained the proper value of the property before putting it up for sale. For the appellant it is urged that the description of the property was correct in all particulars except the valuation and that the description including the valuation as stated in the sale proclamation was identical with the schedule to the petition of execution which was filed on 7th July 1927. It is urged by the appellant that the judgment-debtors may be presumed to have known in 1927 about the value stated by the decree-holder. For in 1927 they obtained a copy of the execution petition and filed it in the High Court in an appeal which they preferred against the execution. On 22nd December 1930 in a petition to the Court below the judgment-debtors stated that their property worth about 20 lacs of rupees was advertised for sale at a very nominal sum. Afterwards on 6th January 1931 they came to an arrangement with the decree-holder for adjournment of the sale for two months and withdrew their objection to the execution. It is urged that by waiving their objection to the execution they in effect withdrew their objection to the valuation and they cannot now be permitted to ventilate the same objection.

As to the correct valuation of the property a witness on behalf of the judgment-debtors has stated that he would have bid Rs. 20,000 for the property. On behalf of the appellant it is urged that the said witness Kanti Ram Bandopadhya is a common person whose evidence in this respect should not be believed ; he was a contractor who once purchased some land at an auction-sale for Rs. 125 only. He pays no income-tax and he gave up the contract business about two years ago. There is no other direct evidence on the side of the judgment-debtors as to the value of the property. It appears however that the Patni estate of which the property in dispute is a half share was bought in 1904 at Rs. 24,000. It may be taken therefrom that the property in dispute was then worth about Rs. 12,000. In the circumstances I am of opinion that on fair valuation the property would be worth more than Rs. 7,000 at which the decree-holder purchased it. It is how-

ever well-known that properties seldom fetch their market value in a Court auction-sale for the auction purchaser has to take account of the fact that the judgment-debtors in most cases prefer objection to set aside the sale and the matter may drag on for years keeping the auction-purchaser out of possession and entailing legal expenses. Many reported cases have been cited on both sides. On the side of the judgment-debtors reliance has been specially placed on the case of *Sadatmand Khan* v. *Phul Kuar* (1). In that case their Lordships of the Privy Council held that an understatement of the value of the property in a sale proclamation was a material irregularity. In that case the judgment-debtor was a pardanashin lady who was kept in entire ignorance about the sale processes and property worth Rs. 8,000 was purchased by the decree holder at Rs. 670. They also quoted the case of *Krish a Prosad Singh* v. *Moti Chand* (2), where the original judgment-debtor had d ed and the decree-holders did not take steps to serve the sale proces-es on any person representing the infant heir of the judgment-debtor.

The annual profit was over Rs. 4,900 but the decree stated the value as being Rs. 2,000. The main point in both the above cases was that the judgment-debtor was kept in entire ignorance of the sale. In this case the judgment-debtors were vigilant for a period of 4 years up to the date of the sa e. The appel ant quoted the cases of *R. Olpherts* v. *Mahabir Pershad Singh* (4) and *T. R. Arunachellam Chetti* v. *V. R. K. M. A. R. Arunachellam Chetti* (3). In both those cases their Lordships of the Privy Council upheld the sale in the circumstances of those cases. It was held that irregularity alone is not a ground for setting aside the sale. It must be proved by the applicant that there was some substantial injury in consequence of the irregularity. That the judgment-debtors knowing the misdescription of the property in the proclamation cannot be allowed by law to keep quiet for a long time and after wards make a grievance of it. Much reliance was placed on behalf of the appellant in the case of *Maharaj Bahadur Singh* v. *Sachindra Nath Ray* (5) where the judgment-debtor knowing of the undervaluation did not make his objection in proper time and their Lordships dismissed the judgment-debtor's appeal.

In this case the judgment-debtors knew of the under valuation in 1927. They made various objections and carried them up to the High Court but did not make any objection as to the undervaluation till December 1930 and even those objections were withdrawn by them in January 1931. It was only after the sale had been effected that they made a grievance of the under valuation. In the circumstances, having regard to the principles of the cases noted above, I am of opinion that there is force in the argument on behalf of the appellant that the judgment-debtors cannot at this late stage be allowed to make a grievance of the undervaluation. Also there is no evidence that it was the undervaluation which led to a low price at the sale. O. 21, R. 90 provides that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the appellant has sustained substantial injury by reason of such irregularity or fraud. The judgment-debtors did not themselves give evidence. The witnesses who were examined on their behalf deposed that the sale processes had not been served and it was that fact which led to a low price at the sale. None of them stated that it was the undervaluation of the property which led to a low price at the sale. In the circumstances I am of opinion that this appeal should be allowed and the sale should be upheld. I agree in the order which my learned brother proposes to make.

K.S. *Appeal allowed.*

4. (1884) 9 Cal 656=10 I A 25 (PC).

5. A I R 1928 Cal 328=113 I C 562.

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MUKERJI AND BARTLEY, JJ.

Jahurdan Garib Khan and *others*—Defendants—Appellants.

v.

Sakina Bibi and *others*—Plaintiffs—Respondents.

Appeal No. 463 of 1928, Decided on 26th May 1932, from original decree of Second Court Sub-Judge, Howrah, D/-12th October 1928.

(a) Mahomedan Law— Dower - Addition can be made during continuance of marriage —Promise from husband when accepted by wife forms part of marriage contract.

Under the Mahomedan Law an addition may be made to the dower at any time during the continuance of the marriage and the husband's promise to add to the dower, if accepted by the wife, becomes incorporated with the marriage contract and is binding on him, though unless the Mahomedan Law applies a marriage already contracted may not form a valid consideration for such increase. [P 212 C 2]

(b) Practice—New case—Substantive case put forward failing—Party cannot proceed on new supposed case.

Where a party has put forward a substantive case and that case has failed, it would not be right to allow him to proceed on a supposed case which was not his case at all at any stage of the suit. [P 212 C 2]

(c) Mahomedan Law— Dower—Retainer— Right of, can be clamed only when possession is lawful and obtained without force or fraud—Possession must be initially obtained for her dower.

The Mahomedan Law entitles a widow to hold the properties of her husband until her dower debt is paid, only if she has lawfully and without force or fraud obtained possession of them. Such possession must initially be obtained by the widow on the ground of her claim for her dower-debt, and it would be lawful and in lieu of her dower only when the dower contract provides for it or she has been put into such possession by her husband in her life-time or by his heirs after her death. [P 212 C 2]

(d) Mahomedan Law—Dower— Retainer— —Presumption—Widow continuing in possession since her husband's life-time—Presumption is that possession is lawful—Presumption however is not one of law but depends upon particular circumstances.

There is a presumption under the Mahomedan Law that when the widow has been in possession of her husband's property during his life-time and has continued so for some time after his death, her possession has been lawfully obtained and is in lieu of her dower. This presumption however is not a presumption of law but a presumption of fact depending upon the circumstances of each particular case. [P 212 C 2; P 213 C 1]

S. C. Maity and *Apurba Charan Mukerji*—for Appellants.

H. S. Suhrawardy and *Amiruddin Ahmed* for *A. S. M. Akram*—for Respondents.

Judgment.—This is an appeal from a preliminary decree in a suit for partition and for accounts. The defendants are the appellants. One Garib Khan had two wives. The elder wife Alihan Bibi, who died before her husband, was the mother of the two plaintiffs. The younger wife Johurdan Bibi survived her husband and is defendant 1 and her daughter is defendant 2. Johurdan Bibi, after the death of her husband, which took place in November 1921, has married one Sheikh Ali Mohamed in Nika form. The plaintiffs' case was that the property mentioned in Schedule Ka to the plaint belonged to Garib Khan and therefore they, as his two daughters, are entitled each to a 7as. 8 gds. thereof and that the properties described in Schedule Kha formerly belonged to her mother Alihan Bibi, some under a Hebanama which Garib Khan had executed in her favour, and since she predeceased him, he, on her death, obtained a share therein, and he having died they are each entitled to a 7as. 2gds. share in them. Schedule Ka was an item of a cash amount of Rs. 1,700. Schedule Kha as originally given in the plaint were two items of immovable properties situate in Shibpur in the District of Howrah, 14 items of utensils, 33 items of ornaments alleged to have belonged to Alihan Bibi, 9 more items of ornaments which are said to have been given to her by her mother and a money-lending business. To Schedule Kha were subsequently added some more immovable properties situate in the District of Chapra.

Amongst the defences that were taken in the written statements those that need be mentioned for the purposes of this appeal are: that Alihan Bibi had no immovable properties of her own and all immovable properties given in the plaint belonged to Garib Khan; that the moveables described in Schedule Kha to the plaint, with the exception of a few of them which were articles of personal use of Garib Khan had been made a gift of by Garib Khan to Jahurdan Bibi; that the money-lending business belonged not to Alihan Bibi but to Garib Khan; and that Garib Khan towards the end of his life had contracted to give Jahurdan Bibi a dower of Rs. 10,000 and she was possessing the properties in suit in lieu of the said dower. The Subordinate Judge overruled the defences and holding in favour of the plaintiffs has made a preliminary decree in the usual form. (His Lordship disposed of several grounds as regards gift and other evidence and proceeded). Lastly, it has been endeavoured to establish that the plaintiffs are entitled to a decree because the properties are held by defendant 1 in lieu of a dower of Rs. 10,000 which Garib Khan had contracted in her favour. The reason why this dower was promised is

said to be this : that Garib Khan had already given Rs. 4,000 and other articles and ornaments to his first wife. The dower originally promised by Garib Khan to Jahurdan Bibi at the time of the marriage was Rs. 125. It is said that because of the gift aforesaid in favour of Alihan Bibi, which on her death had benefited her daughters and sons-in-law that Garib Khan, presumably out of a sense of fairness, himself proposed to enhance the original dower of Rs. 125 to Rs. 10,000. The story is that he sought the advice of the Mahomedan Marriage Sub-Registrar and acting upon a Fatwa given by the latter divorced his wife, remained separated from her for three months and a half and married her afresh and executed a Kaibinnama, and the marriage and the Kabinnama were entered in a book kept by the said Mahomedan Marriage Sub-Registrar.

Now, we have been taken through the evidence that there is on the record relating to these matters. In our judgment, the story of the gift in favour of Alihan Bibi is a myth. The evidence relating to the Talak and the Iddat is discrepant and unconvincing. What has been sought to be proved in connexion with the fresh marriage does not sufficiently establish those formalities which are the essentials of a valid Mahomedan marriage. On a consideration of the evidence relating to this story we are not satisfied either that it is true even in its main features or that the entry in the book of the Mahomedan Marriage Sub-Registrar was made on the date that it purports to have been made. The Subordinate Judge has in his judgment pointed out some of the suspicious features of the transaction and we agree generally with his observations in this respect. What exactly took place it is not possible to ascertain, but it is possible that some sort of a ceremony may have been gone through or that some manipulation was made and the signature of the Mahomedan Marriage Sub-Registrar was obtained against an entry subsequently made. Apart from the unsatisfactory character of the evidence of the other witnesses, who can in no sense be regarded as independent or disinterested, a curious feature of the evidence of the said Mahomedan Marriage Sub-Registrar is that he has no independent recollection whatever of the transaction which is so singular in its character and which could not but have left a lasting impression on his mind, if in reality it was a transaction in which he had taken a part; cases of fresh marriage after divorce only with the object of enhancing the dower being, if existent at all, only few and far between. It is difficult to assign any reason why this round-about course was adopted; the purpose could be accomplished in other simpler ways. There is authority for the view that under the Mahomedan law an addition may be made to the dower at any time during the continuance of the marriage, and the husband's promise to add to the dower, if accepted by the wife, becomes incorporated with the marriage contract and is binding on him, though unless the Mahomedan law applies, a marriage already contracted may not form a valid consideration for such increase. On the strength of this proposition it has been argued that if there was no divorce the original marriage stood and so the enhancement of the dower should be enforced.

But the appellants put forward a substantive case and when that case has failed it would not be right to allow them to proceed on a supposed case which was not their case at all at any stage of the suit. Besides, to hold in appellants' favour on that footing we shall have to find that there was a contract for such enhancement, but we are not satisfied that there was any real contract to that effect. Again, even if there was such a contract, that by itself would not entitle defendant 1 to retain possession of the properties. The Mahomedan law would entitle her to hold the properties, until her dower debt is paid, only if she has lawfully and without force or fraud obtained possession of them. Such possession must initially be obtained by the widow on the ground of her claim for her dower-debt, and it would be lawful and in lieu of her dower where the dower contract provides for it or she has been put into such possession by her husband in her life-time or by his heirs after her death. None of these elements, it must be conceded, has been proved in this case. There is, it is true, a presumption under the Mahomedan law that when the widow has been in possession of her husband's property during his life-time and has continued

so for some time after his death, her possession has been lawfully obtained and is in lieu of her dower. But this presumption which the Mahomedan law has designed for the benefit of the widow, as a means of protection to her, her rights having been specially safeguarded in the Koran, is not a presumption of law but a presumption of fact, depending upon the circumstances of each particular case. In the present case there is nothing to show that it was defendant 1 and not Garib Khan who was in possession during the latter's lifetime, and soon after his death, the possession was resisted. Even if the agreement to enhance the dower were proved we would not have felt bound to hold that defendant 1 was entitled to hold the properties until the dower debt was satisfied.

We consider it only necessary to add in conclusion that the Commissioner who will be appointed to carry out the terms of the preliminary decree will take evidence to find out what were the assets of the money-lending business that belonged to Alihan Bibi, and it is only in respect of that business that the plaintiffs would be entitled to a 7 as. 2 gds. share each. Should he find that apart from the money-lending business which Alihan Bibi owned there are assets of the other money-lending business which Garib Khan used to carry on, then the shares of that business will have to be calculated on the footing of properties left by Garib Khan and not Alihan Bibi, that is to say each of the plaintiffs will get a 4 as. 8 gds. share therein. The result is that, in our judgment, the grounds urged in support of the appeal all fail. The appeal therefore should be dismissed with costs, hearing fee being assessed at five gold mohurs.

R.K. *Appeal dismissed.*

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C. C. GHOSE, AG. C. J. AND
S. K. GHOSE, J.

Chundy Churan Law—Plaintiff—Appellant.

v.

Abbas Ali Bhuya and *others*—Respondents.

Appeals Nos. 988 to 990 of 1931, Decided on 26th July 1933, from appellate decrees of Addl. Sub-Judge, Tipperah, D/- 19th November 1930.

Bengal Tenancy Act (8 of 1885 as amended by Act 4 B. C. of 1928), S. 179, Proviso, and S. 67—Kabuliyat executed before 1885—Interest and damages are both recoverable—Proviso has no retrospective effect.

As the main S. 179 has undergone no alteration by the amendment of 1928, the proviso introduced by Act 4 of 1928 would not have any effect in case of permanent mokarari leases created before the Bengal Tenancy Act. The proviso notwithstanding its language would have no retrospective effect in a case in which the main part of that section itself would not apply. [P 215 C 2]

Kabuliyats purporting to be mourashi mokarari leases were executed between 1865 and 1867 and the rents reserved were payable in ten monthly kists. There was further stipulation that in default of payment of the money due on each kist, interest would run at the rate of 2 per cent per month and that damages at the rate of 25 per cent over and above interest would be payable by the tenants in case the institution of suits for recovery of rent and interest became necessary.

Held: (1) that the landlord was entitled to recover both interest and damages: *A I R* 1934 *Cal* 119, *Foll.*; [P 214 C 2]

(2) that S. 67 had no operation as the kabuliyats were executed long before and the arrears were claimed for periods prior to the introduction of the amending Act of 1928. [P 215 C 2]

Narendra Chandra Bose and *Satyendra Nath Mitter*—for Appellant.

Amarendra Mohan Mitter—for Respondents.

Judgment.—These are three appeals before us: Appeals Nos. 988, 989 and 990 of 1931. These appeals have arisen out of three suits. Appeal No. 988 arises out of Suit No. 232 of 1929 and the corresponding appeal to the lower appellate Court was Appeal No. 17 of 1930. Appeal No. 989 arises out of Suit No. 107 of 1929 and the corresponding appeal in the lower appellate Court was Appeal No. 24 of 1930. Appeal No. 990 arises out of Suit No. 109 of 1929 and the corresponding appeal in the lower appellate Court was Appeal No. 25 of 1930.

In Appeal No. 988 there is no appearance on behalf of the respondents. In Appeals Nos. 989 and 990 some of the respondents are represented by the learned Advocate Mr. Amarendra Mohan Mitter. The learned Advocate has pointed out to us that respondent 6, Ansar Ali, died some time ago and no substitution having been effected on the record of his legal representatives within time the appeals so far as he is concerned abated. He has also pointed out to us that in the last mentioned suits corresponding to Appeals Nos. 989 and 990 there was a

minor defendant who was defendant 7 and her name was Sm. Badarennessa Bibi. It does not appear from the record that in any of the Courts below was the minor represented by a guardian-ad-litem and it does not appear also what steps have been taken for the representation of this minor defendant in this Court. So far as this minor defendant is concerned the decrees made in the Courts below are nullities and so far as this Court is concerned there are no proper appeals against the defendant Sm. Badarannessa Bibi. Her rights remain unaffected. Now, as as regards the respondent Ansar Ali who died and in respect of whom the appeals have abated, the learned advocate has taken this point that the entire Appeals Nos. 989 and 990 are now incompetent. We are unable to agree with the learned Advocate's contention because the suits are for rent and rent was payable jointly and severally by the body of the tenants who had executed the kabuliyats or who were representatives of the people who had executed the kabuliyats in favour of the landlord. The position therefore is that as regards the respondent Ansar Ali the decrees of the lower appellate Court will stand and there will be no order against his representatives in this Court; but that does not in any way prevent the appellant from proceeding with his appeals as regards the remaining respondents and obtaining judgment against them. We do not think that the preliminary objection has any substance and we now proceed to deal with the question of the merits of these three appeals.

In all these three appeals the suits are based on kabuliyats executed between 1865 and 1867, i. e., long prior to the introduction of the Bengal Tenancy Act, 1885. The rents are claimed for the years 1332 to Magh 1335 B. S. The leases created by these kabuliyats were all mourashi mokarari leases. It appears from the kabuliyats that the rent reserved was payable in ten monthly kists, that is to say, in kists ranging between Baisakh and Magh of each year. It was also agreed by and between the parties to the kabuliyats that in default of payment of the money due on each kist interest would run at the rate of 2 per cent per month. It was also agreed that damages at the rate of 25 per cent over and above the interest payable by the tenants would have to be paid by the tenants in case the institution of suits for recovery of rent and interest became necessary. Now, the questions involved in these appeals are really, first, question of the construction of the kabuliyats and, secondly, whether or not certain provisions of the Bengal Tenancy Act have application to the facts and circumstances of the three cases out of which these appeals have arisen. The main points which have been taken on behalf of the tenants are these: It is argued in the first instance that interest and damages are not payable together; in other words, the contention is that the landlord would have to be content either with interest or with damages; that is to say, the provisions as regards the payment of interest and damages are exclusive of each other. In the second place it has been contended that S. 67, Ben. Ten. Act, applies and also S. 68, Ben. Ten. Act, applies, and that the application of these two sections along with the application of S 179 as it stands now in the Bengal Tenancy Act, would have the effect of restricting the plaintiff landlord to a claim for interest on the arrears of rent not exceeding 12½ per cent as provided for by S. 67, Ben. Ten. Act. In particular, the contention is that having regard to the terms of the proviso to S. 179 the landlord is incompetent to claim anything more in the way of interest than what is allowed by S. 67, Ben. Ten Act.

As regards the contention that both interest and damages are not payable and that the landlord must be content with one or the other we are of opinion that it is negatived by the decision of this Court in *Chandi Charan Law* v. *Rohini Kumar* (1), where the judgment was pronounced on 21st June 1933, by Mitter and Henderson, JJ. The kabuliyat in that case was in exactly the same terms as the kabuliyats in the present cases and, having regard to the view taken by their Lordships and the view taken in the cases which are referred to in the judgment of their Lordships on this point, we are unable to hold that the provisions as regards interest and damages are exclusive of each other and that the landlord must be content with one or the other. We think the land-

1. A I 1934 Cal 119.

lord is entitled to interest as well as damages and that interest should be calculated on the monthly kists as provided for by the contract between the parties. As regards the other question, it has to be considered from these points of view—first, whether Ss. 178 and 179 apply to permanent leases created before the Bengal Tenancy Act, and, secondly, whether S. 179 as it stands now with the proviso is applicable to the facts and circumstances of the present cases notwithstanding the fact that the leases in question were executed before the Bengal Tenancy Act, 1885, came into operation. It has been held in a long series of cases beginning with *Aparna Charan* v. *Karam Ali* (2) and ending with *Jogesh Chandra* v. *Asuba Khatun* (3) that S. 179 as it stood at the date of the cases referred to above was not applicable to permanent mokarari leases created before the Bengal Tenancy Act, 1885, came into operation. So far so good. But now the question has been argued that whatever might have been the state of the law, having regard to the existing provisions as embodied in S. 179 of the present Bengal Tenancy Act as amended, the proviso must have operation even though the permanent mokarari leases in question were executed before the Bengal Tenancy Act, 1885, came into operation.

On the other hand, Mr. Narendra Chandra Bose's contention is that if the main S. 179 has undergone no change notwithstanding Act 4 (B. C.) 1928, and if it was held that the words of the main section which have remained unaltered were not applicable to permanent mokarari leases, then the proviso to a section which was not applicable would not have effect in the circumstances of the present cases and in this connexion our attention has been drawn to a judgment of this Court delivered by Mukerji, J., and reported in *Tara Prasanna Roy* v. *Motaherali Mir* (4). Mukerji, J., has held that, having regard to the language of this proviso, it must have operation even in cases where the contract between the parties was executed before the introduction of the Bengal Tenancy Act, 1885. In the case before Mukerji, J., however it was held that the circumstances of the case satisfied the requirements of S. 179 so far as the status of the parties and the character of the lease was concerned. In the case before Mitter and Henderson, JJ., likewise there was no question as to the applicability of the substantive part of S. 179, nor as to the period of time at which the cause of action arose. In the present case the point to be considered is, when did the cause of action arise? If the cause of action arose before the amendment by which the proviso was incorporated in S. 179 came into operation, the proviso, notwithstanding its language, would have no retrospective effect in a case in which the main part of that section itself would not apply. As the main section which has undergone no alteration has been held in a series of cases to be not applicable to permanent mokarari leases created before the Bengal Tenancy Act the proviso would not have any effect whatsoever in such cases and the proviso would have effect only in cases where leases—although permanent and mokarari in nature—had been created after the Bengal Tenancy Act came into operation. If that be the correct conclusion on the applicability of S. 179 with the proviso added thereto, then it follows that S 67 would have no operation in the circumstances of the present case where the kabuliyats were executed long before, and the arrears are claimed for periods also before the introduction of the present Act.

The result therefore is that the plaintiff landlord will be entitled to recover interest on the kists mentioned at the rate stipulated by the parties and embodied in the kabuliyats. He will also be entitled to recover damages as provided for in the kabuliyats and that judgment must be entered in his favour accordingly. The plaintiff will not get any costs in the appeal in which there is no appearance on behalf of the respondents, but he will be entitled to his costs in the other two appeals.

R.K. *Appeals allowed.*

2. (1906) 4 C L J 527=10 C W N 527.
3. A I R 1927 Cal 41=98 I C 46.
4. A I R 1933 Cal 703=147 I C 216=60 Cal 897.

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GUHA AND BARTLEY, JJ.

Manmatha Nath Mitter—Appellant.

v.

Sarada Prosad Chakravarty—Respdt.

Appeals Nos. 1756 and 1757 of 1931, Decided on 23rd May 1933.

(a) Bengal Tenancy Act (8 of 1885), Ss. 6 and 103-B—Presumption under S. 103-B is rebutted by another presumption in favour of tenant on proof of existence of tenure in 1818 from time of permanent settlement—Rent cannot be enhanced except under S. 6—Rent charged once in 1818 — Still rent is not enhancible,

A presumption in favour of landlord under S. 103-B arising from the entry in the settlement khatian that the rent of the tenure was enhancible, is rebutted by a counter presumption in favour of the tenant from proof of the existence of the tenure from 1818, that the tenure existed at the time of the permanent settlement. The primary onus on the tenant is then shifted on to the landlord by the evidence before the Court as to the existence of the tenure in the year 1818 and by the further evidence showing pre-existence of the same. If the tenure has been held from the time of the permanent settlement, its rent cannot be enhanced except as provided by S. 6. In such a case it is for the landlord to prove that he is entitled to enhance the rent payable in respect of the tenure by the conditions under which the tenure is held. Simply on the finding that the rent was changed once in the year 1818, it cannot be held that the condition under which the tenure was held, was that the rate of rent payable in respect of the same, is enhancible when there is nothing to indicate that the history of the tenure in question and the intention of the parties concerned are such that it would be inferred in favour of the landlord that there was no intention to fix the rent in perpetuity notwithstanding the fact that the rate of rent was only once altered in 1818 : *A I R* 1924 *Cal* 133, *Dist* ; 8 *C L J* 177, *Ref*. [P 216 C 2; P 217 C 1, 2]

(b) Civil P.C. (1908), S. 100 — Question of fact.

Whether a presumption should be drawn from a certain state of facts proved before the Court is a question of fact. [P 216 C 2]

Amarendra Nath Bose and *Hemanta Kumar Basu*—for Appellant.

Hira Lal Chakravarty — for Respondent.

Judgment—*S. A. No.* 1756 *of* 1931.—This appeal is by a landlord who had applied for settlement of fair and equitable rent in respect of a tenure claiming enhancement under S. 7 (2),Ben.Ten.Act. The application of the landlord was opposed by the tenant, on the ground that rent payable in respect of the tenure was not liable to enhancement although the entry in the settlement Record of Rights as finally published showed that the rent was liable to enhancement. The Assistant Settlement Officer by whom the case was heard in the first instance, came to the conclusion on the materials placed before him by the parties concerned that the evidence produced in the case was sufficient to rebut the presumption of correctness attached to the entry in the finally published khatian, and that the rent payable in respect of the tenure in question was not liable to enhancement. The decision of the Assistant Settlement Officer dismissing the landlord's application for enhancement of rent was affirmed on appeal by the learned Special Judge, 24-Parganas. The landlord has appealed to this Court.

The first question arising for consideration in the appeal is whether the Courts below are right in presuming in favour of the tenant respondent in this Court that the tenure in question was held from the time of the permanent settlement. On the materials placed before the Court, the date of the origin of the tenure could not be ascertained. There was no doubt a presumption in favour of the landlord under S. 103-B, Ben. Ten. Act, arising from the entry in the settlement khatian that the rent of the tenure was enhancible; but the evidence adduced in the case raised a counter-presumption in favour of the tenant, from the proof of the existence of the tenure from the year 1818 (1225 B. S.). Whether a presumption should be drawn from a certain state of facts proved before the Court, is a question of fact ; and both the Courts have come to the conclusion that from the facts proved, the inference could be drawn that the tenure existed at the time of the permanent settlement. The primary onus on the tenant was shifted on to the landlord by the evidence before the Court as to the existence of the tenure in the year 1818 and by the further evidence showing pre-existence of the same: see in this connexion the case of *Annada Chandra* v. *Kunja Behari* (1). If the tenure in question has been held from the time of the permanent settlement, its rent could not be enhanced except as provided by S. 6, Ben. Ten. Act. It was for the landlord to prove that he was entitled to enhance the rent payable in respect of the tenure by the conditions under which the tenure is held.

The Assistant Settlement Officer held that no part of the evidence proved any of the conditions laid down in S. 6, Ben. Ten. Act, and the learned Judge in the Court of appeal below has agreed with that view of the case. The burden of proof was on the landlord to establish

1. (1908) 8 C L J 177.

the conditions, and if the landlord could not establish that by the conditions under which the tenure was held he was entitled to enhance the rent his claim for enhancement must fail. In the case before us, the rent was changed once in the year 1818, and from that fact only we are asked to hold that the rent of the tenure was enhancible, the conditions under which the tenure was held being that rent could be enhanced by the landlord. In support of this position reliance was placed on behalf of the appellant, on the judgment of this Court in the case of *Nurul Huq* v. *Birendra Kishore* (2), in support of the proposition that where the original nature of the tenancy is not known, the fact that the rent has been altered once negatives the hypothesis that the rent has been fixed in perpetuity. Mookerjee, J., in this judgment in the case mentioned above, dealing with the facts proved before the Court in the case before him, stated as follows:

"Here the history of the settlement of 1846 has been unravelled in detail; it has been ascertained beyond doubt that the rate then taken as the basis was adopted as the rate fair and equitable at that time; and there was no intention to fix that rate in perpetuity. We hold accordingly that the Special Judge was right in his conclusion that the tenures are not held on condition that the rate of rent was perpetually fixed at Rs. 3-15-6 in 1846, and that fair and equitable rent may accordingly be settled now notwithstanding the fact that the rate of rent has not been altered since that period."

In view of what has been set out above it is not possible to say that in the case before us it must be held that the condition under which the tenure was held was that the rate of rent payable in respect of the same was enhancible simply on the finding that the rent was changed in the year 1818. The basis of the judgment in *Nurul Huq's* case (2), referred to above, was that from the history of the settlement and from other evidence in the case it was possible to ascertain beyond doubt that there was no intention to fix the rate of rent in perpetuity. We having nothing before us in the present case to enable us to come to the conclusion that the condition of the tenancy was such that the landlord had the right in him to enhance rent under the provisions of S. 6, Ben. Ten. Act. There is nothing to indicate that the history of the tenure in question and the intention of the parties concerned were such that it would be inferred in favour of the appellant in this Court, that there was no intention to fix the rent in perpetuity notwithstanding the fact that the rate of rent has not been altered since the year 1818. In our judgment the decisions arrived at by the Courts below are correct and must be affirmed, and we direct accordingly. The appeal is dismissed with costs. The hearing fee is assessed at two gold mohurs.

S. A. No. 1757 *of* 1931. — This appeal is to be governed by our judgment in appeal from Appellate Decree No. 1755 of 1931. This appeal is dismissed, the decision of the Court of appeal below being affirmed. There is no order as to costs in this appeal as the respondents have not appeared.

R.K. *Appeals dismissed.*

2. A I R 1924 Cal 133=72 I C 979.

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C. C. GHOSE, AG. C. J. AND
S. K. GHOSE, J.

Nukur Chandra Sarkar — Accused—Petitioner.

v.

Ranjit Kumar Mullik—Complainant—Opposite Party.

Criminal Revn. Petn. No. 324 of 1933.
Decided on 10th April 1933.

Penal Code (1860), S. 477—Will—Concealment of—Will made over to son (accused) by solicitor—No steps to obtain probate—Suit for maintenance by mother of accused compromised—Same solicitor acting for mother—Subsequent affidavit by accused that testator died intestate — Accused's explanation held sufficient—As there was no secretion, accused held did not come within clutches of S. 477.

J died some time in 1924 after having executed a will on 24th December 1918. The will after execution remained with the solicitors till 2nd February 1926 when it was made over to the accused who is the only son of testator. The testator also left a widow and a daughter's son. Although the accused got possession of the will from the solicitors on 2nd February 1926, he did not take any steps whatsoever to apply for obtaining probate thereof. The accused to obtain from the Land Acquisition Court certain moneys in respect of the acquisition of a portion of the testator's estate swore an affidavit some time in July 1930 to the effect that the testator had died intestate. The people, who were advising the widow and who were managing the maintenance suit on her behalf knew that there had been a will executed by the testator, that the will had remained in the custody of the solicitor and that the will had been made over to the accused on taking a proper receipt in respect thereof from the accused.

Held : that as the accused was advised that having regard to the terms of the will it was not necessary to obtain probate that would furnish sufficient explanation for the action of the accused in suggesting in the affidavit of July 1930 that the testator had died intestate. [P 220 C]

Held further: that as the accused obtained possession of the will with the knowledge of the solicitors, who were responsible for the drawing up of the will, who were responsible for the custody thereof till February 1926, there was no secretion in the eye of the law and within the meaning of S. 477. [P 220 C 1, 2]

P. R. Das, Satindra Nath Mukerjee & Satish Chandra Munshi—for Petitioner.

Probodh Chunder Chatterjee and *Bireswar Chatterjee*—for Opposite Party.

Order.—This is a rule calling upon the Chief Presidency Magistrate and the complainant to show cause why the order made by one of the Presidency Magistrates, Mr. Wazen Ali, dated 7th March 1933 committing the accused to the Sessions Court for trial under S. 477, I. P. C., should not be quashed or why such other or further order should not be made as to this Court may seem fit and proper on the ground that the evidence adduced by the prosecution does not disclose an offence under S. 477, I. P. C, and, as such, the commitment of the accused is bad in law. We have heard Mr. P. R. Das of the Patna Bar in support of the Rule and Mr. Probodh Chandra Chatterjee has shown cause. In order to understand the facts involved in this matter and which have given rise to the present prosecution it is necessary to state a few facts very shortly.

It appears that one Janardan Sarkar died some time in 1924 after having executed a will on 24th December 1918. The will after execution remained with the Solicitors Messrs. Kar Mehta & Co. till 2nd February 1926 when it was made over to the present accused who is the only son of the testator. The testator died leaving a widow named Tarangini Dasi who had a brother named Brojo Kishore Mondal and the person who said that he represented the complainant in the present proceedings, namely Ranjit Kumar Malik, a daughter's son of the testator. It appears that although the accused got possession of the will from the Solicitors, Messrs. Kar Mehta & Co. on 2nd February 1926, he did not take any steps whatsoever to apply to this Court on its original side for obtaining probate thereof. The receipt granted by the accused to Messrs. Kar Mehta & Co. has been produced in the present proceedings and is marked Ex. 17.

The explanation which has been sought to be given on behalf of the accused for his inaction in the matter of obtaining probate of the will is said to be this: that on the terms of the will there was nothing provided to show the destination of the corpus till a certain event had taken place, namely, the death of the widow and that although various provisions are to be found in the will in the matter of legacies and annuities the accused, who, it will be remembered, is the only son of the testator, was not to get any portion of the movable or immovable properties left by the testator till the widow of the testator died. It is said on behalf of the accused that there was a complete intestacy so far as the corpus of the estate was concerned and that he had been advised that, under the circumstances obtaining in the present case, he being the only son entitled to get the property debors the will under the Hindu law was not under any obligation whatsoever to apply for probate. Be that as it may, so far as the facts are concerned it appears that the widow of the testator, namely, the accused's mother, started a civil suit on the original side of this Court for obtaining a suitable maintenance for herself. That suit being Suit No 903 of 1930 was started by the mother of the accused in the month of May 1930 and it resulted in a compromise decree some time in December 1930.

The result of the compromise decree in that suit was that directions were given for the payment to the plaintiff, i. e. the mother of the accused, a sum of Rs. 200 per mensem on account of her maintenance. That suit was managed on behalf of the plaintiff by Messrs. Kar Mehta & Co. who were the testator's solicitors who were the people who had the custody of the will up to February 1926 and who had made over the will to the accused on 2nd February 1926 after they had obtained a proper receipt from the accused, namely, Ex. 17. It appears that the accused had to obtain from the Land Acquisition Court certain moneys in respect of the acquisition of a portion of the testator's estate and that for some reason or other he took it into his head

to swear to an affidavit some time in July 1930 to the effect that the testator had died intestate. But, at any rate, the fact remains that the people who were advising the widow and who were managing the suit on her behalf knew at all material times from 1926 down to the date of the compromise decree in the maintenance suit that there had been a will executed by the testator, that the will had remained in the custody of the solicitors and that the will had been made over to the accused on taking a proper receipt in respect thereof from the accused.

It is also in evidence that although, according to the accused's thinking, the testator had died intestate as alleged by him in the affidavit referred to above, he had gone on making payments to the legatees and the annuitants in terms of the will, and in support of this reference may be made to the deposition of the mother in the present proceedings wherein she makes it abundantly clear that that was done by the accused. But be that as it may, the matter stood like this: that the accused who had the will in his custody did not apply for probate, and it was not until 17th August 1932 that the will was discovered as the result of a police search in the accused's house on a complaint made ostensibly by the mother but on a complaint filed by Ranjit Kumar Mallik on behalf of the mother. Whether or not the mother was the real complainant is a question which admits of very considerable doubt having regard to the course of the proceedings in the present prosecution because if one goes through the order sheet from 16th August 1932 down to 7th March 1933 one cannot say with any degree of certainty that the prosecution which had been going on was in truth and in substance a prosecution on behalf of the mother and that no one else — be he Ranjit Kumar Mallik, the daughter's son of the testator, or any body else, such as Brojo Kishore Mandal—had anything to do with engineering the prosecution. But we will proceed on the assumption that the complainant was the mother of the accused. It appears that after the will had been discovered in August 1932 attempts were made to bring about a settlement between the mother and the accused and that ultimately probate was applied for in respect of the will in question and probate was obtained.

After probate had been obtained the mother instituted a second suit on the original side being Suit No. 447 of 1933 for construction of the will and for administration of the estate left by the testator. That suit is still pending but in that suit an interlocutory application having been made the maintenance which was allowed by the compromise decree in the maintenance suit has been increased and a sum of Rs. 300 a month has been directed to be paid by way of and as maintenance to the mother. That was on 25th January 1933. So far as the estate itself of the testator is concerned it is reasonably clear that effective steps have been taken, are being taken and will be taken in the administration suit for obtaining the Court's directions for the purpose of safeguarding the estate itself; but the present prosecution has been allowed to go on and, so far as the Magistrate's Court is concerned, it did not terminate till 7th March 1933 when the order referred to above and which is the order complained of was passed by the Magistrate.

We are not concerned, although a great deal may be said on the facts, with, whether this present prosecution is a bona fide prosecution or not. There are indications which induce in the mind of the Court very considerable doubts; but, as we have said just now, we are not concerned with those doubts nor with the determination of the question as to who is the real complainant in the case or whether other persons are not interested in seeing the case drag out its ordinary length with ulterior motives or not. Leaving that question apart and aside we have got to consider the terms of the ground on which the present rule has been issued and whether the accused can be roped in within the four corners of S. 477, I. P. C, So far as that question is concerned, and that is the only question which need detain us, the facts, if one may summarise them again, are these: that, at any rate, from February 1926 the people who had been responsible for the conduct of the two suits referred to above and who must have been advising the plaintiff, i. e., the mother of the accused at all material times from 1930 onwards, were aware of the existence of the will and of the fact

that the will had been made over to the duly constituted executor by the solicitors on a proper receipt being taken in respect thereof.

If the solicitors were aware of the existence of the will it is unreasonable to hold that the plaintiff in the two suits did not know or could not know or could not have been advised as to the existence of the will in question. Any one acquainted with what obtains on the original side when suits for maintenance are started need not be reminded that the first question which engages the attention of the pleader who draws the plaint or of the solicitor who advises the pleader who draws the plaint is whether or not the person out of whose estate the maintenance is to come died leaving a will or died intestate. That is the first question to engage one's attention and, as we have said, it is unreasonable to hold that the existence of the will did not become known or could not become known to the plaintiff in the first of the original side suits. If, as is only natural to assume, the existence of the will must have become known to the plaintiff that disposes of at once the question whether there was a secretion of the will within the meaning of S. 477, I. P. C.

Mr. Chatterjee who has addressed to us a strenuous argument has confined his attention to a few of the words occurring in the section. He has confined his attention to the question as to whether the conduct of the accused was a fraudulent and dishonest one. No doubt that is a very important circumstance to be taken into consideration; but the central fact emerging from a consideration of the proceedings had in this suit is whether there was a secretion of the will in question within the meaning of S. 477, I. P. C. If there was no secretion then nothing further need be considered. As we have said just now it is difficult to come to a conclusion that there was a secretion in fact of the will in question.

We will come in a few moments to the question of the affidavit in 1930—a matter to which very properly Mr. Chatterjee has drawn our pointed attention. The explanation is that the terms of the will showed that the accused was entitled to the property left by the testator subject to the legacies and annuities dehors the will. That may or may not be so as a matter of construction, but we are unable to overlook the point that has been raised on behalf of the accused that he was advised that having regard to the terms of the will it was not necessary to obtain probate and also the fact that the will had passed into the lawful custody of the executor duly nominated and constituted under the terms of the will. If as matter of fact the accused had been advised that in the circumstances obtaining, and having regard to the terms of the will it was not necessary to obtain probate, that would furnish in our opinion sufficient explanation (this explanation is being added not for the purpose of justifying the action of the accused) for the action of the accused in suggesting in the affidavit of July 1930 that the testator had died intestate. That affidavit had become necessary, we are informed, because the accused, had to make arrangements for withdrawal of a certain amount of compensation money from the Land Acquisition Court in respect of an acquisition of a portion of the testator's estate; but whether that was so or not the only point that need engage our attention is whether the explanation that has been submitted for the affidavit in question is an explanation which may be taken into consideration. On the facts of this particular case we are reluctant to say that the explanation need not be taken into consideration. We think it should be taken into consideration.

The only further point that need be considered is whether if the executor obtains possession of the will with the knowledge of the solicitors who were responsible for the drawing up of the will, who were responsible for the custody thereof till February 1926, it can be said in these circumstances in addition to what has already been observed that there was a secretion in the eye of the law and within the meaning of S. 477, I. P. C. We have examined the entire record from cover to cover and we think that the accused may reasonably urge that there has been no secretion whatsoever of the will. The accused would have been well advised if he himself had acquainted his mother of the facts referred to above, namely, that the will had passed into his possession from the Solicitors Messrs. Kar Mehta & Co.

In various affairs of life people commit various mistakes, but that is neither here nor there. The only question is whether the accused has placed himself in such a position that he does come within the clutches of S. 477, I. P. C. After the fullest and the most anxious consideration we have come to the conclusion that the accused has made good the ground on which the present rule has been issued and that the proceedings started against the accused should be quashed, and we accordingly direct that those proceedings be quashed and that the accused, if he is under any order for bail, should be discharged from such order.

R.K. *Proceedings quashed.*

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Special Bench

PANKRIDGE, AMEER ALI AND M. C. GHOSE, JJ.

Emperor

v.

Surjya Kumar Sen and *another*—Accused—Appellants.

Capital Sentence Case No. 22 of 1933, with Criminal Appeals Nos. 679, 680 and 678 of 1933, Decided on 14th November 1933.

(a) Penal Code (1860), Ss. 121, 121-A and 302—Accused since release plotting against Government—Plans vigorously put into operation—Accused personally responsible for death of innocent persons—Conviction under Ss. 121 and 121-A and sentence of death held proper.

Ever since the accused's release from internment he had been planning and plotting against the King's Government and his plans were put into active operation on a certain date and up to the date of his arrest, they were pursued with complete ruthlesness and disregard for the sanctity of human life and he had further been found to be personally responsible for the deaths of two innocent persons and he was also responsible for the deaths of the victims of what was known as the Armoury Raid.

Held: that he was rightly convicted under Ss. 121 and 121-A, with murder and with abetment of murder and that the sentence of death was rightly passed on him. [P 231 C 2]

(b) Penal Code (1860), S. 121-A—Conspiracy in action—Accused member—Intention to use violence if necessary—Possession of deadly weapons—It is immaterial whether weapons are used for aggression or resistance.

Where a conspiracy was in action or existence and the accused was still a member of it and it was his intention to use violence when occasion demanded it and he did use violence, he was a rebel in arms against the Crown and in the unlawful possession of deadly weapons.

Held: that it was immaterial whether the accused used those weapons in acts of aggression or of resistance. [P 231 C 2]

(c) Penal Code (1860), Ss. 109 and 302—Death caused in raid — Person instigating leader of raid is abettor of murder.

Any person who instigates a raider, or leader of the raid in which death has been caused is guilty of abetment of murder. [P 225 C 1]

(d) Penal Code (1860), S. 121-A—Institute attacked as used by Europeans, expecting them to be Government supporters—At time of raid only one person found to be official—Raid still amounts to waging war.

Where an institute has been attacked because the persons using it are Europeans and Anglo-Indians who might be expected to be supporters of the Government, the mere fact that only one of the persons present there was an official would not make the raid on the institute anything less than waging war. [P 225 C 1]

(e) Evidence Act (1872), S. 10—Document written by deceased describing conversation with third person who referred to accused as conspirator is admissible under S. 10.

A document written by a woman since deceased in which she described her conversations with a third person in which she said that he told her that among his revolutionary friends was the accused, to whom he was accustomed to turn for guidance, is admissible under S. 10, as the statement if proved is itself a relevant fact by virtue of S. 10. The statement by the writer is a relevant fact and being admissible under S. 10 is evidence against all the conspirators ncluding the accused, to the effect that the third person made his statement concerning the accused. [P 227 C 1]

(f) Criminal Trial — Conspiracy — Former association must be construed in light of subsequent actions.

The former association of an accused person with proved conspirators must be construed in the light of his subsequent actions. [P 227 C 2]

(g) Criminal Trial—Burden of proof—Criminal activities of accused—Statement by accused on record—No repudiation nor explanation—Proof of admission of guilt is not necessary.

If a person voluntarily elects to put on record a statement of his criminal activities and thereafter neither repudiates that statement nor offers a reasonable explanation of it, he has no grievance whatever if the Court regards that statement as conclusive against him. In such circumstances there is no burden placed on the Crown of establishing the truth of the admissions of guilt ali unde. [P 229 C 2; P 230 C 1]

N. N. Sircar and *N. N. Banerji Bahadur*—for the Crown.

B. C. Chatterji, Radhika Ranjan Guha, Santosh Kumar Basu, Parimal Mukherjee, J. C. Gupta and *A. K. Das*—for Appellants.

Judgment.—The appellants before us were tried by Commissioners appointed under the Bengal Criminal Law Amendment Act of 1925. They were all charged with conspiracy to wage war against the King (S. 121-A, I. P. C.) and with waging or abetting the waging of

such war (S. 121, I. P. C.). The appellant Sen was further charged with the murder of Capt. Cameron at Dalghat on 13th June 1932, and with the abetment of the murder of Mrs. Sullivan at Pahartali on 24th September 1932. The appellant Dastidar and the female appellant were charged with the attempted murder at Gahira on 19th May 1933, with the unlawful possession of explosives [S. 4 (b), The Explosive Substances Act, 190-] and with the unlawful possession of arms and ammunition on the same date and at the same place [S. 19 (f), Indian Arms Act, 1-78]. There is a further charge against the appellant Dastidar of attempting to murder Assistant Sub Inspector Sasanko Bhattacharji on 6th March 1931.

The trial began on 15th June 1933. The Commissioners examined 170 witnesses, and in the course of the proceedings 346 documentary and material exhibits were tendered. The Commissioners delivered their judgment on 14th August 1933, convicting the appellants on all charges framed against them with the exception of the charge of attempted murder at Gahira of which the appellant Dastidar and the female appellant were found not guilty and acquitted. They sentenced the male appellants to death under S. 121, I. P. C.. and the female appellant to transportation for life under the same section. They passed no separate sentences in respect of the other offences of which the appellants were convicted.

The only objection taken before the Commissioners as to the form and conduct of the trial was with reference to the charge under S. 4 (b), Explosive Substances Act. The Commissioners overruled this objection, and when Mr. Basu for the appellant Dastidar was taking the point before us, the learned Advocate-General for the Crown stated that, inasmuch as no sentence had been passed under that section, he would have no objection if, in order to save the time of the Court, the convictions of the appellant Dastidar and the female appellant under it were set aside, and we thereupon decided to accept this suggestion. We have now to deal with the convictions under the other sections, against all of which the appellants have appealed. In addition, as the male appellants have been sentenced to death, the propriety of their conviction under S. 121, I. P. C., and of the sentences imposed upon them has to be considered by us under Ch. 27, Criminal P. C. The Commissioners have given a detailed account of the events at Chittagong during the period beginning with the preparations for the Armoury Raid of 18th April 1930 and ending with the arrest of the appellants Tarakeswar Dastidar and Kalpana Dutt on 19th May 1933.

There is no need for us to recapitulate this account, for much of it is common ground, since counsel appearing for the appellants have generally speaking not sought to question the events themselves, but have argued that the connexion of their clients with them has not been established We will deal first with the case of the appellant senior. Mr Chatterjee, if he will permit us to say so, showed very great wisdom in abstaining from putting his client's case too high. He did not dispute the fact that the appellant was arrested at Gairala on 16th February 1933 and that being then in unlawful possession of a revolver and ammunition, he was guilty under the Arms Act He further stated that documents found upon his person at the time of his arrest showed that he had been on terms of close association with one Pritilata Waddadar. This person is a girl of about 20 years of age, who admittedly took a leading part in the attack on the Pahartali Railway Institute on 24th September 1932, and whose dead body was afterwards found in the vicinity of the Institute. A post mortem examination showed the cause of death to be poisoning by cyanide of potassium presumably self administered. Mr. Chatterjee also conceded that the watchers' reports established that the appellant had for some months prior to the Armoury Raid been constantly associating with persons, some of whom have since been killed in conflict with the forces of the Crown, while others have been convicted of waging war against the King. Finally, he did not dispute the fact that the revolver found on the appellant was one of those stolen in the Armoury Raid He indicated that in view of these circumstances he did not feel justified in submitting that the Commissioners were wrong in convicting his client of conspiracy to wage war under S. 121-A, but

at the same time he maintained that the evidence did not show that the appellant was guilty of any of the acts of war alleged against him.'

We will first deal with the appellant's alleged connexion with the Armoury Raid. It is pointed out that, although the appellant was under police observation, there is no evidence at all that he was in Chittagong on 17th April. With regard to 18th April Mr. Chatterjee says that the language of the watcher's report (Ex. 124/31) suggests that the presence of the appellant on that date was a matter of inference rather than of direct observation. He also criticises Ex. 112, the personal diary of a police officer named Ramani Mohan Mujumdar, P. W. 64, on which the Commissioners have relied. In dealing with the case of the appellant Dastidar, we shall give our reasons for holding that this is a document which should be regarded with considerable suspicion. However, even if we eliminate the direct oral evidence of the appellant's presence in Chittagong after 16th April, we consider that his actual participation in the Armoury Raid is established beyond all doubt. That he was deeply involved in the conspiracy is scarcely disputed and it is hardly conceivable that he should have been absent when the active compaign was launched. Moreover no suggestion has been made as to where he was, if not at Chittagong, nor has any reason been assigned for his leaving the town. The evidence however of his presence goes far beyond these general considerations of probability. For reasons which we shall give shortly, we are in entire agreement with the finding of the Commissionors that among the conspirators the appellant passed by the name of "Masterda." In the so-called mobilization lists (Ex. 91) found at the search of the house of Gonesh Das, the conspirator, on the morning of 19th April 1930, Masterda is shown as in charge of the largest group of raiders. The matter is finally concluded by the statement of the appellant himself in Ex. 199, a document which the Commissioners have in our opinion rightly held to be in the handwriting of the appellant senior. The material passage is as follows:

"After the Puja Vacation myself and my coworkers at Chittagong were so much engrossed in the arrangement for action that we all cleanly forgot about Rani. After an extensive preparation for six months the Chittagong revolution manifested itself on the night of 18th April 1930. Every leader joined it. On 22nd April there was a fight for about two and a half hour with the British soldiers at Jalalabad Hills, and the British Army was vanquished at last. We sustained 12 casualties in that hand to hand fight. After the Jalalabad fight we came down from the hills and concealed ourselves."

Our conclusion is that the appellant took a leading part in the raid and his conduct amounted to waging war against the King. It will be here convenient to deal with the evidence proving that when Masterda is mentioned in documents written by members of the conspiracy, the appellant is meant. There is firstly direct oral evidence that the appellant was called Masterda by his friends. Perhaps if this was all, the fact could not be held to be satisfactorily established, although not a suggestion has been hazarded before us as to who Masterda can be if not the appellant, in spite of the fact Masterda is unquestionably an important, if not the most important, member of the conspiracy. What puts the matter beyond the region of conjecture is Ex. 199, where the appellant speaking of his introduction to Prithilata writes:

"When Rani came home during the Puja Vacation in 1931 she saw Anita. This time he had come with a firm determination that she would tell everything fully to Anita and try to meet me (Masterda)."

In view of these facts no importance can be attached to the absence of the name "Masterda" in the admitted letters in the handwriting of Prithilata found on the person of the appellant at the time of his arrest in which the writer addresses him not as "Masterda" but as "Dada." We have referred to Ex. 199, which is said to have been found at Gairala at the time of the appellant's apprehension, tied up with other documents in a bundle in a ditch. An analysis of these documents is to be found in the Commissioner's judgment at p 247 of the paper book. We are however at the moment concerned with the circumstances in which these documents were found and the question of their authenticity. It is not apparent that any very vigorous attack was made on the bona fides of the search before the Commissioners. Be that as it may, the point has been pressed before us.

It is pointed out that the Havildar, P. W. 103, states that at sunrise after the arrest of the appellant he noticed a small tank, from which one of his men recovered a dhoti and a sari. He adds : "We did not find anything else then. We searched and did not find anything more." The Sub-Inspector of Police accompanying the party states that he found the bundle of papers tied up in a towel on clearing hyacinth from a ditch. The search witness P. W. 111, who describes himself as a zemindar, identifies the bundle in question as found in a ditch. He also says in cross-examination that he was present when things were found "in the tank on the first day." To the Court he stated that the ditch was :

"about 50 cubits from the tank to the west."

He adds:

"I am sure the things found on the first day were found in the ditch. Chemise, cloth, pair of white canvas shoes, were found in the ditch on the first day."

The search list is Ex. 187. Counsel has drawn our attention to the fact that items 37 and 38 appear to be the garments found by the Havildar, and they are described as "recovered from the water of a ditch on the north-west corner of the tank" a description substantially the same as that given of the place where the bundle of papers was found. The argument is that the police claim to have found the bundle in a place already searched by the Havildar without any bundle being found. Therefore the bundle was put there after the Havildar's search. Therefore it was put there by the police. We do not find it possible to accept this contention. The confusion between "tank" and "ditch" is easy enough, and having regard to the evidence of the search witness it appears to us that the place, where he saw the bundle recovered, is at some distance from the place where the Havildar recovered the clothes.

We may add that, if there is any inconsistency, it is only of importance, if it is serious enough to raise a reasonable suspicion, that the Police Officer accompanying the military party had provided himself with a bundle of forged and incriminating documents for the purpose of "planting" it on the appellant. In our opinion there is nothing to justify such a suspicion. Once the Court is satisfied of the bona fides of the discovery of the bundle, there is no reason to entertain suspicions as to the authenticity of its contents. Apart from this consideration however it has in our opinion been clearly demonstrated that the documents alleged by the prosecution to be in the appellant's handwriting are in fact in his handwriting. They have been submitted to Mr. Bennett, P. W. 170, the handwriting expert who, after comparing them with the admitted handwriting of the appellant, gives as his opinion that they were written by him. Our attention has not been drawn to any passages in this witness's cross-examination which discredit his testimony. Mr Bennett's evidence is corroborated by that of Umesh Chandra De, P. W. 129, who is acquainted with the appellant's handwriting and has seen him write both in English and Bengali.

Finally we have ourselves examined considerable portions of the documents in both scripts, and we entertain no doubt that the Commissioners were right in coming to the conclusion that the documents are genuine. We will now deal with the Pahartali raid of 24th September 1932, in the course of which several persons were injured and Mrs. Sullivan, a lady of 60 years of age, was murdered. Counsel has found it impossible to argue that his client was not connected with it. On Prithilata's dead body was found a document Ex. 56, which, it is not disputed, is in her handwriting. In it she states that she was summoned by "Masterda" to join in the raid, but that, when asked to lead it, she felt diffident on account of her sex. But "Masterda soon convinced me and I took my leader's command." The appellant's own version of his connexion with the Pahartali outrage is to be found in Ex. 189 which was found at Gairala, and has been satisfactorily proved to be in his handwriting. It is headed "Bejoya," and it was clearly written on the Bejoya day at the end of September 1932. After referring to other revolutionaries, who have been killed or convicted, he writes of Prithilata as follows :

"To-day I remember more that emblem shed, pure and beautiful, whom I immersed fifteen days ago, putting weapon in her one hand and nectar in the other. The remembrance of her is predominant today. I have not been able to forget her remembrance even for a moment during these fifteen days, whom I sent to the field of battle dressing her up with my own hands in battle attire whom I permitted to jump

into the sure jaws of death. When I told her piteously after I had dressed her up that I had dressed her for the last time and her dada would never in his life dress her again the idol smiled a little."

It is admitted that the reference is to Prithi the "nectar" can only mean the poison, and "battle attire," the male dress she was wearing at the time of her death. All who joined in the raid or personally directed it were in our opinion guilty of the murder of Mrs. Sullivan. Any person who instigated a raider or leader of the raid is therefore guilty of abetment of murder. Accordingly the appellant was rightly convicted of that offence under S. 302/109, I. P. C. It was suggested before the Commissioners that the Pahartali raid was not waging war, because only one of the persons playing whist in the Institute was an official. The same argument was hinted at here and quickly abandoned. No contention could be more ludicrous. The Institute was attacked because the persons using it were Europeans and Anglo-Indians, who might be expected to be supporters of the Government. The conspirators' own statements make this plain. Prithi writes in Ex. 56 that the revolutionaries have been compelled

"to take up arms against the lives of any and every member of the British community, official or non-official."

That such had been the policy of the conspirators from the outset is established by leaflets found after the Armoury Raid. Ex. 51 is one of such leaflets. It concludes as follows:

"The Indian Republican Army further declares that any person who will be able to produce any Englishman, woman or child of any age to its headquarters, dead or alive, will be amply rewarded.

By Order
President in Council,
Indian Republican Army
Chittagong Branch."

With regard to the case of this appellant it only remains to consider whether the commissioners were right in finding him guilty of the murder of Capt. Cameron at Dhalghat on 13th June 1932. The case for the prosecution is that both Prithi and the appellant were in the house at Dhalghat, in company with Nirmal Sen and Apurba Sen, who were killed by rifle fire on that occasion. It is said that when the shots were fired from the upper room which killed Capt. Cameron, who was about to enter it, the appellant was inside with Nirmal and Apurba, Prithi being downstairs. The direct evidence on the point is that of P. W. 26, a girl Snehalata Debi, described as about 14 years old, the daughter of the woman to whom the house belonged. It is undisputed that on the first occasion on which she gave an account of the incident before any Court, she mentioned the appellant "Masterda" and identified him by means of a photograph. Her veracity is however attacked because her deposition on that occasion (Ex. 333) contains no reference to the presence of any woman. She admits that she made no mention of Prithi before the Magistrate, and gives "lojja," or delicacy, as the reason of her silence. We agree with the commissioners that this fact coupled with the tender years of the witness would, as a matter of prudence, prevent the Court from acting on her evidence, if it were unsupported by material corroboration. We are not troubled by the minor discrepancies in her story. They are only to be expected in view of her age, and in view of the fact that before the commissioners she was describing an event that had happened a little more than 12 months previously. One piece of corroboration on which reliance is placed by the Crown is Ex. 257.

This document was discovered on the person of a boy named Anil Dutt, who was arrested on 4th March 1933 at a village named Vidagram for disobeying the Curfew regulations. It is useless to speculate from whom he had obtained it or what he intended to do with it. The fact remains that it has in our opinion been satisfactorily proved to be in the handwriting of the appellant by the witnesses Bennett and De, to whom reference has already been made. It purports to be the copy of a record made by Prithi of her introduction to Nirmal Sen and subsequently to the appellant and their actions thereafter. We know from Ex. 199 that Prithi had put it on record in writing that when meeting the appellant for the first time she felt that she was going to see her god. This very language is used of the first meeting with "Masterda" in Ex. 257. We consider it a fair inference that this exhibit is a copy of the writing by Prithi to which reference is made in Ex. 199. As regards the particular incident we are now considering, a detailed account of it and the

events leading up to it is given in the document, corresponding in all material particulars with the story told by P. W. 26 before the commissioners, and, as far as the appellant is concerned, with her story before the Special Magistrate. It is not unlikely that questions put to the girl in the course of the investigation, by some one with Ex. 257 at his disposal, have had the effect of making her think she has a clearer recollection of details than at this distance of time she possesses.

But the points with regard to which this may have occurred are of no material importance, since as to the part played by the appellant her story has throughout remained substantially the same. A special value attaches to Prithi's account, of which Ex. 257 is a copy, from the fact that the handwriting of the exhibit is the appellant's who may therefore in the circumstances fairly be considered to have adopted the story set out in the original, at any rate in so far as it relates to himself. Prithi's presence at Dhalghat is also established by certain documents found there by a European and an Indian police officer on 22nd June 1932. Among them we need only mention Exs. 178 and 179. It has not been denied that these are letters written by Ram Krishna Biswas to Prithi in July 1931. Ram Krishna was then a prisoner in Alipur Jail, having been sentenced to death for the murder of Inspector Tarini Charan Mukerji at Chandpur on 1st December 1930. Prithi's statement in Ex. 56 is that while Ram Krishna was awaiting execution in the jail she visited him 40 times. The jail registers corroborate this, and also prove that he did in fact write and . . . . . despatch the two letters found at Dhalghat. As Prithi is proved by the documents in the case to have entertained the highest regard for Ram Krishna, the finding of these letters shows that Prithi had been at Dhalghat and had been compelled to leave there in haste.

In our opinion the commissioners were right in holding that the appellant was at Dhalghat on 13th June 1932, that he was an occupant of the upstairs room when the shots which killed Capt. Cameron were fired, that those shots were fired in pursuance of the common intention of all the occupants, and that by the application of S. 34, I. P. C., the appellant was guilty of murder. We have now dealt with the case of the appellant Sen and must consider that of the appellant Dastidar. As regards his alleged connection with the conspiracy, the evidence is that in December 1928 he attended the Calcutta Congress in the company of other conspirators, and that in September of the following year he took a prominent part in the celebrations in honour of Jotin Das, the hunger striker. In the early part of 1930, the watchers' reports prove his association with the conspirators, but it has very properly been pointed out that the last mention of him in these reports is on 20th March 1930. Subsequent to that the only evidence of his presence in Chittagong is that of P. W. 64, who proves his presence there on the afternoon of 18th April. In support of his oral testimony he produces his personal diary, Ex. 112. As we do not propose to rely on it, it will be sufficient to say that its language is consistent with the contents being the result of information and not of observation. Further we cannot exclude the possibility that the entry was made after the Armoury Raid, and the names appearing there are those of the persons who, in the opinion of the writer, were the most likely to be concerned in it.

To sum up we are not satisfied that the appellant was in Chittagong at the time of the raid or indeed after 20th March. It has perhaps some significance that the only positive defence put forward by any of the accused in this case on any of the charges is this appellant's defence of alibi in respect of the Raid. He states that on 18th April, he was at Rajshahi attending a conference. There is no evidence is support of this alibi, which was put forward when the appellant was examined under S. 342, Criminal P. C., but we need not consider it critically, as the learned Advocate-General admitted in the course of argument that he had not been able to establish affirmatively that the appellant was in Chittagong at or about the time of the Raid. The prosecution place considerable reliance on the association of the appellant with Ram Krishna Biswas, of whom mention has been made, and they prove that in March 1930 when Ram Krishna was

suffering from injuries received in a very suspicious accidental explosion, the appellant was concerning himself with the management of his (Ram Krishna's) private affairs.

Another piece of evidence used to establish the appellant's connexion with the conspiracy is a document (Ex. 105) written by Prithi and found at Dalghat. In it describing her conversations with Ram Krishna in jail, she says that he told her that among his revolutionary friends was one Futyada, whom he held in high regard, and who had recruited him and to whom he was accustomed to turn for guidance. It is not now denied that "Futu" was the name of which the appellant was known to his intimates, and the small difference in form between "Futu" and "Futya" does not in our opinion affect the matter. It appears that there is a Kaviraj, who comes from the same village as the appellant and Ram Krishna, called Futu, but there is no reason to suppose that he had anything to do with the conspiracy. For reasons that we are about to give, we think the document admissible in evidence and we also think that the Futyada referred to in it is the appellant Dastidar. At the same time having regard to the fact that it is the report of the conversation of a third person, we do not attach great evidentiary value to it, and expunging it from the record would make no difference to our finding that the appellant has been shown to be a member of the conspiracy. On the question of the admissibility of the document the opinion we have formed is as follows:

We consider the reference by Ram Krishna to Futya admissible under S. 10, Evidence Act, for the following reasons: Such statement, if proved, is in itself a relevant fact by virtue of S. 10, Evidence Act. The statement by Prithilata is again a relevant fact under S. 10, Evidence Act, as against Ram Krishna Biswas (and other conspirators). The statement by Prithilata has been proved. Hence the statement by Prithilata is evidence against all the conspirators including Tarakeswar Dastidar, to the effect that Ram Krishna Biswas made his statement concerning Tarakeswar Dastidar. The statement concerning Tarakeswar Dastidar is therefore in our opinion proved.

On the question of the appellant's connexion with the conspiracy, it must always be remembered that his former association with proved conspirators must be construed in the light of his subsequent actions. He disappeared after the Raid, and all we know of his movements since that time is that he participated in acts of violence. At the time of his apprehension he was, as we shall show, the directing mind of the conspiracy, and was considering the possibility of committing further outrages.

We may also refer to Ex. 186 found on the person of the appellant, Sen at the time of his arrest. We have no doubt that the Futu there referred to is the appellant Dastidar; if so, association between the two appellants is established. The conclusion we have arrived at is that in all probability he was in the conspiracy from the start. If however this is open to reasonable doubt, it is beyond question that immediately after the Armoury Raid he threw in his lot with his former associates, and was an active member of the conspiracy, and a rebel in arms against the Crown up to the moment of his arrest at Gahira on 19th May 1933.

We can deal very briefly with the conviction of this appellant for the attempted murder of Sub-Inspector Bhattacharji (P. W. 72) at Barama on 16th March 1931. It is not now contended that the witness is not stating what he believes to be the truth, when he says that as he was pursuing the appellant, the latter fired a revolver and hit him in the chest. Neither is it contended that the appellant was not present in the company of another armed man, when the Sub-Inspector in broad daylight met with his injuries. What is suggested is that as the Sub-Inspector knew the identity of the appellant, but did not know the identity of his companion, it is possible that a process of what the Commissioners describe as "auto-suggestion" has induced him to attribute to the appellant injuries in fact inflicted by the appellant's companion. We see no ground to suppose that anything of the sort has happened, and we are prepared to accept the evidence of the Sub-Inspector as not only honest but accurate. That being so the appellant has been rightly

convicted of attempted murder under S. 307, I. P. C.

We may here say that the Commissioners have held that the appellant's conduct at Barama, although it amounted to an offence under this section, was not an act of waging war, inasmuch as the appellant's primary motive for attempting to murder the police officer was the desire to escape apprehension, and not the desire to weaken the forces of the Government. The appellant's counsel has argued in support of that view, and has pointed out that by similar reasoning opening fire at Gahira should be held not to amount to waging war, because the Commissioners have held that the common intention of those who fired may have been to drive away the forces of the Crown and escape, and therefore they have declined to convict under S. 307, in respect of that occasion.

We need not stop to consider whether the one finding would follow logically from the other; for in our opinion both acts were overt acts of waging war. We concede that it is possible to imagine a case where, after the conspiracy has been abandoned as a failure, attempts to arrest former conspirators are made and forcibly resisted. It may be correct; we do not say that it is correct, that such resistance does not amount to waging war, as the intention to wage war is no longer entertained. Such however was not the situation either at Barama or Gahira. The conspiracy was still in active existence, and the appellant was still a member of it. It was his intention to use violence when occasion demanded it, and he did use violence. He was, as we have said, a rebel in arms against the Crown and in the unlawful possession of deadly weapons. In these circumstances it appears to be immaterial whether he used those weapons in acts of aggression or of resistance.

With regard to the actual occurrences at Gahira, there is no need to say very much. Counsel has argued that we should not believe Prosonno Talukdar (P. W. 122) who says that the 3 revolvers were made over to him by the appellant. This argument is based on his failure to make a definite statement to this effect at the time, and to the language of the search list. For the reasons given by the Commissioners we are prepared to accept this witness's version of the incident. Moreover the mere question of physical delivery seems to us of no great importance. Having regard to the position occupied by the appellant in the conspiracy, and to the fact that the revolvers have been shown to be part of the Armoury Raid booty, we think that the appellant has been rightly held to have been found in joint possession of them and of the explosives recovered at Gahira, independently of the part he is said to have played in surrendering the weapons.

A word should here be said as to the documents seized by the police at Gahira. The most important of these are Ex. 223, found on the person of the appellant, Exs. 226, 227, 235, 239 found in the "ghar" of Purno Chandra Talukdar, and the Ex. 127 series, which consists of documents which were dropped from the sari of the female appellant at the time of her arrest.

As to this series we may say that we agree with the Commissioners that the account given of the circumstances in which the documents were found by Sepoy Samendar Khan of the Jat Regiment, P. W. 80, and put in his shoe and not made over to the sepoy's jamadar until the afternoon of the next day, is reliable. Samendar Khan is not a police officer, and has no experience in criminal investigation, and having regard to a sepoy's standard of education, it is by no means surprising that he should not appreciate the importance of documents found on arrested persons, and the necessity of making such documents over to his superiors at the first opportunity.

The effect of these documents is in our opinion damning. It is not necesary to assign a meaning to every line. For example in Ex. 127 (d) it is unnecessary to decide whether 'D.M.' stands for District Magistrate, or "baby" for revolvers or whether the existence of a plot to assassinate the District Magistrate of Chittagong is disclosed. Such are the Advocate-General's suggestions and they possess a high degree of probability. But even if we discard them, this document and others clearly establish that in May 1933 the revolutionaries at Gahira were receiving letters from an inmate of the jail discussing a scheme for a jail rising and the rescue of

the appellant Sen. This particular document is stated by Mr. Bennett to be in the handwriting of Amulya' Biswas, a detenue confined in Chittagong jail at that time For our purpose the precise identity of the writer is of no particular importance, for the internal evidence clearly proves that, whoever he was, he was then an inmate of the jail and was in communication with the appellant Dastidar and his companions with regard to plans of the nature we have mentioned. Ex. 223, which as we have observed, was found on the appellant's person, proves in our opinion that at this stage the appellant Dastidar was, to adopt the language of the learned Advocate-General, at the helm of the conspiracy. It was from him that the revolutionaries and their sympathisers sought directions as to the best manner in which their unlawful activities could be employed. Mr. Basu has described the inferences, that we hold have been rightly drawn, as "mere speculation". In our opinion however they are irresistible, the more so as there is no attempt at a rival interpretation, although the writers would presumably frame their communications in terms intelligible to the recipient. We are satisfied that, after the arrest of the appellant Sen, his mantle fell upon the shoulders of Tarakeswar Dastidar and that in May 1933 he was the leader of the conspiracy and was so regarded by the other conspirators.

We have finally to consider the case of the female appellant, with regard to whom we have not thought it necessary to call on Counsel for the Crown. The suspicions of the police, that she was a possible conspirator, were first aroused by the fact that she was arrested dressed as a boy in Pahartali on 17th September 1932. She was released on bail on 23rd November 1932 and thereafter disappeared. At that time a bad livelihood case under S. 109, Criminal P. C., was pending against her. She is said to have been at Dhalghat at the time of the capture of the appellant Sen and to have succeeded in evading arrest. At the time of her apprehension at Gahira an important document, Ex. 156, was found on the premises. It has been proved by Mr. Bennett, after comparison with admitted documents, to be in the handwriting of the female appellant. We have made a similar comparison ourselves, and see no reason to doubt the the correctness of the expert witness's opinion. The document is in a mutilated condition, but the substance of it can for the most part easily be ascertained. In it the writer states that while a student at the Bethune College she became imbued with revolutionary ideas and "joined the organization." She says that after the Armoury Raid she devoted herself to the organization and she describes a plot for rescuing the undertrial prisoners and the introduction of arms and explosives into the jail for this object. Owing to the mutilated state of the document it is not possible to say whether she claims to have taken an active part in this. She next says that she was summoned by the "venerable leader" to take part in the Pahartali raid and describes how her participation therein was prevented by her arrest. She states that she absconded "to fulfil her hankering after some revolutionary action". She refers to an engagement with the police at Gairala "where .... great ....rda was arrested". It is not clear whether she was personally present on that occasion, but she says "the tragedy" touched her heart, and her hankering for practical action grew more intense. She says her desire is going to be fulfilled "to-day" by the newly elected President, that what she is about to do is not "a whimsical act", and that she is going to sacrifice her life.

Now, that is a highly important document and it is significant that it nowhere appears that the writer has ever put forward any explanation of it or repudiated the admissions contained in it. Counsel for the appellant has complained that the prosecution have failed to corroborate the statement contained in it. We shall consider at a later stage the correctness of this assertion, but at the moment we feel compelled to observe that this line of criticism in our opinion proceeds on a wholly erroneous assumption. If a person voluntarily elects to put on record a statement of his criminal activities, and thereafter neither repudiates that statement nor offers a reasonable explanation of it, he has no grievance whatever if the Court regards that statement as conclusive against him. In such circumstances there

is no burden placed on the Crown of establishing the truth of the admissions of guilt aliunde.

It has been suggested by counsel that the document may be a fiction composed for purposes of publicity, and it is pointed out that Ex. 56 (Pritilata's statement) was in fact printed and circulated in the form of a leaflet, a specimen of which is on the record. This explanation has never been definitely advanced by the writer of the document even in her grounds of appeal, and represents at the most an ingenious surmise on the part of her counsel. It may be conceded that the arrangement and language of Ex. 156 render it highly probable that the appellant had Ex. 56 in her mind when she composed Ex. 156, and that to this extent the former document served as a mcdel for the latter. But from this it is quite impossible to draw the conclusion that the statements of fact in Ex. 156, which to a large extent deal with events as to which Ex. 56 is silent, are untrue. Finally, if we apply the test of corroboration, though in our opinion it is in the circumstances altogether unnecessary that this test should be satisfied, we find the appellant's assertions as to her activities corroborated in a most remarkable manner. Reference must again be made to Ex. 199 which it will be remembered is the appellant Sen's account of the way in which girls and women were introduced into the revolutionary movement. It describes in great detail the doings of one Anita, who is said to have been in October 1929 a first year student in Calcutta. After dealing with the Armoury Raid there is a statement that "a few months after the raid" the writer established communication with Anita, who procured in Calcutta materials for the projected dynamite outrage in the jail and managed to arrange for the introduction of "arms, money, etc.", into the jail. The document states that the writer decided to see Anita personally towards the end of the summer vacation of 1931, but that there were difficulties as she was "being looked on with suspicion by the I. B. by this time." In fact the police records show that it was in the middle of July 1931 that the female appellant was placed under police observation.

The meeting was finally brought about clearly in the rainy season of 1931, and before the Puja vacation of that year or at any rate before the arrival of Military reinforcements in December 1931, which rendered meeting difficult. Referring to this period the writer states "Anita was reading in Chittagong College then." Now the records of the College have been put in and proved by the accountant of the College and they show that not only is this statement true of the female appellant but it is true of no other woman in the world. The witness states that the appellant was admitted in September 1931, and that prior to her admission there had been no female student since 1927. After the appellant's admission there was no female student admitted until March 1932, that is to say, until a time considerably later than the period of which the writer is speaking.

In our opinion it has been conclusively shown that the Anita of Ex. 199 is the female appellant, in spite of the fact that there is no positive evidence that she was ever called Anita, and the fact that it is common ground that her nickname or pet name is "Bhulu". We consider that the appellant's admissions as to her connexion with the dynamite conspiracy find full corroboration in the contents of Ex. 199. This being so it is unnecessary to decide whether, as is claimed by the prosecution, the document Ex. 317 signed "Ajit", in the hand writing of the appellant, or, if it is, what inference can be drawn from it as to her complicity in the first dynamite plot.

The statements in Ex. 156 as regards the intention of the female appellant to participate in the Pahartali raid are clearly corroborated by the facts relating to her arrest on 17th September, with which we have dealt above. As regards her presence at Gairala on 16th February 1933, we do not feel justified in drawing any conclusion from Ex. 156, since the part of it which is concerned with this incident is so seriously mutilated as to make satisfactory deduction impossible. It is true that female garments were discovered at Gairala, which would indicate that there was a woman among the party of which the appellant Sen was one. There was also found here a letter in Bengali addressed to the female appellant's brother, Phaya. This is Ex. 197, and in

its present state it bears the English date 16th February 1933. The Bengali portion has been shown to be in the handwriting of the female appellant, who, it is proved, has a brother who is known as Phaya. Doubt however is cast on the genuineness of the English date; the attention is drawn to the fact that when the document was photographed the portion containing the date was not reproduced. It is said that this was due to an oversight on the part of those responsible for the photography.

We do not think it necessary to go further into the matter, and we clearly hold that in the absence of oral evidence we are unable to say that the presence of the female appellant at Gairala on 16th February 1933 has been conclusively established. It is common ground that she was arrested at Gahira on 19th May 1933, and having regard to her writings and her general conduct prior to that date, we have no doubt that her reason for being at Gahira was her determination to take an active part in the conspiracy and to carry on the war the conspirators were waging. We have no doubt therefore that she has been rightly convicted of waging and abetting the waging of war against the King. We may however notice that as a last resort a suggestion was put forward that her reason for associating with the appellant Dastidar was not that she wished to co-operate with him in carrying out the object of conspiracy, but that her connexion with him was solely of a sentimental nature. Again, this explanation has never been put forward by the appellant herself and there is nothing at all to support it.

Reference was made to Ex. 186 found on the person of the appellant Sen at the time of his arrest. There is a statement in the exhibit that Bhulu has been playing tricks, and that she appears to be cheerful because Futu and others are expected. The most this document could possibly be said to indicate is the wounded vanity of a middle aged man on discovering that a young woman naturally prefers the company of a man of 23 to his own. In any case Ex. 186 cannot possibly be used as a ground to support the suggestion of sentimental association, made as far as we can see for the first time in this Court. We have now considered the merits of the case of each appellant, and after setting aside the convictions of Tarakeswar Dastidar and Kalpana Dutt under S. 4 (b), Explosive Substances Act, we are of opinion that the convictions of all the appellants under the other sections must be maintained.

As to the question of sentence, the commissioners state that with regard to the appellant Sen, they are unanimously of opinion that nothing but the extreme penalty will meet the ends of justice. We are in entire agreement with them on this point. We have no doubt that ever since his release from internment in 1928 this appellant has been planning and plotting against the King's Government. His plans were put into active operation on 18th April 1930, and up to the date of his arrest they were pursued with complete ruthlessness and disregard for the sanctity of human life. He has been found to be personally responsible for the deaths of Capt. Cameron and Mrs. Sullivan, and we consider him reponsible for the deaths of victims of the Armoury Raid. We therefore confirm the sentence of death passed by the commissioners under S. 376, Criminal P. C. The commissioners state that the case of the appellant Tarakeswar Dastidar presents more difficulty, but after anxious consideration they have unanimously come to the conclusion that the extreme penalty should be imposed. We also have considered the matter with great care, and we are of opinion that the commissioners rightly thought it inconsistent with their duty to award a less severe punishment. Since April 1930, and probably before Tarakeswar Dastidar has been an active member of this conspiracy, in pursuance of which a considerable number of the King's servants and the King's subjects have lost their lives. He has rightly been found guilty of attempting to murder Sub-Inspector Bhattacharji, and of an overt act of waging war at Gahira where on his arrest he was discovered to be in the unlawful possession of arms and explosives. So far from the arrest of his co-appellant in February 1933 putting an end to his criminal activities, he thereupon assumed a more prominent position among the conspirators, and, as the documents show, he was up to the very last entertaining and discussing plans for further outrages.

These facts make it quite impossible for us to disagree with the commissioners and reduce the capital sentence which we confirm under the section referred to. The sentence of transportation for life passed on the appellant Kalpana Dutt is the lightest penalty which the law permits for the offence of which she has been convicted. It has not been suggested that the sentence should be enhanced, and so we are not called upon to offer any observations with regard to it. The result is therefore that except with regard to the convictions under S. 4 (b), Explosive Substances Act, to which we have referred, the appeals of all the appellants are dismissed. In their judgment the commissioners have commended the work of the police in investigating the case. We think their commendation well merited. In conclusion we wish to place on record our appreciation of the care and ability displayed by the commissioners in the performance of their task. In spite of the mass of material the conduct of the trial was in all respects satisfactory, and the judgment delivered by the commissioners is remarkable for its clear analysis of the evidence and for the sound reasoning by which the conclusions set out therein have been reached. Moreover it is abundantly clear that every submission made on behalf of the accused persons was most carefully and anxiously weighed by the tribunal.

R.K. *Order accordingly.*

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PANCKRIDGE, J.

In re *Binjraj Harnandrai* — Applicant.

Application No. 83 of 1928, Decided on 21st June 1933.

(a) Presidency Towns Insolvency Act (3 of 1909), Ss. 55, 56 and 7—Advoidance of transaction made by insolvent—Creditor can apply when Official Assignee refuses to apply.

Where the Official Assignee, though asked by a creditor has refused to apply to have certain transactions of the insolvent avoided under Ss. 55 and 56, the Court can entertain such an application by the creditor. The proviso to S. 7 is no bar to such an application because the questions under Ss. 55 or 56 are not matters arising under S. 36, simply because the respondents have been examined under that section : *A I R* 1921 *Cal* 403 and *A I R* 1926 *Cal* 618, *Rel on.* [P 232 C 2; P 233 C 1]

(b) Presidency Towns Insolvency Act (3 of 1909), S. 7—Different transactions with different persons cannot be challenged in same application.

An application under S. 7 impugning a transaction by insolvent under Ss. 55 and 56 should be framed according to the ordinary principles for framing suits and therefore if different transactions of the insolvent with different persons are sought to be impugned in the same application, the petition is defective. [P 233 C 1,2]

(c) Insolvency—Affidavits must make out case—Oral evidence may be permitted only as corroborative evidence.

The Insolvency Act primarily contemplates evidence on affidavit. It is open to the Court to permit oral evidence to be given either because it thinks it right that persons who have sworn affidavits should have their evidence tested by cross-examination, or in order that witnesses who have not sworn affidavits may give evidence in corroboration of witnesses who have sworn them. It is however essential that the affidavits should, apart from any oral evidence, make out a case by admissible evidence which, if believed, will justify the order asked for. [P 233 C 2; P 234 C 1]

B. C. Ghose and *Sekhar Bose*—for Applicants.

S. N. Banerjee and *K. P. Khaitan*—for Respondents.

Order.—Notice of this application was taken out by Messrs. Hoare, Miller & Co., Ltd., on 7th December 1932. It is sought by the application to impeach certain transactions entered into by the insolvents and to have them declared void as against the Official Assignee under Ss. 55 and 56, Presidency-towns Insolvency Act. The application is supported by an affidavit of a principal officer of the company, who states that the company are creditors of the insolvents to the extent of Rs. 38,000. The deponent also states that he has requested the Official Assignee to make this application, but the Official Assignee has declined, although the company was willing to accept responsibility for the costs incurred by him. Certain preliminary points are taken. It is said that the company has no locus standi in the matter, and that their proper remedy is an appeal to the Court under S. 86 of the Act against the decision of the Official Assignee refusing to make the application. I am unable to accept this argument. The Act does not specifically prohibit an application by a creditor on behalf of himself and the general body of creditors. It is true that *In re Surajmull Munglechand* (1) Greaves, J., held that it was not permissible for a creditor to apply to set

1. AIR 1921 Cal 403=70 I C 463.

aside an alleged fraudulent transfer without reference to the Official Assignee. However, the language used shows that the learned Judge contemplated the possibility of a creditor properly making such an application if he had first applied to the Official Assignee to move in the matter and the Official Assignee had declined to do so. I do not think that the observations of Sanderson C. J., and Rankin, J., in *Tyeb Ali Mullick* v. *Purna Chandra Pal* (2) contain anything which is contrary to Greaves, J.'s opinion as expressed in the former case. Moreover, Sir Dinshaw Mulla states in his Law of Insolvency at p. 432 that it is the practice, both in Bombay and in Calcutta, to give leave to the creditor to make the application in circumstances like the present.

I therefore hold that I am entitled to entertain this application at the instance of the creditor. Mr. Banerjee's second objection is that the proviso to S. 7 of the Act is a bar to this application. Again I do not agree, because the matters with which the application is concerned cannot, in my opinion, be properly described as "arising under S. 36." It is when we come to the substance of the application that the difficulties of the applicant arise. Para. 1 of the notice asks for an order for the payment of eight several sums to the Official Assignee by nine different persons. Para. 2 of the notice asks that the claim of certain creditors be declared void and that the names of the alleged creditors be expunged from the schedule. Para 3 asks for a declaration that certain property alleged to be mortgaged to one Ramgopal Arjundas belongs to the Official Assignee as part of the property of the insolvents. It is true that the creditors do not press their claims in respect of certain of the sums mentioned in para. 1. Even so however it is obvious that serious difficulties are likely to arise if the Court is required to investigate in one application a number of different transactions between the insolvents and different persons. There are no specific rules prescribing the form in which an application should be made when it is sought to impugn a transaction by an insolvent on the grounds mentioned in Ss. 55 and 56. However I consider that the Court is bound in some measure to observe the ordinary principles as to framing suits laid down by the Civil Procedure Code. What the applicants have done here is analogous to joining different causes of action against different defendants in the same suit. I think that, on grounds of practical convenience, this cannot be permitted. I cannot believe that it was the intention of the legislature to permit a comprehensive inquiry such as is now asked for to be raised by an application under S. 7.

The situation is aggravated by the nature of the evidence upon which the applicants base their claims. The affidavit in support states that, from the inspection of the insolvents' books and from the public examination of one of the insolvents, as well as from the examination under S. 36 of three other persons, it has been found that the insolvents have dealt with their property and made payments with a view to fraudulently preferring certain creditors and have made fictitious transfers. The affidavit later states that, as a result of the examination mentioned in the foregoing paragraphs, the following acts of fraudulent transfer and preference have been found. It is obvious that the whole body of evidence referred to cannot be admissible in respect of everyone of the transactions, and, in fact, it has been suggested, in my opinion plausibly, that much of the evidence is not admissible with regard to any of the transactions. Apart however from the latter aspect of the matter, the affidavit gives no indication what particular pieces of evidence are relied upon with regard to particular transactions. In my opinion, the Court cannot be called upon to spend its time collating the evidence with regard to particular transactions. Counsel for the applicants has suggested that the difficulties occasioned by the affidavit will be solved if he is permitted to call oral evidence. I do not think that this can be allowed.

In my opinion, the Insolvency Act primarily contemplates evidence on affidavit. It is open to the Court to permit oral evidence to be given either because it thinks it right that persons who have sworn affidavits should have their evidence tested by cross-examination, or in order that witnesses who have not sworn affidavits may give evidence in corroboration of witnesses who have sworn them

2. AIR 1926 Cal 618=93 I C 898.

It is however in my opinion essential that the affidavits should, apart from any oral evidence, make out a case by admissible evidence which, if believed, will will justify the order asked for. I am not satisfied that such a case is made by the affidavits with regard to any of the transactions which are called in question. In these circumstances, it appears to me that the situation is not one that can be remedied by the production of oral evidence. For the reasons I have given, I think the application must be dismissed with costs. At the same time I wish to say that my decision is not to be regarded as a decision on the merits. In other words it will still be open to the creditors to take steps to have the insolvent's transactions set aside either by means of a suit, or if so advised, by an application under S. 7 which does not suffer from the defects which I have mentioned and which are, in my opinion, fatal to the present application.

R.K. *Application dismissed.*

A. I. R. 1934 Calcutta 234

MITTER AND HENDERSON, JJ.

Anilkumar Ghosh and *others*—Decree-holders—Appellants.

v.

Hemantakumar Ghosh and *others*—Judgment-debtors—Respondents.

Appeal No. 30 of 1932, Decided on 13th June 1933, from original order of Sub. Judge, Khulna, D/- 1st August 1931.

Execution — Step-in-aid — Attachment of decree is not step-in-aid of execution of such decree—Civil P. C (1908), O. 21, R. 53—Limitation Act (1908), Art. 182.

The order of attachment of the original decree, instead of being a step-in-aid of the execution of such original decree is really a request to stay the execution of the original decree. Instead of being a step-in-aid of execution of the original decree; it rather arrests the execution of the decree and does not save limitation for executing such decree. [P 234 C 2; P 235 C 1]

Neeradbandhu Ray—for Appellants.

Bijankumar Mukherji and *Jaygopal Ghosh*—for Respondents.

Mitter, J.—This is an appeal by the decree-holders and arises out of an order dismissing their application for execution of a decree which they have attached. It appears that the decree, now under execution, was obtained by Munshi Mobarak Ali Sardar and others against Hemantakumar Ghosh and others in the High Court in Appeal from Original Decree No. 25 of 1925. This decree was obtained on 12th December 1927, and the total amount of the decree including costs and interest came to Rs. 1,500 odd. This decree was attached at the instance of the present appellants Anilkumar Ghosh and others in execution of their own decree against the decree-holder of the High Court's decree on 10th December 1930. The order of attachment was passed by the Munsif's Court at Khulna on that date and was communicated to the Court where the decree now sought to be executed, i. e., High Court's decree, was pending for execution and the attachment was duly noted in the register of that Court. On 11th April 1931, the present appellants applied for the execution of the decree which was obtained by Mobarak Ali Sardar and others against Hemantakumar Ghosh and others, in respect of which the order of attachment was made. Obviously, application for execution by the appellants was made more than three years from the date of the decree, which was 12th December 1927, and it is admitted that limitation could only be saved provided it could be successfully contended that the order of attachment or the application for attachment, which was made on 10th December 1930, in the Munsif's Court at Khulna, was a step-in-aid of the execution of the original decree of the High Court. The judgment-debtors contended that it was not a step-in-aid of the execution of the original decree. This contention prevailed with the Subordinate Judge, who has dismissed the application of the present appellants, on the ground of limitation.

Against this order the present appeal has been brought and it has been contended before us that it should be held that the step taken by the appellants for attachment of the decree now sought to be executed was a step-in-aid of execution of the said decree which is now sought to be executed, i. e., the High Court's decree. Under Art. 182 of the schedule to the Limitation Act, an application must be made within three years from the several starting points one of which is the date of the original decree or order and the other is the date of some steps which are taken in aid of the execution of the decree. It can hardly be said that the order for attachment of the decree now sought to be executed by the appellants was a step-

in-aid of the original decree; and, if one looks to the provisions of O. 21, R. 53, Civil P. C., it will appear that if the decree sought to be attached was passed by another Court, then the attachment of such decree is to be made by the issue to such other Court of a notice by the Court which passed the decree sought to be executed, i. e., in this case, Khulna Court, requesting such other Court to stay the execution of its decree unless and until the two conditions mentioned in sub-Cls. (1) and (2) of Cl. (b) are fulfilled. So the order of attachment of the original decree, instead of being a step-in-aid of the execution of such original decree, was really a request to stay the execution of the original decree of the High Court. Instead of being a step-in-aid of execution of the original decree it rather arrests the execution of the decree of the High Court. Of course the effect of the stay was only this: that it was a limited stay and it would not prevent either the holder of the decree sought to be executed or his judgment-debtor from seeking to execute the original decree. The appellants in the present case are themselves to blame if they did not apply to execute the attached decree within the period of limitation. The appellants cannot have any higher rights than the original decree-holder, i. e., the person against whom he obtains the decree, i. e., their judgment-debtor. Accordingly, we are of opinion that the Subordinate Judge has taken the right view of the matter and this appeal must be dismissed with costs. The hearing fee is assessed at one gold mohur.

Henderson, J.—I agree.

R.K. *Appeal dismissed.*

A. I. R. 1934 Calcutta 235

GUHA AND BARTLEY, JJ.

Subimalchandra Chatterji—Defendant—Appellant.

v.

Radhanath Ray—Plaintiff — Respondent.

Appeal No. 1362 of 1931, Decided on 23rd June 1933, from appellate decree of Addl. Dist. Judge, 24-Parganas, D/- 6th January 1931.

(a) Contract — Formal document — Reference to, does not prevent it being complete.

A mere reference to the preparation of a formal document does not prevent a contract, otherwise binding being complete: *Rossiter* v. *Miller*, (1878) 3 *A C* 1124, *Ref.* [P 237 C 1]

(b) Part performance—Lease—Lessee continuing in possession under existing lease—Possession continued after first lease is part performance of agreement to renew lease.

Where possession has been obtained before the agreement, the lessee having continued to be in possession all along by virtue of an existing lease, the possession after the expiration of the pre-existing lease is only referable to a contract for renewal and is to be treated as part performance of such contract: *Dowell* v. *Dew*, (1843) 12 *L J Ch* 158, *Ref.* [P 237 C 1, 2]

(c) Equity—Contract.

Equity holds people bound by a contract, which, though deficient in some requirements as to form, is nevertheless an existing contract. [P 238 C 1]

(d) Part performance — Lease — Contract complete—Agreement registered — Material terms performed — Parties are bound in equity by contract to lease—Equity.

Where there is a complete and concluded contract for lease, evidenced by a registered instrument, and it has been followed up by performance of the material terms and conditions contained therein, equity will hold these parties bound by the said contract for lease: *AIR* 1931 *P C* 79, *Ref.* [P 238 C 1]

(e) Part performance — Lease — Period of four months — Parties not contemplating time of essence — Lessee in possession and paying rent—Purchaser with notice of agreement suing in ejectment—Specific performance held not barred by efflux of time.

An agreement to lease dated 30th July 1918 contained a period of four months for giving a formal patta. The parties to the agreement did not contemplate that time was of the essence of the contract, in the matter of the execution of a formal document (the patta). The lessee had been effectively in possession of the property demised by payment of rent to the party entitled to receive the same, for the time being. The purchaser purchased the property in question with knowledge of the agreement for lease, and filed a suit to eject the lessee in 1927.

Held: that on the facts and circumstances of the case, it could not be held that the lessee's right to specific performance of the contract for lease was barred by efflux of time, the date on which the suit for ejectment was filed by the purchaser. [P 237 C 2]

Sharatchandra Ray Chaudhuri, Pyarimohan Chatterji, Bankimchandra Ray and *Dasharathi Chatterji* — for Appellant.

S. M. Bose and *Jatinmohan Basu*— for Respondent.

Judgment.—This is an appeal by the defendant in a suit for ejectment, after service of notice to quit. The case of the plaintiff was that the defendant was a monthly tenant, whose tenancy had been determined by notice to vacate the premises. The claim for ejectment was resisted by the defendant, on the ground that there was a registered agreement for lease dated 20th April 1917, for a term of 21 years, and that the defen-

dant was not therefore liable to be ejected. It is necessary to mention in this connexion that the plaintiffs in the suit were the purchasers at a sale held on 13th November 1928, in execution of a mortgage decree passed on the basis of a mortgage of the premises in question, in possession of the defendant, executed by Jugalkrishna Mallik and Phulkumari Dasee on 25th February 1924. The property in suit belonged originally to one Shyamlal Mallik, who died intestate in the year 1901, leaving him surviving his widow, Phulkumari, who obtained letters of administration, and subsequently adopted Jugalkrishna as a son, by virtue of an authority to adopt. Jugalkrishna after attainment of majority, instituted a suit for possession of the estate of Shamlal Mallik on 22nd February 1917. and the agreement to lease, on which the defendant based his title to be in possession, was executed by Jugalkrishna on 20th April 1917, after the institution of the suit for possession against his mother, Phulkumari Dasee.

The suit so instituted appears to have been compromised, and it was arranged that Phulkumari was to have a life interest in the estate left by her husband, Shyamlal Mallik; Jugalkrishna was to get the estate after the death of Phulkumari; that the garden house—the property, from which the defendant-appellant was sought to be evicted—amongst others, was to be managed jointly by Jugalkrishna and Phulkumari, and in case of disagreement between them, by the receiver appointed in the case. According to the findings of fact arrived at by the trial Court, which were not in any way reversed by the Court of appeal below, there was no disagreement between the mother and the adopted son, in regard to the management of this property, and there was collection of rent payable in respect of the same, in accordance with the terms of the agreement to lease; some of the receipts showed that Phulkumari accepted the new rental fixed by the agreement executed by Jugalkrishna, thereby ratifying the agreement. The receiver also received rent at the rate mentioned in the agreement Plaintiff 1 was the receiver, and the mortgaged property was purchased by the plaintiffs with knowledge of the agreement executed by Jugalkrishna on 20th July 1917.

A reference to the terms of the agreement to lease is necessary at the stage, and it requires notice that the agreement contained all the material terms of a lease, with a stipulation that a patta shall be granted within four months of the receipt of the permission of the Court for the execution of the same. There was the further stipulation that, if the executant of the agreement, Jugalkrishna, failed to execute a patta on the terms set out in the agreement, the person in whose favour the agreement was executed, Nalinbihari Chatterji, would be entitled to get the agreement specifically performed with the help of the Court. Jugalkrishna further covenanted that the aforesaid Nalinbihari Chatterji will continue to pay rent and remain in possession after the expiry of the terms of the existing lease, until the patta was executed. It is worthy of notice in this connexion that Jugalkrishna all along promised to execute a patta—he had never refused to do so—Phulkumari died in the year 1925, and Jugalkrishna was, on her death, entitled to execute the patta, in his own right, without the permission of the Court, as contemplated in the agreement to lease.

On the above state of facts, and in view of the terms of the agreement to lease, the trial Court dismissed the plaintiffs suit for ejectment. On appeal by the plaintiffs' the learned Additional District Judge, 24-Parganas, reversed the decision of the trial Court, and passed a decree for ejectment in favour of the plaintiffs, on the footing that the defendant--the successor in interest of Nalinbihari Chatterji, in whose favour the agreement to lease was executed by Jugalkrishna Mallik on 29th July 1917—was only a monthly tenant, whose tenancy had been determined by notice to quit. According to the learned Judge in the Court of appeal below, the contract evidenced by the agreement to lease was uncertain, as it was not possible to fix the date, from which the proposed lease was to run, and there was no part performance of the contract to lease, inasmuch as at the date of the execution of the agreement, the lessee was already in possession; that the continuance of possession amounted to nothing in the matter of part performance. The Court below further held that the right to get specific performance of the contrac

having been extinguished by effiux of time—the four months' time mentioned in the agreement, within which a patta was to be executed, having expired on 30th November 1918—the defendant in the suit, out of which this appeal has arisen, was not entitled under the law to resist the action for ejectment. The defendant has appealed to this Court.

The case is one in which, according to the defendant-appellant before us, there was a registered agreement for a lease in the year 1917 for a term of 21 years, which was a concluded contract between the parties concerned, and which could not be avoided by the plaintiffs—the purchasers of the reversion—their purchase having been subject to the agreement, and with notice of the existence of the agreement. The agreement for lease, on which the defendant's claim to possession as tenant is based, was placed before us, for our consideration; and reference has been made to the terms of the document. As indicated already, the agreement was a concluded and a complete contract between the parties concerned, with the intention that a formal document, a patta, should be executed.

There can be no question that a mere reference to the preparation of a formal document does not prevent a contract, otherwise binding, being complete [*Rossiter* v. *Miller* (1)]. It has to be noticed in the next place that there was no uncertainty in regard to the commencement of the term of the lease; though not expressly stated, the time of commencement could be calculated in the case before us, with reasonable certainty. The lease was to commence from the expiration of the existing term, a fact definitely known to the parties to the agreement for the extension of an existing lease, for a further period of twenty-one years, on certain conditions settled by the agreement. It is further clear that where possession had been obtained before the agreement, the lessee having continued to be in possession all along by virtue of an existing lease, possession after the expiration of the pre-existing lease was only referable to a contract for renewal, and was to be treated as part performance of such contract: see *Dowell* v. *Dew* (2).

The question arising for consideration next is whether the defendant had in him a right enforceable by law at the date, when the action for ejectment, was brought by the plaintiffs. The period of four months mentioned in the contract, of course, had expired on 30th November 1918, and a suit for specific performance of the contract for a lease would be barred under the Limitation Act, after 30th November 1921. The matter for consideration then is whether time was of the essence of the contract, so far as the execution of a patta by Jugalkrishna Mallik was concerned. In view of the conduct of the parties, and regard being had to the clear intention of the parties expressed by the conduct, there having been no refusal by Jugalkrishna at any time in the matter of execution of a patta, as found by the trial Court, it could not be held that the parties to the agreement of the year 1917 contemplated that time was of the essence of the contract in the matter of the execution of a formal document, the patta, the lessee having been effectively in possession of the property demised by payment of rent to the party entitled to receive the same, for the time being. According to the finding of the Court of first instance not reversed in appeal, plaintiff 1 as receiver had received rent from the lessee in possession, not to speak of Phulkumari, the mother of Jugalkrishna who had both of them, the mother and the son, powers of management, according to the terms of settlement of a dispute between themselves. It further appears that the plaintiffs purchased the property in question with knowledge of the agreement for lease.

On the facts and circumstances of the case before us, it could not be held that the defendants' right to specific performance of the contract for lease was barred by efflux of time on 23rd December 1927, the date on which the suit for ejectment, out of which this appeal has arisen, was instituted by the plaintiffs. We are in agreement with the view indicated in the judgment of the learned Subordinate Judge in the trial Court, that there having been no refusal to

1. (1878) 3 A C 1124=48 L J Ch 10=26 W R 865=39 L T 173.

2. (1843) 12 L J Ch 158=1 Y & Call C C 344=7 Jur 117.

execute a patta, as contemplated in the contract for renewal of the term of the existing lease, the lessee was willing to waive his right to get a patta till Jugalkrishna became "the full owner of the property on the death of Phulkumari in June 1925," and taking that point of time into account, it could not be said that the defendants' right to have the contract for renewal of lease for twenty-one years, specifically performed, was in any way barred by time, at the date of the institution of the suit for ejectment, in December 1927. It is necessary to mention in this connexion that equity holds people bound by a contract which though deficient in some requirement as to form, is nevertheless an existing contract. There was a complete and concluded contract between the parties concerned in the case before us, evidenced by the agreement of the year 1917; that contract, evidenced by a registered instrument, was made and was in existence, and had been followed up by performance of the material terms and conditions contained therein; and equity will hold the parties, who are in the position of Jugalkrishna Mallik, bound by the contract for lease entered into in the year 1917: see in this connexion *Ariff* v. *Jadunath Majumdar* (3). The plaintiffs were not therefore entitled to eject the defendants as "only a monthly tenant," after a notice to quit.

In the above view of the case before us, which is in consonance with justice and equities involved in the case, regard being had to the facts and circumstances arising for consideration in the same the decision and decree passed in favour of the plaintiffs-respondents in this appeal by the Court of appeal below are set aside, and those of the trial Court, dismissing the plaintiffs' suit for ejectment are restored. The appeal is allowed with costs to the defendant-appellant throughout the litigation, including the costs in this appeal.

R.K. *Appeal allowed.*

3. AIR 1931 P C 79=131 I C 762=58 I A 91=58 Cal 1235 (P C).

A. I. R. 1934 Calcutta 238

JACK AND NAG, JJ.

(*Khondkar*) *Muhammad Amirul Islam* —Plaintiff—Appellant.

v.

Muhammad Abdul Hamid — Defendant—Respondent.

Appeal No. 987 of 1931, Decided on 8th June 1933, from appellate decree of Addl. Dist. Judge, Rajshahi, D/- 4th December 1930.

Principal and Agent—Suit for recovery of sums misappropriated by agent is governed by Limitation Act (1908), Art. 89.

The term movable property in Art. 89 includes money. Therefore Art. 89 applies to the suit for the recovery of money received by the agent on behalf of the principal and not accounted for. Art. 89 is not limited only to suits for accounts: 16 *I C* 414 *Appr*; 8 *C W N* 113; 40 *I C* 359 and *A I R* 1919 *All* 440, *Diss* and *not Foll.* [P 239 C 1, 2]

Beereshwar Bagchi—for Appellant.

Nasim Ali and *Farhat Ali*—for Respondent.

Jack, J.—This appeal has arisen out of a suit for recovery of certain amounts alleged to have been realized by the defendant as the plaintiff's dewan and misappropriated by him. We are concerned with four items. The trial Court decreed these items in favour of the plaintiff. The lower appellate Court has allowed the appeal in part and decreed the suit for Rs. 60 only in place of Rs. 600 decreed by the trial Court. The four items in question are: first of all, Rs. 240 alleged to have been realized by the defendant as the price of mangoes on 6th Jaistha 1326, and Rs. 60 on 29th Jaistha 1326, on account of which he only paid Rs. 150; then (second item) Rs. 100 said to have been realized by the defendant as the price of mangoes on 10th Jaistha 1328; third item Rs. 250 said to have been realized by the defendant as the price of fish in Baisakh 1326; and fourth item Rs. 100 said to have been realized from Gangagobinda Chakrabarty on 10th Jaistha 1328, as kharij dakhil. As regards items 2 and 3, the lower appellate Court found that the plaintiff had failed to prove his case that the defendant realized these amounts. The learned Judge has gone into the evidence including the receipts said to have been issued by the defendant in the name of the plaintiff and says:

"On a careful consideration of the evidence, I hold that the plaintiff fails to prove his case that the defendant realized these items."

He comes to this conclusion partly on the ground that the plaintiff withheld some evidence which could have satisfactorily proved his case. It is contended that the receipts having been signed by the defendant the learned Judge was wrong in coming to this conclusion. But these are findings of fact and the Judge has given reasons for his conclusions and was perfectly entitled to make a presumption against the plaintiff under S. 114, Evidence Act; if he considered that evidence which might have been given, had been withheld. I think therefore that we should not be justified in interfering with the decision of the lower appellate Court as regards these items. The same reasoning applies to item 4 also. The only question left is as regards item 1. The learned Judge found that this amount had been realized by the defendant, but held that the plaintiff's claim as regards Rs. 90, out of Rs. 150 due, was barred by limitation. He finds that Art. 62, Limitation Act, is applicable and that limitation was extended because of the fraud of the defendant. It is contended on behalf of the appellant that Art. 89, Limitation Act, is applicable. The article is as follows:

"By a principal against his agent for movable property received by the latter and not accounted for, and the period from which the limitation starts is when the account is, during the continuance of the agency, demanded and refused, or where no such demand is made, when the agency terminates."

It is established that the term movable property in this article includes money. Therefore on the plain wording of Art. 89, this article applies in the present case as this money was received by the agent on behalf of the principal and was not accounted for. That being so, the period of limitation is to run from the time when the account was demanded and refused or from the time the agency terminated. In this case, there was apparently no previous demand and therefore the limitation of three years would run from the time the agency terminated, which was in 1330 B. S. It was neither the case of the plaintiff nor the defendant that any account was demanded and refused. On the other hand, the plaintiff's case was that he was unaware of the realization of these sums owing to the fraud of the defendant inasmuch as he did not submit any account.

Certain rulings were referred to in support of the respondent's contention that Art. 89 is only applicable when the suit is for accounts: *Jogendra Nath* v. *Deb Nath* (1), *Kesho Prosad Singh* v. *Sarwam Lal* (2) and *Puran Mal* v. *Ford MacDonald & Co., Ltd.* (3). None of these authorities directly applies to the case in point. There are no doubt statements contained in them in support of the proposition that Art. 89 is applicable only to cases for accounts. On the other hand, reference has been made by the appellant to the case of *Jhapajannessa Bibi* v. *Bama Sundari Choudhurani* (4), in which we find it stated that clearly a suit for the recovery of specific sums misappropriated would be in closer accordance with the wording of Art. 89 than a suit for an account. This is obvious and of course Art. 89 also applies to a claim for a balance of account, but there is no reason to suppose that it is limited only to suits for accounts. The word "account" in the third column can apply of course when any property is received and not accounted for. As Art. 89 is applicable in this case, the plaintiff's claim as regards Rs. 90 is not barred by limitation. In these circumstances, it is not necessary to consider whether S. 18, Limitation Act, would apply or not. The claim of the plaintiff as regards Rs. 90 therefore succeeds.

This appeal is therefore allowed in part as regards Rs. 90 out of the claim of Rs. 150 in item 1 which was disallowed by the lower appellate Court. The appellant will recover one-half the costs incurred by him in this Court and in the lower appellate Court, also interests on the decretal amount at 6 per cent from the date of the institution of the suit till realization. The order as to costs passed by the trial Court will stand in proportion to the success and failure of the parties as determined by this Court. Save and except as aforesaid, the judgment of the Court below is affirmed.

Nag, J.—I agree.

R.K. *Appeal partly allowed.*

1. (1903) 8 C W N 113.
2. (1917) 40 I C 359.
3. A I R 1919 All 440=52 I C 373=41 All 635.
4. (1912) 16 I C 414.

A. I. R. 1934 Calcutta 240

MUKHERJI AND BARTLEY, JJ.

Hira Lal Ahir—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 865 of 1933, Decided on 23rd November 1933.

Criminal P. C. (1898), Ss. 403 (1), 236 and 237 — Two challans one under S. 451, I. P. C., and another under Ss. 161 and 511 for offences committed in same transaction —Trial under first proceeding, under other adjourned sine die — Accused acquitted in trial under first challan — Trial under other challan is not barred under S. 403 (1) or under general principles of autre fois acquit.

Two separate police challans were sent up to the Magistrate. One for an offence under S. 451, I. P. C, and S. 42, Prisons Act, and another under Ss. 161 and 511, I. P. C., alleging that the accused had trespassed into the Presidency Jail in order to have communication with a prisoner and that thereafter he had offered a bribe to a European Warder of the said jail. The case started on the former challan was taken up first while the case which started upon the latter challan was adjourned sine die. The accused was acquitted on the first charge and then the case on the latter challan was proceeded with. It was contended that the trial under the latter challan was barred under S. 403 (1):

Held: that even though S. 236 or S. 237, Criminal P. C, might apply, the provisions contained in S. 403, sub-S. (1) were not applicable. The general principle of autre fois acquit were also inapplicable because the fact that the accused was acquitted in the previous trial did not necessarily mean that the offence under the latter challan was not committed. [P 241 C 1]

A. N. Chowdhury and *Suresh Chandra Talukdar*—for Petitioner.

Khundkar and *Nirmal Chandra Chakravarty*—for Opposite Party.

Order.—This Rule has been issued to show cause why the proceedings pending against the petitioner should not be quashed or why such other or further order should not be made as to this Court may seem fit and proper. The proceedings aforesaid are in connexion with a trial for an offence under S. 161/116, I. P. C., which is now pending in the Court of the Police Magistrate of Alipore and in which a charge in respect of that offence has already been framed. The facts necessary to be stated are the following:

In consequence of an occurrence which took place on 31st May 1933 two separate Police Challans were sent up, by the Assistant Commissioner of Police to the Magistrate one for an offence under S. 451, I. P. C., and S. 42, Prisons Act, and another under S. 161/511, I. P. C. The facts upon which these challans were sent up, shortly put, were that it was alleged that the accused had trespassed in the Presidency Jail in order to have communication with a prisoner and that thereafter he had offered a bribe to a European Warder of the said Jail. The case started on the former challan was taken up first while the case which was started upon the latter challan was adjourned sine die. It is stated in para. 12 of the petition upon which this Rule has been issued that the Assistant Commissioner of Police, who represented the Crown before the learned Additional District Magistrate at a stage when a question of transfer of these cases or one of them was pending before him, had clearly and frankly admitted before him that the latter case, namely, the one under S. 161/511, I. P. C., would not be proceeded with, if the other case, namely, the one under S. 451, I. P. C., and S. 42, Prisons Act, resulted in an acquittal of the petitioner. The latter case was then proceeded with, and in the result the petitioner was acquitted by the Magistrate, who tried it, by a judgment dated 12th July 1933. It appears that thereafter when the present case was about to be proceeded with an application was made to the District Magistrate for quashing the proceedings in this case but the advocate who represented the petitioner in these proceedings eventually said that he did not want to press the application at that stage. The case thereafter was proceeded with and ultimately a charge was framed against the accused under S. 161/116, I. P. C., as already stated. It was at this stage that the present Rule was obtained.

Upon the arguments that have been addressed to us by Mr. Chowdhury who has appeared in support of the Rule, the case is to be approached from two points of view: Firstly, as a case in which in view of the provisions of S. 403, Criminal P. C., and also upon general principles irrespective of the said provisions, whether the present trial should be allowed to be proceeded with having regard to the fact that in the case there has been an acquittal as already stated; and secondly, the question will arise whether in view of the statement contained in para. 12 of the petition, to which reference has already been made,

this trial on the present charge be allowed to be proceeded with any further. So far as the first of these matters is concerned, it is perfectly clear to us that having regard to the nature of the allegations upon which the two cases were started, it was quite open to the Court to regard all the three offences as committed in the same transaction and that if evidence was led in respect of all the matters concerned in the transaction, S. 235, sub-S. (1), Criminal P. C., would have justified in the other trial the framing of a charge under Ss. 161 and 116, I. P. C., as a charge for a distinct offence to be tried along with the two offences for which that trial was being held. Cl. (2), S. 403, Criminal P. C., says that

"a person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under S. 235, sub-S. (1)."

Sub-S. (2), S. 403, Criminal P. C., therefore would enable the Court to hold a second trial in the case of this distinct offence, for which no charge was framed and which was not tried in the previous trial. It has been argued by Mr. Chowdhury that the case comes under sub-S. (1), S. 403, Criminal P. C., because in the previous trial evidence was led in respect of all the acts which are said to constitute an offence under S. 161/116, I. P. C., and a charge in respect of that offence could have been framed in that trial under S. 237, Criminal P. C. We need not consider the question whether these sections or any of them apply because, in our judgment, the clause itself can have no application to the present case. It may be pointed out that the evidence that was led in that case as regards the present offence was adduced, as appears from the judgment of the trial Magistrate in that case, for the purpose of proving the charges that were being tried in that case and the learned Magistrate dealt with that evidence in these words :

"Evidence has been adduced to show that the accused in presence of P. W. 3 offered bribe to Mr. John when he was taken to the Presidency Jail. I understand it is the subject-matter of a separate case against the accused now pending before the Suburban Police Magistrate, Alipore. The offer of bribe is certainly a criminal offence. Does such offer prove that the accused is guilty of the offences with which he has been charged in this case. I do not think it always does. An innocent man may offer bribe to a public servant and to save himself from an awkward situation involving worries and troubles."

It is clear therefore that although evidence with regard to this distinct offence was led in the other trial the Court did not consider the question of the accused's guilt or innocence in respect of this offence because that question was expressly reserved for a separate trial. In such circumstances, even though S. 236 or S. 237, Criminal P. C., might apply, the provisions contained in S. 403, sub-S. (1) are not applicable. In the words of the sub-section it may be said that no charge in respect of the present offence might have been made and the accused could not be convicted of the present offence, because of that express reservation. The general principle of autre fois acquit is also inapplicable because the fact that the accused was acquitted in the previous trial does not necessarily mean that the present offence was not committed.

So far as the other matter is concerned, it depends entirely upon an alleged understanding between the Assistant Commissioner of Police who represented the Crown in the Court of the District Magistrate and the petitioner. The understanding is now denied on behalf of the Crown by the learned Deputy Legal Remembrancer who has appeared to show cause in this Rule. It is an understanding which is not possible for this Court to enforce except on the ground that the ends of justice would not require the continuance of the present trial. We have considered the circumstances of the case, and while we have not formed any opinion as regards the guilt or innocence of the accused, we think we should say that the circumstances which disinclines us to interfere with the proceedings now is the fact that a charge has already been framed. Without expressing any opinion on the merits therefore we find ourselves unable to say that the ends of justice require that the proceedings should be interfered with at this stage. Upon the aforesaid grounds, we think that the Rule should not be made absolute and we accordingly order that it be discharged.

R.K. *Rule discharged.*

A. I. R. 1934 Calcutta 242 (1)

GUHA AND BARTLEY, JJ.

Superintendent and Remembrancer of Legal Affairs, Bengal.

v.

Khodabaksha Shah—Accused.

Govt. Appeal No. 1 of 1933, Decided on 5th June 1933, against order of Deputy Magistrate, Berhampur, D/- 13th January 1933.

Penal Code (1860), S. 188 — Validity of order under S. 133, Criminal P. C., is not open in proceeding for disobedience—Criminal P. C. (1898), S. 133.

Question as to the validity of a final order under S. 133, Criminal P. C., cannot be raised in a trial for an offence under S. 188, Penal Code, for disobedience of the order. If in the proceedings under S. 133 no objection is raised that a cosharer had not been made a party, it cannot be raised in the subsequent proceedings under S. 188 Penal Code. [P 242 C 2]

Debendranarayan Bhattacharjya—for the Crown.

Abdul Ali—for the Accused.

Judgment.—This is an appeal by the Local Government under S. 417, Criminal P. C., and is directed against an order of the Deputy Magistrate, First Class of Berhampur, district Murshidabad, dated 13th January 1933, acquitting the accused Khodabaksha Shah, under S. 245, Criminal P. C., of an offence punishable under S. 188, I. P. C. that is, disobedience of an order duly promulgated by a public servant. The order which was promulgated in this case and which was a valid and operative order, so far as the respondent was concerned, was made by a competent authority under S. 133, Criminal P. C. The fact of the promulgation of the order made under S. 133 was not denied, and was duly proved before the trying Magistrate in the case. That a public servant can promulgate an order lawfully empowered to promulgate the same is not denied before us. On the evidence to which reference has been made by the learned Magistrate in his order of acquittal, there was clearly a direction on the accused to abstain from doing a certain act. and the accused certainly knew of that direction to him; there was on the facts proved in the case, disobedience of the direction. In the circumstances, the order of acquittal, passed by the learned Magistrate in this case under S. 245, Criminal P. C., cannot in our judgment, be supported.

The defence raised by the respondent Khodabaksha related to the validity of the final order made in the proceedings under S. 133. Such a question could not be raised at the trial of the accused for an offence under S. 188, I. P. C. A point appears to have been raised that the respondent Khodabaksha was not alone responsible for the obstruction, as he had another cosharer, who had not been made party to the proceedings under S. 133, in which the question of obstruction was enquired into. This was not a case which was made before the Court at any previous stage, nor was it a case made before the Court which passed the order under S. 133. In view of the order promulgated by a competent authority under S. 133, and in view of the disobedience of the order by the accused against whom the order was promulgated, he was liable to conviction under S. 188, I. P. C.

Our order therefore is that, on the facts and in the circumstances of the case, and, as we are clearly of opinion that the disobedience of the order under S. 133 tends to cause riot, we allow the appeal and impose a fine of Rs. 500 on Khodabaksha, and direct that, in default of payment of the fine, the said Khodabaksha will undergo rigorous imprisonment for six weeks.

R.K. *Appeal allowed.*

A. I. R. 1934 Calcutta 242 (2)

LORT-WILLIAMS AND M. C. GHOSE, JJ.

A, a pleader, In the matter of.

Civil Rule No. 1240 of 1933, Decided on 11th December 1933.

Legal Practitioners Act (1879), S. 12—No distinction between various kinds of law-breaking—Habitual and wilful breaking of law implies defect of character justifying dismissal from practice — But for isolated breaking of law on one or two occasions action should not be taken—For acts falling midway between these two, warning with suspension will be sufficient.

No distinction can be drawn between the various kinds of law-breaking as to when such breaking amounts to a defect of character making pleader unfit to practise as pleader. The principle upon which Courts ought to proceed is, that where a pleader wilfully breaks the law upon one or two isolated occasions, it may not be necessary for the Court to take any action under S. 12. Where, on the other hand, it is shown that the pleader has wilfully and habitually broken the law, then the Court may quite reasonably come to the conclusion that his acts imply such a defect of character as to render him unfit for practice as a pleader, and in such

a case the Court may dismiss him from practice. Where the acts of the pleader fall midway between the two extremes, then the Court may take a more lenient view, and may think it sufficient to warn the pleader, by inflicting upon him a period of suspension or otherwise, that if he persists in breaking or defying the law, such conduct will inevitably lead the Court to the conclusion that he is totally unfit to practise in the Courts which have been established to enforce the law.

A pleader was prosecuted three times and convicted twice for semi-political offences.

Held: that the case fell within the mediate position and warning with suspension was sufficient: *A I R* 1924 *Mad* 479, *Ref.*

[P 243 C 2; P 244 C 1]

Basak and *Rupendra Kumar Mitter*—for the Crown.

Atul Chandra Gupta and *Priya Nath Bhattacharjee*—for Pleader.

Lort-Williams, J. In this case, a Rule was issued by virtue of the powers vested in the Court under S. 12, Legal Practitioners Act (18 of 1879), calling upon *A*, a pleader, to show cause why he should not be suspended or dismissed from practice, on the ground that the fact that he had been convicted in two cases under S. 21 of Ordinance 2 of 1932 for disobeying the order of the District Magistrate of Rangpore, and had been sentenced thereunder to rigorous imprisonment for one year, and two years respectively, and that he had been previously convicted in June 1930 under S. 188, I. P. C , implied a defect of character which unfitted him to be a pleader. One of the convictions in 1932 was set aside on appeal. This pleader therefore has been convicted twice, within the last three years, of what amounted to semi-political offences. The conviction under S. 21 of Ordinance 2 of 1932 was for leaving the village where he had been ordered to reside. Such an order can only be made if the local Government is satisfied, under S. 4 of the Ordinance, that there are reasonable grounds for believing that the person, to be restrained, has acted, is acting, or is about to act, in manner prejudicial to the public safety or peace or in furtherance of a movement prejudicial to the public safety or peace. The conviction in 1930 was for holding a public meeting in defiance of an order of the Local Government, or the police, prohibiting such a meeting. In all these cases the question arises whether the facts proved, constitute an offence implying a defect of character which unfits the pleader or mukhtear, as the case may be, from practising as such. The question is not free from difficulty. As was stated by Coutts-Trotter, J., *In the matter of a First Grade Pleader* (1):

"While this Court will not interfere with, or have regard to, any man's political opinions, or opinions on public questions, it is impossible to allow a person, who proclaims or practises what is called the doctrine of 'Civil Disobedience' to ask to be part of the machinery of the Courts, which exist for the very purpose of the thwarting of civil disobedience and the enforcement of civil obedience."

It is difficult to draw any distinction between the various kinds of law-breaking, upon which any general principle can be founded. One can imagine cases where the law has been broken on one or more occasions, as for example, with regard to offences under motor-car legislation. These obviously strike one as being different in gravity to offences, such as we are now dealing with, of a semi-political character, which are directed against laws or Ordinances passed for the purposes of preserving the public peace. On the other hand, it may be argued that even offences under motor-car legislation, may result in breaches of the peace. In my opinion therefore no such distinction can be drawn, and the principle upon which we ought to proceed is that where a pleader wilfully breaks the law upon one or two isolated occasions, it may not be necessary for the Court to take any action under this section of the Legal Practitioners Act. Where, on the other hand, it is shown that the pleader has wilfully and habitually broken the law, then the Court may quite reasonably come to the conclusion that his acts imply such a defect of character as to render him unfit for practice as a pleader, and in such a case the Court may dismiss him from practice. Where the acts of the pleader fall midway between the two extremes then the Court may take a more lenient view, and may think it sufficient to warn the pleader, by inflicting upon him a period of suspension or otherwise, that if he persists in breaking or defying the law such conduct will inevitably lead the Court to the conclusion that he is totally unfit to practise in the Courts which have been established to enforce the law.

In the present case, it seems to us, that the pleader's acts fall within the

1. AIR 1924 Mad 479=92 I C 214.

mediate position to which I have referred. He has been prosecuted three times and convicted twice for semi-political offences, and we desire to warn him, that if he persists in these courses, the Court will eventually have to consider the question of dismissing him from practice. We should have thought that a period of six months' suspension would be adequate in this case. But we are informed that the pleader was, in fact, suspended from practice, owing to his inability to obtain a license, from 15th February 1933 to 25th August 1933, a period of a little over six months. Consequently, we think that he has been punished sufficiently and the Rule accordingly will be discharged.

M. C. Ghose, J.—I agree.

K.S. *Rule discharged.*

A. I. R. 1934 Calcutta 244

MUKERJI AND S. K. GHOSE, JJ.

Narayan Chandra Dutt and *others*—Defendants—Appellants

v.

Sm. Bhuban Mohini Basu Mallik—Plaintiff—Respondent.

Appeal No. 252 of 1929, Decided on 3rd July 1933, from original decree of Second Court Sub-Judge, 24-Parganas, D/- 31st July 1929,.

(a) Hindu Law — Religious endowment—Some residue of power is left in founder to act for benefit of idol, whether he is himself shebait or not—But such power is limited by custom or by founder's own disposition.

In the case of a Hindu religious endowment, the parties ordinarily concerned are first the founder, second the idol, and third the shebait. The first and the third may be united in one and the same persons, but whether that is so or not, it is recognized that some residue of power will be left in the founder to act for the benefit of the idols when the necessary provisions are wanting. But these powers are subject to limitations which may be imposed by custom or by the founder's own dispositions. [P 246 C 1]

(b) Hindu Law — Religious endowment—Founder divesting himself of properties dedicated for sheba, but appointing himself to be first shebait—Line of succession of shebait laid down — Line cannot be altered by founder after gift takes effect, unless such right is reserved or is for benefit of deity.

Where a founder of a Hindu endowment divests himself of properties dedicated for sheba but appoints himself as the first shebait and lays down the line of succession of shebaits, he cannot alter the line, when once the gift takes effect, unless it be for the benefit of the deity or such power has been reserved. An express provision precluding himself from so acting is not necessary: *Case law referred.* [P 247 C 2]

(c) Hindu Law — Religious endowment—Founder's right of supervision or control can be exercised only for benefit of endowment—Order of succession of shebaitship cannot be altered unless through Court for good causes.

Per *Mukerji, J.*—Residuary rights of supervision or control as the founder, in the absence or express reservation, may have in respect of the endowment, can only be exercised for the benefit of the endowment and cannot extend to an alteration in the order of succession to shebaitship unless through the intervention of the Court and except for good cause shown. [P 250 C 1]

Gunada Charan Sen, Bijan Kumar Mukherjee and *Apurbadhan Mukherjee*—for Appellants.

Brajalal Chakravarty, Amarendranath Bose, Rupendra Kumar Mitter and *Sukumar Dey*—for Respondent.

S. K. Ghose J,—For the sake of convenience the volumes of printed paper books in this appeal will be referred to as follows:

Group I Part I	... Appeal from Original...	"A"
Group I Part II	... Decreee No. 252 of 1929	"B"
Group I	Appeal from Original Order No. 2 of 1923	"C"
Part II	Appeal from Original Decree No. 252 of 1929...	"D"

The parties to this litigation derive their interest from one Narendra Kumar Dutt, now deceased. According to the genealogical table in the written statement at C. 81 which is not now in dispute the original defendant Narayan Chandra Dutt was the son of a cousin of Narendra's. The original plaintiff Bhubanmohini Basu Mallik was the daughter and only child left by Narendra. The latter who was a very wealthy man, executed an arpannama on 18th April 1893 by which he dedicated the Ka schedule properties to the worship of twelve siba idols and provided for a line of shebaits of which he himself was to be the first and his wife and then his heirs were to come in the order of succession. Accordingly Narendra himself became the shebait and continued to be so until his death on 20th May 1922. His wife had died in 1903. After her death Narendra executed a second arpannama on 28th December 1903 by which he cancelled the previous arrangement about the shebaitship and appointed the defendant Narayan and his sons, etc., according to the rule of primogeniture to be the succeeding shebaits. According to the evidence which is not now in dispute Narayan in Narendra's life-

time took over the duties of the sheba and the management of the debuttar properties and after Narendra's death he continued to be in possession. On 17th July 1922, Bhuban Mohini brought the present suit alleging that, as the sole heiress of the deceased Narendra, she was the lawful shebait and that the second arpannama was not valid or genuine: She accordingly prayed for declaration to that effect, for declaration of title to and recovery of possession of the plaint properties as debuttar properties, and for other reliefs. Narayan Chandra Dutt filed written statement claiming that the second arpannama was genuine and valid and that he was the rightful shebait, and resisting the plaintiff's claim to the properties some of which he alleged were his own. During the litigation the original plaintiff and the original defendant died and their heirs have been substituted: see A. 628.

The learned Subordinate Judge has decided in favour of the first arpannama and held that plaintiff is the lawful shebait. He has also decided that the properties of schedule Ka and property No. 3 of schedule Kha to the plaint are the debuttar properties. He has accordingly given to the plaintiff a partial decree. The defendant appeals and the plaintiff has also filed cross-objections. The first point raised on behalf of the appellant arises out of issues 4 to 8 of the trial. The position taken up by the appellant is that Narendra had the right to change the terms of the arpannama of 1300 B. S. regarding the appointment of shebait after his death, and that therefore the arpannama Bahalipatra of 1310 B. S. is a valid and operative document. It will be necessary therefore to consider the terms of the two documents.

The arpannama Ex. 4 is printed at p. 17, Vol. B. It is a registered document bearing date 6th Baisakh 1300 B.S. corresponding to 18th April 1893. The relevant terms are these: Narendra had already caused to the established twelve Siva idols called Hariseswar, treating himself as the shebait. On that date he executed a will relating to his other properties. By this arpannama he created a debuttar for the Sheba of the idols by dedicating the two properties which are mentioned in Schedule *Ka* of the plaint viz. (1) 14 bighas of land on which the temples stand (2) and one-sixth share of the property known as the Madhyam zamindaris. The rights of the founder in those properties were to cease and they were to devolve on the deities. The document proceeds:

"During my life time I shall keep the aforesaid properties, dedicated to Hariseswar Deities as above, in my own possession and control and I shall perform the Sheba in my own way as a Shebait. If after my death, my wife Sreemati Golapi Dasi remains alive, then she too will continue the Sheba of Hariseswar Deities as Shebait and possess the properties in the capacity of a Shebait. After the death of both of us, whoever shall be my heir or heirs, he or they down to their sons and grandsons and other heirs in succession, either singly or jointly, shall possess the estate as Shebait and continue to perform the Deb-Sheba of Hariseswar Deities. But the Shebait will not be competent to transfer by way of gift or sale or charge the temples or shares in zamindari, i. e., to say the Debuttar estate further, for the period a person or persons will remain Shebait or Shebaits, he or they will not be liable for accounts to anybody. God forbid if any of my heirs gives up the Sanatan (ancient) Hindu religion and adopts any other faith, and thereby becomes unfit for performing the duties of Deb-sheba according to Hindu Sastras, then he or they shall be debarred from Shebaitship. In his or their place, any other heir who will adhere to the Hindu religion will become Shebait and perform the Sheba of Hariseswar Deities."

Further:

"Neither I nor any of the Shebaits will be competent to convey by way of sale or gift the above share (in the zamindaries); nor can it be attached in any way owing to any liability either of myself or of any of my heirs. * * * Be it further declared that if in future any decision is needed from Court regarding heirs, or selection of Shebait, in that case those persons concerned will bear the expenses themselves. The Debuttar estate will not be liable for the same."

It is clear from this document that the founder divested himself of the properties dedicated for the Sheba, that he appointed himself to be the first Shebait, and that he further laid down a line of succession of Shebaits. The second document Ex. A is printed at p. 8 Vol. C. It is termed Arpannama Bahalipatra and it bears date 13th Pous 1310 corresponding to 28th December 1903. It does not appear to be registered. As on the former occasion a will was executed on the same date. Ex. A recites the terms of the previous Arpannama which it says it confirms. But there is a change:

"My wife Golapi Dasi is now dead. Under the circumstances, after my death my nephew (brother's son) Sriman Narayan Chandra Dutt, who has been brought up as my son, will be appointed to the office of the Shebait."

And so it makes a change in the line of succession of Shebaits. The parties are at issue on the question whether Narendra could validly do this. It may be observed here that there has been no attempt to show that the change was made for the benefit of the idols or for other than the purely personal reasons that are stated in the document. The contention on behalf of the appellant is mainly this, that Narendra though acting as Shebait had at all times the powers of a founder, and that his direction as to succeeding Sebaits was in the nature of a testamentary disposition which it was within his power to alter. Now in the case of a Hindu religious endowment the parties ordinarily concerned are first the founder, second the idol, and third the Shebait. The first and the third may be united in one and the same person, but whether that is so or not it is recognised that some residue of power will be left in the founder to act for the benefit of the idols when the necessary provisions are wanting. Thus the Shebaitship is vested in the founder and his heirs and they may interfere in the management for the benefit of the deity. But these powers are subject to limitations which may be imposed by custom or by the founder's own dispositions. And so the Shebaitship will not be vested in the founder if he has disposed of it otherwise *Gossamee Sree Greedharreejee* v. *Rumanlolljee Gossamee* (1), *Maharaja Jagadindra Nath* v. *Hemanta Kumari* (2), *Mohan Lalji* v. *Gordhan Lalji* (3), *Ananda Chandra* v. *Braja Lal* (4); *Kali Krishna* v. *Makhan Lal* (5).

The inter-relations between the three parties to the endowment must be governed primarily by the terms of the foundation, so long as these are not opposed to the law of the land. After the gift the founder has no right to impose other conditions, nor can he interfere in the management unless he has reserved the power to do so, as was done in the case in *Ishri Prasad* v. *Ram Krishan Das* (6), to which Mr. Sen for the appellants referred; nor is he competent to revoke, alter or resume the trust, even though the manager may be guilty of misconduct. The cases bearing on these points will be found collected in Iyer's Hindu and Mahomedan Endowments, Edn. 2, pp. 121, 714, 715, 722, 723, Mulla's Hindu law, Edn.. 5, Arts. 327, 237 and 339. It is not necessary that there should be a deed, but when there is a deed and no provision in it, the founder is the de facto Shebait and at any time before his death he may confer the office of Sebait on another: *Pramatha Nath Mullick* v. *Pradyumna Kumar Mullick* (7). If the deed provides for succession that provision must be in accordance with the law of succession: *Monohar Mukherjee* v. *Bhupendra Nath* (8). For a summary of the case law before 1922 on the subject of founder's rights, see Mayne's Hindu law, Edn 9, Art. 440, p. 619. It is in accordance with the aforesaid principles that where the founder has laid down a line of succession he should not be allowed to alter it, unless he has reserved the right to do so. In 1922 this question came up for decision in this Court in the case of *Gouri Kumari Dasi* v. *Ramanimoyi Dassi* (9). the facts of which are similar to those of the present. Woodroffe, J., said:

> "It is clear law that the donor of a Debuttar property can make no change in the order of succession of Shebaits as laid down in the deed of endowment in the absence of a reservation to that effect in the deed."

The authority of this decision has been followed more than once in this Court: see *Chandi Charan* v. *Dulal Paik* (10), *Sm. Monorama Dasi* v. *Dhirendra Nath Basu* (11). In the former case with regard to the powers of a founder, Page, J., pointed out that by absolutely dedicating the preperty and appointing a line of succession of sebaits the founder became functus officio. Mr. Sen, for the appellant has argued on a theory of testamentary disposition by the founder and referred for authority to the case of *Sreepati Chatterjee* v. *Khudi Ram* (12). In that case Chakrabutty, J., sought to lay down that the rule prohibiting a Hindu from creating a special line of succession unknown to Hindu

1. (1890) 17 Cal 3=16 I A 137 (PC).
2. (1904) 32 Cal 129=31 I A 203 (PC).
3. (1913) 35 All 283=40 I A 97 (PC).
4. A I R 1923 Cal 142=74 I C 793=50 Cal 292.
5. A I R 1923 Cal 160=72 I C 686=50 Cal 233.
6. A I R 1930 All 620=129 I C 446.
7. A I R 1925 P C 139=87 I C 305=52 I A 245=52 Cal 809 (PC).
8. A I R 1932 Cal 791=141 I C 544=60 Cal 452=37 C W N 29 (FB).
9. A I R 1923 Cal 30=70 I C 175=50 Cal 197.
10. A I R 1926 Cal 1083=93 I C 684.
11. A I R 1931 Cal 329=126 IC 268=57 Cal 860.
12. A I R 1925 Cal 442=82 I C 840=41 CLJ 22.

law did not apply to the case of appointment of a shebait, and in doing so he held that the donor could alter the appointment of a shebait provided he had not expressly precluded himself from doing so. On the first point Chakrabutty, J., has been overruled by the Full Bench in *Monohar Mukherjee* v. *Bhupendra Nath Mukherjee* (8), and so the authority of this case has been greatly weakened. Moreover at p. 37 (of 37 *C W N*) the learned Judge remarks:

"It is now settled law that the appointment and succession to the office of a shebait must follow the line laid down in the original grant and in the absence of special direction and usage the heirs of the donors succeed."

At p. 28 (of 41 *C L J*) he remarks that (except in the case of *Gaurikumari Dassee* v. *Ramanimoyi Dassee* (9) there is no authority,

"nor is there anything on principle which would stand in the way of the donor to alter the appointment of a shebait to the office or the rules regulating the worship except on the ground that the donor has expressly precluded himself from doing so or that such an alteration affects some right of property of the shebait so appointed or the rights of a third party which had already been created; provided always that any such alterations do not affect any of the fundamental gifts."

Later he refers to the provisions for appointment of shebait as being in the nature of a testamentary arrangement. But where there is an express provision for the appointment of a line of shebaits, it is difficult to see why that should not be sufficient to show that the founder intended to preclude himself from acting again in the matter and why further express provision to that effect should be necessary. As a matter of fact in deciding the appeal before them the learned Judges did not give effect to the theories propounded by Chakrabutty, J., for it was held that the founder was not competent to change the shebaitship of the lands which were already endowed by the first deed of 1308. Leaving aside the theory of testamentary disposition Mr. Sen, has further suggested that the first Arpannama was in the nature of a deed of gift to Narendra's wife which she could not accept as she died in his life-time. In support of this Mr. Sen, has referred to the case of *Khetter Chunder Ghose* v. *Hari Das* (13). The facts of that case may easily be distinguished, but the main point is that there the deed was unquestionably a deed of gift of an idol and of lands with which it was originally endowed. Here the Arpannama of 1300 is itself the deed of the original endowment, setting forth the terms on which that endowment was made and it cannot be said that the arrangement about the shebaitship was not an integral part of the endowment. As has already been pointed out, the facts here are similar to those in the case of *Gouri Kumari Dasi* v. *Ramanimoyi Dassee* (9), and the cases following that case. No useful purpose will be served by referring to other cases which were mentioned by Mr. Sen, as they do not touch the proposition on which this part of the appellants' case rests. In the present case it is clear from the plain terms of the Arpannama of 1300 B. S. that the founder Narendra divested himself of the properties and gave them over to the idol absolutely, appointed himself to be the first shebait, and laid down a line of succession of shebaits. Mr. Sen, has referred to the words:

"During my life-time, I shall keep the aforesaid properties dedicated to Harisewar deities as above, in my own possession and control and I shall perform the sheba in my own way as a shebait,"

and contended that those words indicate that the founder reserved to himself general control over the sheba and the property. But those words must be taken along with the other words in the deed. Narendra did not reserve to himself any power to alter the line of succession and from the terms of the document it is clear that he precluded himself from so altering. He had therefore no power to make the alteration by the Arpannama Bahalipatra of 1310 B. S. We must agree with learned Judge below in holding that Narendra had no power to change the terms, condition, and stipulation in the Arpannama of 1300 about the appointment of shebait after him, and that the Arpannama Bahalipatra dated 13th Pous 1310 is not valid and operative. At the trial issue 4 was raised as follows:

"Whether the terms, conditions and stipulation about the appointment of shebait after Narendra Kumar in the Arpannama dated 6th Baisakh 1300 B. S. are vague, meaningless, indefinite and void for uncertainty?"

This point has not been argued on behalf of the appellant and we are also satisfied that the issue must be answered

13. (1890) 17 Cal 557.

in the negative and in favour of the plaintiff. The next point raised on behalf of the appellant is comprised in issue 11, viz., whether the property which is No. 3 of Schedula *kha* to the plaint is debuttar property as claimed by the plaintiff, or whether it is the self-acquired property of Narayan Chandra Dutt as claimed by the defendant. The learned Subordinate Judge has held in favour of the plaintiff. (After considering the entire evidence His Lordship held that the shares in question, being properties No. 3 of schedule *kha* of the plaint, were not acquired independently of the debutter estate but that they were debuttar properties, proceeded). The next point is whether there was a bona fide transfer of the shares to Narayan. I have already referred to the defence on this point. Ex. L dated 24th August 1907 and printed at B 154 is a deed of transfer by Narendra to Narayan of 599 shares for a sum of Rs. 1,000. He had previously transferred one share to Kshetra Mohan Ghose who again on the same day, 24th August 1907, transferred that one share to Narayan for a consideration of Rs. 10 (vide, B-156). The share certificate shows endorsement of transfer (at B-65). The company also recognised Narayan as the share-holder (vide, proceeding of 14th June 1914, B-57) and the list of share-holders (B-143, 147). It is note-worthy that Narayan in his turn transferred one share to his son Jatindra, the present defendant on 3rd May 1918 (vide, B-205). Plaintiff's case is that these transfers by Narendra were necessary in order to relieve him of the business of the syndicate. For this reason the first transfer was made in favour of Kshetra Mohan Ghose, since deceased, who was a trusted adviser. (See the evidence of K. K. Dutt at A-77 and further evidence A-306-303). After his wife's death in 1903, Narendra left everything to Narayan as the latter himself says. In 1907, Narendra as also Kshetra on the same day made a transfer of all the shares in favour of Narayan who was to act for him. Narendra wrote to the municipality to substitute Narayan's name (B 216) and he also wrote to the company.

The learned Subordinate Judge has taken the view that it was not a real transfer. It is contended on behalf of the appellant that there is no allegation in the plaint that 'consideration did not pass nor was the passing of consideration made the subject-matter of issue. Narayan himself admitted in his evidence that the consideration was utterly inadequate and that the shares were practically thrown away. But he said that he did pay Rs. 1,000 though there is nothing but his word for it. The reason for the transfer as suggested by Narayan was that the company took putni lease of a one-fourth share of Boro zillah against the wishes of Narendra, with the result that there was heavy litigation. That there were difficulties over this business is borne out by documents at B 56, 110, 112 and 114. The learned Judge however did not believe the story that for that reason Narendra would transfer his shares. We think that the learned Judge is right and that really no consideration passed. But even assuming that consideration did pass, the question would still remain whether the sale was for legal necessity and if not whether the transferee Narayan was a purchaser in good faith; neither of these positions can be maintained in view of our findings of fact detailed above. It is the ordinary rule of Hindu law that property dedicated to religious use is inalienable and the objection may be raised by a successor to the shebaitship. A recent decision on this point is in the case of *Ram Charan Das* v. *Naurangi Lal* (14). The result therefore is that we must agree with the learned Subordinate Judge in holding that the defendant has got no right to the properties No. 3 of Sch. *kha* to the plaint.

There was an objection as to limitation, but it was not seriously pressed by the learned advocate for the appellant. The suit being instituted within a few months of the death of Narendra, it cannot be barred by limitation. This disposes of the appeal. (His Lordship then disposed off the cross-objoctions on facts and ordered the inclusion of mesne profits in the decree and concluded). With this reservation, the decree of the lower Court must be affirmed. The appeal is dismissed. The cross-objection is also dismissed. Having regard

14. AIR 1933 P C 75=142 I C 214=60 I A 124=12 Pat 251 (P C).

to the circumstances of the case the parties will bear their own costs throughout.

Mukerji, J.—I entirely concur in the judgment delivered by my learned brother and desire to add only a few words.

The Judicial Committee in the case of *Gossamee Sri Greedharijee* v. *Romon Loolljee* (1) has very clearly pointed out that when the founder of an endowment dedicates properties to a deity and appoints a shebait or lays down the order of succession to shebaitship, he makes a gift with a condition attached and that the deity or those who speak for him on earth need not take advantage of the gift; but that if the gift is taken and the condition insisted on, it must be observed. The deity, in the ideal sense, is the recepient of the gift, and the shebait takes the gift for him and on his behalf. The analogy of the transaction to a gift to a mortal with a condition attached is, to all intents and purposes complete and perfect. When the gift to the deity has taken effect, the donor or founder, in the absence of a reservation to the contrary, ceases to have any proprietary right in the properties, the subject-matter of the gift, and such right thereupon vests in the deity. In the Arpannama of 1893 there is not only no reservation, but an express declaration in these words:

"I make debuttar in favour of the said Harisheswar deities and I dedicate them to the aforesaid Harisheswar deities and I write that with effect from this day under the following terms, my rights therein cease and they vest in the aforesaid Harisheswar deities,"

Then follow certain terms amongst which the relevant one is this:

"I shall keep the aforesaid properties, dedicated to Harisheswar deities as above, in my own possession and control and I shall perform the sheba in my own way as a shebait,"

These words cannot, in my opinion, be read in the way in which Mr. Sen desires to read them, namely as derogating from the gift and reserving some sort of proprietary right over the dedicated properties. They merely declare that the founder would continue to act as shebait as he had been hitherto doing; that the properties would remain in his possession and control as such shebait, and that he was not laying down any rules for the performance of the sheba which he declared he would perform in the way he had been previously doing or in such manner as he liked. On the gift taking effect, the properties vested in the deity, and though the donor remained in possession the character of that possession was very different from what it was before: he remained in possession thenceforward as shebait and not as a person in whom there was any proprietary right. As already pointed out, he expressly declared that he would have no such right from that day. It is not possible to conceive that after the donor had completely parted with his proprietary right and that right had vested in the donee by the gift having taken effect, he should be still competent to interfere with or alter the condition which was attached to the gift and subject to which the gift was taken.

When the worship of a deity has been founded, the shebaitship, in the absence of course, of any usage to the contrary, vests in the founder and his heirs, unless the same has been disposed of otherwise. In an endowment in which the shebait is appointed with power to appoint his successor, the shebait, if he exercises that power does so on the strengh of the authority delegated to him by the founder. And the present case if the founder had reserved such power for himself, he could have, even after the dedication and even in his capacity as shebait appointed his successor. It is not possible however to read the deed in that way. Here the founder had disposed of the shebaitship in the clearest possible language. Mr. Sen has also argued that the deed should be read as indicating that the donor had not constituted himself as shebait but he merely went on acting as such as he had hitherto done and that by it he merely expressed his intention that after him his wife was to be the first shebait and that when subsequently he found that his wife died the disposition which was in its nature a testamentary one could very well be altered by him. The language of the deed, in my judgment, does not favour such a contention: it clearly intended the founder to be the first taker of the shebaitship, and once the gift of the shebaitship took effect the plaintiff's right became a vested right which could not be subsequently interfered with.

Mr. Sen has also endeavoured to make out that the founder of the endowment,

as such, has always some residuary rights left in him, under which, he may, if he chooses, alter the line of succession of shebaitship. Such rights of supervision or control as the founder, in the absence of express reservation, may have in respect of the endowment, can only be exercised for the benefit of the endowment, a circumstance which is entirely absent in the present case, and cannot in my judgment, extend to an alteration in the order of succession to shebaitship unless through the intervention of the Court and except for good cause shown.

K.S. *Order accordingly.*

A. I. R. 1934 Calcutta 250

GUHA AND BARTLEY, JJ.

Hriday Kishore Nandi—Petitioner.

v.

Hari Bhusan Dey and *others* — Opposite Parties

Civil Rule No. 981 of 1933, Decided on 15th August 1933, from orders of First Addl. Sub-Judge, Alipur, D/- 17th July 1933.

Court-fees Act (1870), S 7 (iv) (e) — Suit for removal of defendants from shebaitship and injunction from wasting temple property —Ad valorem court-fees need not be paid on valuation of debuttar property.

Where plaintiff sues for the removal of the defendant from shebaitship and for the appointment of any competent person as shebait and prays further for injunction against the defendant that they may not waste or possess the debuttar properties, the plaintiff need not pay ad valorem court-fee on the valuation of debuttar property. [P 250 C 1,2; P 251 C 1]

Syed Nasim Ali and *Diptendra Mohan Ghose*—for Petitioner.

Rupendra Kumar Mitter—for Opposite Parties.

Order.—The question in controversy between the parties in this case is whether ad valorem court-fees should be paid in view of the nature of the reliefs sought by the plaintiff in Title Suit No. 3 of 1932, in the Court of the Subordinate Judge, 24-Parganas. The prayers made by the plaintiff in the suit, the petitioner in this Rule, are set out in the application to this Court on which this Rule was granted. The plaintiff instituted the suit in the allegation that the opposite party No. 1 has assumed office of the shebait of a private debuttar without any right to do so and has been mismanaging the debuttar estate and misappropriating the income thereof; and has committed acts of malfeasance and misfeasance, so far as this debuttar estate was concerned. The prayers made in the plaint were mainly the following: 1. A decree be passed for the removal of defendants 1 and 2 on a declaration that they have no manner of shebaiti right to the properties described in the plaint. 2. After declaring that the descendants of the late Mathur Mohan Nandi have no shebaiti right, a decree be passed appointing the plaintiff or any other competent person as shebait. 3. A permanent injunction be issued in order that the defendants in the suit may not waste or possess the debuttar properties 4. A decree may be passed for appointment of the plaintiff as shebait and for framing a scheme for the due performance of the worship &c. and festivals of the deity after removing the defendants from the shebaitship.

There were other incidental reliefs prayed for, by the plaintiff; but there was, and there could not be any prayer for the possession of the debuttar properties. The view taken by the learned Subordinate Judge in the Court below is that the real motive of the suit is to get hold of the properties, and that however ingeniously the plaint might have been drawn up the Court should not be deceived so as to allow the plaintiff to evade the stamp law, by nominally omitting a prayer for recovery of possession which is clearly the ultimate aim of the plaintiff as can be well seen through In the above view of the case the petitioner was directed to supply within ten days, requisite ad valorem court-fees upon the valuation of the properties belonging to the debuttar estate, viz., one and half lacs of rupees, less the amount of court-fees already paid. The court-fees it may be mentioned were paid on Rs. 2,100 the valuation of shebaiti right, and on Rs. 50 the value of the relief for permanent injunction. The petitioner after this, applied for the amendment of the plaint withdrawing his prayers for the declaration of his shebaiti right and for the appointment of the petitioner as the shebait, in the place of defendant 1. The application so made was rejected.

In our judgment, on a careful reading of the plaint in the suit it cannot be said that there was a prayer for declara-

ion that he was entitled to possession of the property, and such a prayer could not be made in the case, as the plaintiff was not entitled to possession of the debuttar properties in his personal right. The petitioner was claiming to be the shebait, and even that prayer was eventually sought to be amended. The object of the suit was to exclude defendant 1 from the management of the debuttar properties and interference with the same. The claim originally made was for the declaration of the shebaiti right and by the subsequent application for amendment of the plaint, the scope of the suit was further limited. In the above view of the case, we are unable to agree with the learned Subordinate Judge, in the orders made by him that the petitioner must pay ad valorem court-fees on the valuation of the debuttar properties. There are no materials before the Court upon which it could be said that the reliefs claimed in the suit, regard being specially had to the application for amendment of the plaint, were undervalued. The benefit which might accrue to the petitioner by reason of his success in the litigation, or detriment which is likely to fall on defendants 1 and 2 if they are excluded from the debuttar properties as shebaits, has not been shown to be more than Rs. 2,100. In our opinion therefore the court-fee already paid on the valuation of the suit made by the petitioner has not been established to be improper in any way.

The order passed by the learned Subordinate Judge on 31st May and 17th July 1933, against which this Rule is directed, are set aside; and the suit as instituted will now be tried out by the lower Court, keeping in view the amendments sought to be made in the plaint, the prayer of amendment of the plaint being allowed. The Rule is made absolute, the petitioner is entitled to the costs in this Rule. The hearing fee in this Court is assessed at three gold mohurs.

K.S. *Rule made absolute.*

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MITTER AND HENDERSON, JJ.

Naresh Chandra Lahiri—Judgment-debtor—Appellant.

v.

Jogesh Chandra Majumdar—Decree-holder—Respondent.

Appeal No. 161 of 1933, Decided on 4th July 1933, from Original order of Sub-Judge, Rangpur, D/-11th March 1933.

(a) Civil P. C. (1908), O. 38, R. 5 (3)—Conditional order of attachment before judgment made absolute—Fresh order of attachment need not be issued.

Where a conditional order of attachment before judgment has already been issued, it is not necessary to issue or serve a fresh order of attachment before judgment after the conditional order had been made absolute: *A I R* 1928 *P C* 139, *Ref.* [P 252 C 2]

(b) Civil P. C. (1908), O. 38, R. 7—Attachment before judgment—Mode of executing.

The mode of executing attachment before judgment is the same as the mode which is provided for in the statute for attachment after the decree is passed. [P 253 C 2]

(c) Civil P. C. (1908), O. 21, Rr. 54 and 90—Waiver of irregularities in service of notice and of proclamations—Such questions cannot be raised subsequently.

Where the judgment-debtor in his application for adjournment of sale waives all irregularities in service of notice and proclamation and also of inadequacy of price, he is precluded from raising any question of irregularity even if such irregularity existed. [P 254 C 1]

Amarendra Nath Bose and *Satischandra Sinha*—for Appellant.

Gunada Charan Sen, *Hemendra Chandra Sen*, *Profulla Kamal Das* and *Phanindra Nath De*—for Respondent.

Mitter, J.—This is an appeal on behalf of the judgment-debtor from the order of the Subordinate Judge of Rangpur dated 11th March 1933 by which he refused to set aside the sale held in execution of a money decree on 11th August 1932. In order to understand the contention of the appellant who is aggrieved by the order of the Subordinate Judge refusing to set aside the sale a few facts need be stated. It appears that on 9th September 1932 the judgment-debtor made an application of setting aside of a sale in which he alleged several grounds of irregularity. The petition is to be found at p. 29 part 1 of the paper book. It is not necessary to refer to all the grounds of irregularity alleged. Before us. Mr. Bose who appears for the appellant has confined his argument mainly to one irregularity. He has argued that the sale is bad because there has been no attachment of

the properties directed to be sold and consequently the sale cannot stand. It appears that before the money decree was passed an application had been made on behalf of the decree-holder respondent who was the plaintiff in the suit for attaching before judgment the property which has now been sold. In pursuance of the said application an order was made to the following effect on 16th January.

"In the meantime the property described in the petition be conditionally attached before judgment."

There is a subsequent order of 18th March 1931 when the present appellant appeared where it was stated that the suit was adjourned to 2nd April 1931 for filing compromise petition as well as to show cause why attachment should not be made before judgment if necessary. On 2nd April the defendant that is the present appellant filed a written statement and prayed for its acceptance on the allegation that no compromise having been effected it was necessary for him to file his defence. The plaintiff objected. His objection was rejected and the defendant was allowed to file the written statement. The matter was adjourned to 8th April 1931. On 8th April 1931 no cause against the attachment before judgment was shown and the Court directed that in those circumstances the attachment should be made absolute. It appears that the order of attachment before judgment which was dated 19th January 1931 was drawn up in the manner provided for in O. 21, R. 54, Civil P. C., and it was served by beat of drum and by the other methods mentioned in that order. It is contended before us by the appellant in the first place that the conditional order of attachment became merged in the final order making the attachment absolute which was passed on 8th April 1931; and as such it became necessary for the Court to issue a fresh attachment. In support of this position reliance has been placed on the decision of their Lordships of the Judicial Committee in the Privy Council case of *Muthiah Chetti* v. *Palaniappa Chetti* (1) and our attention has in particular been drawn to the passage in their Lordships' judgment which appears at the bottom of p. 261 (*of* 55 *I A*)and on the top of the p. 262 (*of* 55 *I A*). Their Lordships after referring to the provisions of O. 21, R. 54 observed as follows :

"In view of the provisions the Board listened with some surprise to a protracted argument which culminated in the proposition that a property was in law attached whenever an order for attachment was made. The result, if this were so, would be that a person holding an order could dispense with attachment altogether, as an operation or a fact. Their Lordships need not repeat in another form these propositions. The order is one thing, the attachment is another. No property can be attached unless first the order for attachment has been issued and secondly in execution of that order the other things prescribed by the rules in the Code have been done.'

There is nothing in this judgment of their Lordships of the Judicial Committee to show that where a conditional order for attachment before judgment has already been issued it is necessary to issue or serve a fresh order of attachment before judgment after the conditional order had been made absolute, as it was done in the present case on 8th April 1931. The attachment before judgment in this case was evidently made in pursuance of the provisions of Sub-Cl. (3), R. 5, O. 38, which enacts that the Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified. In these circumstances we are of opinion that there is no foundation for the contention that a fresh notice of attachment before judgment should issue. Indeed no such provision was made in the Code and it seems to us to be contrary to common sense that a fresh application for attachment should be made after the order of attachment before judgment was served. Indeed in very wide terms it states among other things this :

"It is ordered that you are hereby prohibited and restrained until further orders of this Court from transferring or charging the attached property specified in the schedule hereunto annexed by sale, gift or otherwise and that all persons be and they are hereby prohibited from receiving the same by purchase, gift or otherwise."

The mode of executing attachment before judgment is the same as the mode which is provided for in the statute for attachment after the decree is passed ; and that is distinctly provided for in O. 38, R. 7 of the Code. As this is immovable property which was attached we are invited to refer to the provisions of O. 21 R. 54, of the Code

1. A I R 1928 P C 139 = 55 I A 256=51 Mad 349=109 I C 626 (PC).

which relates to attachment of immovable properties. O. 21, R. 54 enacts as follows :

"Where the property is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge,"

Sub-Cl. (2) of the rule is as follows :

"The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the Court house, and also, where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situated "

So it is clear that the order was served exactly in the same manner as the Code provides for ; and no exception can be taken to it. It is also said to have been published by the beat of the drum as it appears from the endorsement of Ex. A which names the drummer and other witnesses to the service. It appears further from the several petitions which begin at p. 10 part 2 of the paper book and which is dated 5th March 1932 down to other petition in the case which carries us sometime in August 1932 that the plaintiff waives all irregularities in the service of notices and of proclamation and also irregularities with regard to adequacy of price, with regard to the property sold. The Subordinate Judge has rightly stated that these petitions clearly indicate that even if there was any irregularity in the service of notice of the order of attachment that had been waived by the applications, which resulted in some cases in the adjournment of the date of the sale to some future dates. As this appears to come under the principle laid down in several cases which came up before their Lordships of the Judicial Committee beginning from the case of *Giridhari Singh* v. *Hurdeo Narain Singh* (2), and we have had recently occasion to consider some of them, we are of opinion that the judgment-debtor is precluded from raising any question of irregularity of the service of notice resulting in the postponement of the sale on the day fixed. The Subordinate Judge has found further that having regard to the state of the market the property has not fetched a very inadequate price. Having regard to all these we are of opinion that the Subordinate Judge has come to a correct conclusion in the case. The appeal is dismissed with costs. The hearing fee is assessed at three gold mohurs.

Henderson, J.—I agree.

K.S. *Appeal dismissed.*

2. (1875) 3 I A 230 (PC).

A. I. R. 1934 Calcutta 253

AMEER ALI, J.

Bhairobux Mangilal—Appellants.

v.

Deokaran and *others*—Respondents.

Original Suit No. 1729 of 1930, Decided on 12th May 1933.

Civil P. C. (1908), O. 30, R. 2 (1) (3) — Fresh declaration amounts to addition of party—Procedure to bring in person is to give leave to put in further declaration within limitation — Practice — Limitation Act (1908), S. 22.

Once partners have been declared, the persons whose names have been declared are to be regarded as parties to the suit. Any fresh declaration will be equivalent to the addition of a party and this can be done by giving leave to put in a further declaration, but such a thing should be made within limitation period: *A I R* 1914 *Cal* 53 ; *AIR* 1930 *Bom* 150 and *A I R* 1924 *Cal* 74, *Ref.* [P 255 C 2]

L. P. E. Pugh and *P. C. Ghose* — for Appellant.

K. P. Khaitan, *Jhoonjhunwalla* and *Sudhis Roy*—for Respondents.

Judgment.—This suit is a commercial case and, but for unforeseen events would have been tried by the Judge taking commercial cases. I desire to remind attorneys and the public that commercial cases that have come into this list, can on application to me be always marked as such, and it is better that all these cases should be tried as commercial cases.

There are three real points in the case. The first is a technical point, that of parties. The second is whether there was a dissolution of a firm carrying on business under the name of Deokjaran Ramkissen in May 1926 coupled with an adjustment of accounts of that firm and the third is whether, if there was such an adjustment, the debt found due upon that adjustment was guaranteed by another firm Sumburam Protabmull in July 1928. There is a subsidiary point, whether the question of guarantee has not been already decided by the Jodhpur Court and whether that decision is binding under the provision of S. 13, Civil P. C.

I will deal with the first point last because the parties are entitled to have my decision upon the questions of fact. I will dispose first of the question of guarantee. This depends upon the oral evidence of Bhairobux and upon the document Ex. F which I referred to at various times as the pink paper, signed by Ramcoomar, the gomastha of Sumburam Protabmull. The onus is undoubtedly upon the plaintiffs to prove both the fact of the guarantee and also authority. As to authority, there is little evidence, assuming I am not bound by the decision of the Jodhpur Court. I do not think that Ramcoomar was merely the cashier. He had authority to do whatever business was done by the firm. On the other hand there is in fact no evidence to show that it was part of the business of this firm to give guarantees. (After examining the facts of the case and the evidence His Lordship proceeded). This is my conclusion. I find therefore there was that no adjustment of the accounts of the firm of Deokaran Ramkissen as a whole in respect of the liability of Deokaran Ramkissen to Bairobux Mangilal, for which Deokaran and Ramkissen had agreed to be responsible. Bairobux I do not believe.

There remains two technical points. The first being as to the effect of the decree of the Jodhpur Court and the second the question of parties. As regards the first question which depends upon the effect of S. 13, Civil P. C., it is not necessary for me to decide. Without having considered the matter with any care, it would however appear to me that the Jodhpur Court did adjudicate upon "the matter" of the guarantee. This being the only defence raised by the defendants in that suit to the claim upon Hundi. There is lastly the question of parties. Unless, all the partners of the plaintiff firm are parties to this suit S. 45, Contract Act, will preclude the making of a decree. In response to a demand in writing under O. 30, R. 2, sub-R. 1, Civil P. C., the plaintiffs made a declaration declaring Bhairobux and Mangilal as the partners of the plaintiff firm. In point of fact I find that at all material times Hanumanbux was also a partner of the plaintiff firm.

What was the reason for leaving him out I do not know. These people have innumerable combinations and for all kinds of reason, firms with different names but the same partners, firms with the same names and different partners and so forth. They take undue advantage of the facilities provided by the law and they must not be surprised if the law sometimes takes advantage of them. Mr. Pugh for the plaintiffs has put in a petition in which without admitting or stating that Hanumanbux is a partner he asks for leave to make a further declaration. More than three years have elapsed since the cause of action accrued. The matter depends upon the effect of O. 30, R. 2 and S. 22, Lim. Act. Rr. 1 and 2 of O. 30 have been taken directly from the English practice. In England R. 2 which is the earlier rule has been largely superseded by R. 1. In India the professions appear to prefer R. 2 and in any event this is the rule with which we are immediately concerned. Sub-R. 3 of this rule reads as follows:

> "Where the names of the partners are declared in the manner referred to in sub-R. (1), the suit shall proceed in the same manner, and the same consequences in all respects shall follow, as if they had been named as plaintiffs in the plaint."

The important words

> "the same consequences in all respects shall follow, as if they had been named as plaintiffs."

What are those consequences?

If *A*, *B* and *C* are named as plaintiffs in a plaint they and no other person are the parties to the suit. If it is found that *D* should also have been made party *D* may be added or if there has been a mistake *D* may be substituted in the place of *C*. This is done under the ordinary rules relating to amendment. By S. 22, Lim. Act, however, no new party may be added after the period of limitation has elapsed. In this case it has elapsed. Mr. Pugh relies principally upon two authorities *Imperial Pressing Co.* v. *British Crown Assurance Corporation Ltd.* (1) at p. 585 of 41 *Cal.* In that case the plaintiff firm being faced by a similar difficulty offered in Court to make a further declaration. Chowdhuri, J., expressed the view that the Court could

> "allow a party who has made a defective declaration under O. 30, R. 2 to put in a further declaration making a full disclosure and thus remedy the defect."

It is clear that he considered the suit as framed "defective for non-joinder of parties" but "that the defect can be

1. A I R 1914 Cal 53=21 I C 836=41 Cal 581.

cured." In that case no point of limitation was taken and none appears to have been involved. The question in this case is whether the defect can be cured after the period of limitation has elapsed. In *Sheodoyal Khemka* v. *Johurmull Manmull* (2) a case which I have already had occasion to consider in another connection, see (. . . . .) Page, J., had to deal with the following situation. In a suit for dissolution of the firm N. R. one of the defendants was described as Johurmull Manmull a firm. The technical point was taken that while two persons Johurmull and Manmull were partners in the firm of N. R. there was in fact and in law no such firm as Johurmull Manmull and that the period of limitation having elapsed, an amendment substituting their names as individuals would be barred: S. 22, Lim. Act.

Page, J., while fully subscribing to the view (p. 554 of 50 *Cal.*) that the Court could not add or substitute a party in the circumstances mentioned came to the conclusion (p. 559 of 50 *Cal.*) that the defendants Johurmull and Manmull were in the plaint as it originally stood "sufficiently described" and "before the Court" and "parties to the suit."

"If an application were made to amend the plaint so as to substitute for Johurmull Manmull the words Johurmull Khemka and Manmull Khemka, such amendment would not be an amendment by which a new party was added, but it would be an amendment merely for the purpose of more clearly describing parties who are already before the Court."

One of Page, J's., reasons for coming to this conclusion was that as a matter of law the firm of Johurmull Manmull even if it had existed could not have been a member of the partnership N. R., from which it followed that the words Johurmull Manmull as they appeared in the plaint must be:

"merely a description of the individuals Johurmull Khemka and Manmull Khemka, admittedly members of the firm N. R."

I respectfully agree with the judgment of Page, J., which is in accordance with justice and good sense. The situation would I think in law have been different had the names of the partners of Johurmull Manmull been declared as Johurmull Khemka and Manmull Khemka and a third partner X Khemka had been subsequently discovered and sought to be added. In *Lakshmansa Babasa* v. *Lakshmansa Baboosa* (3) the question now being considered was mooted but deliberately left open. I am therefore relegated to the language of the rule and upon its plain meaning. I feel bound to hold that once partners have been declared the persons whose names have been declared are to be regarded as parties to the suit. Any fresh declaration will be equivalent to the addition of a party.

This brings me to the question of practice. Whatever may be the case under O. 30, R. 1 there appears to be no machinery for a formal variation of a declaration made under O. 30, R. 2. Chowdhuri, J., in *Imperial Pressing Co.* v. *British Crown Assurance Corporation, Ltd.* (1) (at p. 585 of 41 *Cal.*) appears to have considered that the Court would give leave to put in a further declaration and this perhaps is the most convenient course. It appears to me however that there is nothing to prevent a party making a further declaration the effect of which might afterwards fall to be considered by the Court. If made after the period of limitation had elapsed, it would in my opinion be of no effect. The Court would regard the suit as being one by the parties whose names were originally declared. That is the case here. In so far as there has been an application to me to add a party I reject it. The result is that the suit is bad for non-joinder of parties and for this and the other reasons given must be dismissed with costs including reserved costs.

K.S. *Suit dismissed.*

2. A I R 1924 Cal 74=75 I C 81=50 Cal 549.

3. AIR 1930 Bom 150=54 Bom 285=124 I C 790.

A. I. R. 1934 Calcutta 255

GUHA AND BARTLEY, JJ.

Gopal Chandra Bose — Petitioner.

v.

Uma Kanta Bose and *others*—Opposite Parties.

Civil Rule No. 776 of 1932, Decided on 11th August 1932, from order of Second Addl. Sub-Judge, 24-Pargannas, D/- 27th June 1932.

Arbitration—Charge—Misconduct of arbitrator can be entertained only when award is filed in Court.

The only time for entertaining charges of misconduct against an arbitrator is when the award

has been filed in Court and not earlier : *A I R* 1923 *Cal* 410, *Rel on.* [P 256 C 2]

Brojolal Chuckerbutty and *Bijen Kumar Mukherjee*—for Petitioner.

D. K. Bose, Anil Ch. Dutt, Rishendra Nath Sirkar, Rupendra Coomar Mitter and *Indu Bhusan Mukerjee*—for Opposite Parties.

Order.—This Rule was issued for the purpose of examining whether an order made by the Second Additional Subordinate Judge, 24-Pargannas refusing to entertain an application for setting aside an arbitration in Title Suit No. 40 of 1931 was properly made. We have given our careful consideration to the facts of the case giving rise to the application on which this Rule was granted and we are unable to hold that the order passed by the learned Subordinate Judge should be interfered with. The order is in consonance with the decision of this Court in the case of *Robindra Deb Manna* v. *Jogendra Deb Manna* (1), and the learned Judge is right in holding that the charges of misconduct levelled against the arbitrator should not be inquired into at this stage, seeing that under Sch. 2, Civil P. C., the only time for entertaining charges of misconduct against an arbitrator is when the award has been filed in Court.

The Rule is discharged, but we direct that on failure by the arbitrator to make his award within three months from this date, the reference to arbitration made in the suit should be recalled and superseded, and the suit proceed with by the trial Court in accordance with law. The opposite parties are entitled to their costs in this Rule. The hearing fee is assessed at three gold mohurs. Let the record be returned as soon as possible and let the order be communicated to the Court below without any delay.

K.S. *Rule discharged.*

1. A I R 1923 Cal 410=80 I C 459.

A. I. R. 1934 Calcutta 256

C. C. GHOSE, AG. C. J. AND
S. K. GHOSE, J.

Abu Hossein Mia—Accused — Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petns. Nos. 1041 and 1105 of 1932, Decided on 30th March 1933.

Emergency Powers Ordinance (2 of 1932), S. 51—District Magistrate transferrin gcase to one Magistrate—Case withdrawn to his own file and subsequent transfer to another Magistrate—Action is in contravention of S. 51.

The District Magistrate on the report of the police transferred the case to a Magistrate. Subsequently he withdrew the case from the Magistrate to his own file and transferred it to another Magistrate :

Held : that his action was an action as a Court and was in contravention of S. 51 and that the Magistrate to whom the case was transferred had no jurisdiction to try the case. [P 257 C 2]

N. K. Basu and *Parimal Mukherjee*—for Petitioner.

Khundkar—for the Crown.

Order.—The facts are set out in the judgment of the learned Sessions Judge and need not be repeated. The point that has been argued before us in this case is that the proceedings had against the accused were without jurisdiction as the District Magistrate of Rangpur had no power to transfer the case to the Sub-Divisional Magistrate of Gaibandha in the circumstances which happened. It appears that the District Magistrate's attention being drawn to the contravention by the accused of the terms of the order of 22nd February 1932, which required him to stay in a particular village, the District Magistrate made an order on the report of the Police Officer transferring the case against the accused to the Sudder Sub-Divisional Magistrate for disposal. Subsequently the District Magistrate's attention was drawn to the fact that the offence having taken place within the jurisdiction of the Sub-Divisional Magistrate of Gaibandha, it became apparent to the District Magistrate that the proper officer to try the case was the Sub-Divisional Magistrate of Gaibandha and not the Sudder Sub-Divisional Magistrate and he thereupon made an order withdrawing the case to his own file from, the Sudder Sub-Divisional Magistrate and after such withdrawal, he transferred the case to the Sub-Divisional Magistrate of Gaibandha.

It is argued that having regard to the terms of S. 51 of the Ordinance in question (2 of 1932) the District Magistrate as a Court had no authority to transfer the case in the manner in which he did. On the other hand Mr. Khundkar has argued that the District Magistrate was not acting as a Court in making the order he did, that he evidently laboured

under a mistake in making the orders of transfer and that what he did was merely as an Executive Officer and not as a Court. The District Magistrate has submitted an explanation in which he states that the orders made by him were null and void as he did not act as a "Court". We are unable to accept the view urged upon us by the learned Deputy Legal Remembrancer and by the District Magistrate and in our view it is clear that the District Magistrate in passing the order he did, namely transferring the case in the first instance to the Sudder Sub-Divisional Magistrate, then withdrawing the case to his own file and thereafter transferring the case to the Sub-Divisional Magistrate of Gaibandha did act as a Court, and if that is so his action in our view was in contravention of the terms of S. 51 of the said Ordinance. It follows therefore that the Sub-Divisional Magistrate of Gaibandha had no jurisdiction whatsoever to try the case against the accused. In that view of the matter the conviction and sentence passed on the accused in this case must be set aside. (His Lordship then dismissed another *Revision No.* 1105 on facts and concluded). The result therefore is that while the Rule in Revision Case No. 1041 is made absolute the Rule in Revision Case No. 1105 is discharged and the accused who is on bail must surrender to his bail bond and serve out the remainder of the sentence passed in the case out of which Revision Case No. 1105 has arisen. Let the records in the two cases be sent down at once.

K.S. *Order accordingly.*

A. I. R. 1934 Calcutta 257

MALLIK AND JACK, JJ.

Trailakya Nath Bhattacharjee — Defendant—Appellant.

v.

Bhupendra Nath Mukherjee—Plaintiff—Respondent.

Appeal No. 2316 of 1931, Decided on 17th November 1933, from appellate decree of Special Judge, 24-Parganas, D/- 27th May 1931.

(a) Bengal Tenancy Act (1885), S. 102 (h) —Entry in incidence column that portion of a tenure formed part of mokorari tenure comes within Cl. (h) and can be ordered.

A note in the incidence column of the Record of Rights to show that the tenure contains a certain area which at one time formed a portion of mokorari tenure comes under Cl. (h), S. 102 and can be ordered [P 258 C 1]

(b) Bengal Tenancy Act (1885), S. 50— Presumption applies even to tenures.

The presumption under S. 50 applies not only to raiyati holdings but also to tenures as well : *AIR* 1923 *Cal* 66 and 261, *Rel on.* [P 258 C 2]

Hiralal Chakrabarty — for Appellant.

Rupendra Coomar Mitter and *Shamadas Bhattacharya*—for Respondent.

Mallik, J.—This appeal has arisen out of an application under S. 105, Ben. Ten. Act, for settlement of fair and equitable rent. The application was made by the landlord in respect of a tenancy which had been recorded as a tenure belonging to the defendant with an area of 24 bighas odd at a rental of Rs. 29 odd in the finally published Record of Rights. In the Record of Rights the tenure was also shown as a mokorari tenure. In the proceeding under S. 105 a question was raised as to whether the tenure was mokarari or not. The Assistant Settlement Officer came to the conclusion that the existing rent of the tenure was fair rent and he held also that although the tenure was a permanent one the rent was liable to enhancement and he directed an entry to be made in the Record of Rights accordingly. Against this decision of the Assistant Settlement Officer there was an appeal taken by the tenant to the Special Judge but without any success. Now the tenant-defendant has appealed to this Court.

On behalf of the appellant there were three points taken before us in the beginning. The first one was that there had been no settlement of fair and equitable rent inasmuch as the Assistant Settlement Officer held that the existing rent was fair; the second one was that the finding of the Revenue Officer that the rent was liable to enhancement ought not to have been entered in the Record of Rights inasmuch as the finding had been arrived at under S. 105-A, Ben. Ten. Act, and the third and the last point was that in view of the fact that the tenure was result of an amalgamation of a three-fourths share of a very old tenure of the name of Ram Lochan Dhar and a three-fourths share of a comparatively recent tenure of the name of Bhaba Taran Dhar an entry ought to have been made in the incidence column of the Record of Rights to show that in the present tenure there was a certain area which had been a part of a moka-

rari tenure, the contention being that Ram Lochan's tenure had really been mokarari. As regards the first two points the plain meaning of the expression "Settlement of fair and equitable rent" and a reference to the provisious of S. 107, sub S. 2, Ben. Ten. Act, would show that there is no substance in either of them Mr. Hiralal Chakrabarty when he realised the futility of these two grounds of his frankly stated before us that he would not press either of them

His third ground however was not, in my opinion, without some substance in it. It appears that the tenure of the defendant, as I have observed before, is the result of amalgamation of two tenures three-fourths share of each, one belonging to Ram Lochan and the other to Bhaba Taran Dhar. It appears also that the origin of Ram Lochan's tenure was not known. The contention of the appellant that a note may be made in the incidence column of the Record of Rights to show that the present tenure contains a certain area which at one time formed a portion of mokarari tenure was opposed before us on behalf of the respondent and this opposition was made on two grounds. First of all, it was said that such an entry would not come under any of the clauses of S. 102, Ben. Ten. Act, and secondly, that it could not be said for certain that Ram Lochan's tenure had really been a mokorari one. As regards the first ground I am of opinion that an entry like the one sought for may clearly come under Cl. (h), S. 102, which says that special conditions and incidents, if any, of a tenancy may be noted in the incidence column.

As regards the second ground, namely, that it cannot be said for certain that Ram Lochan's tenure had really been a mokorari one I am of opinion that this ground is untenable. As observed before, the origin of this tenure is unknown and there is the fact that there was a very large number of dakhilas produced by the defendant to show that the rent paid for this tenure had been uniform for a very large number of years. On behalf of the respondent it was said that the presumption on which the defendant would rely from this uniform payment of rent under S. 50, Ben. Ten. Act, cannot apply to the present case inasmuch as the holding was a tenure and not raiyati. But as has been held in two decisions of this Court, namely, in *Tara Kumar* v. *Arun Chandra* (1) and *Krishna Kamini Dasi* v. *Nil Madhab Shah* (2), the presumption under S. 50, Ben. Ten. Act, may apply to tenure as well. That being so, I am of opinion that it can safely be inferred that Ram Lochan's tenure was a mokorari one and as there could be no valid objection to an entry like the one sought for being made in the "incidence" column of the finally published Record of Rights I would order that an entry be made in that column to the effect that three-fourths of the 20 bighas and 8 cottas (which was the total area of Ram Lochan's tenure) out of the present holding was a part of a mokorari tenure. This appeal is dismissed subject to the variation in the decree of the lower appellate Court as indicated above. We make no order as to costs in this Court.

Jack, J.—I agree.

R.K. *Order accordingly.*

1. AIR 1923 Cal 261=74 I C 383.
2. AIR 1923 Cal 65=73 I C 312.

A. I. R. 1934 Calcutta 258

GUHA, J.

Bhudhar Chandra Chattapadhya — Claimant—Petitioner.

v.

Keshab Chandra Ghose and *another*— Opposite Parties.

Civil Rule No. 702 of 1933, Decided on 17th November 1933, against decree of Addl. Dist. Judge, Howrah, D/- 25th April 1933.

Civil P. C. (1908), S. 47 and O. 21, R. 58— Decree against legal heir — Objection by executor that decree cannot be executed against him is one under S. 47 and not under O. 21, R. 58.

Where the decree-holder has rightfully obtained the decree against the legal heir of the deceased, he is entitled to have his remedy as against anybody who may have stepped in the meanwhile, into the shoes of the original legal heir, as legal representative of the estate, e. g., the executor. The objection by the executor that the decree cannot be executed against him as he was not a party is one under S. 47 and cannot be treated as one uuder O. 21, R. 58.

[P 259 C 1]

Heramba Chandra Guha and *Narendra Nath Banerji*—for Petitioner.

Bijan Kumar Mukerji—for Opposite Parties.

Order.—This Rule was issued on the opposite party to show cause why the order of the learned Additional District Judge of Howrah passed on 25th April

1933, in Misc. Appeal No. 1 of 1933 setting aside an order of the Munsif at Amta dated 25th November 1932 allowing an application of the petitioner in a proceeding in execution of a decree in which the relief claimed was that the decree could not be executed against him. The facts and circumstances of the case giving rise to the application before the executing Court, have been set out in very great detail in the judgment of the Courts below, and were placed before me by the learned advocates appearing for the parties in this Rule. The question of jurisdiction properly so called, as raised in this Rule, relating to the inadmissibility of the appeal before the learned Additional Judge, must be decided against the petitioner. The application before the executing Court was obviously one under S. 47, Civil P. C., and could not be treated, as has been contended before me, as an application under O. 21, R. 58, Civil P. C., merely. The parties proceeded in the Courts below on the footing that the application giving rise to this Rule, was one under S. 47, Civil P. C., and there is, in my opinion, no substance in the contention that there was no appeal in the Court of appeal below.

On the merits I have no hesitation in expressing agreement with the view taken by the learned Additional Judge in the Court of appeal below. The case of the petitioner was that the decree sought to be executed was against the widow of defendant 1 in the suit, and the petitioner in his capacity as an executor was never a party to the suit, and therefore he must be regarded as a claimant in the execution proceedings and his claim should be given effect to, in view of the fact that there was no decree against the executor who represented the estate when the execution was levied. As indicated already I agree with the view taken by the learned Judge of the Court of appeal below, that the decree-holder rightfully obtained the decree as against the estate of the deceased ; and he was entitled to have his remedy as against any body who may have stepped in the meanwhile, into the shoes of the original legal heir, as legal representative of the estate.

In my judgment, the order made by the executing Court allowing the objection and releasing the property from attachment was rightly set aside by the learned Additional District Judge in the Court of appeal below. In the result, the Rule is discharged, and the order of the learned Judge is confirmed. I make no order as to costs in this Rule.

R.K. *Rule discharged.*

A. I. R. 1934 Calcutta 259

AMEER ALI AND M. C. GHOSE, JJ.

Pratul Chandra Mitra —Petitioner.

v.

Commandant, Hijli Detention Camp—Opposite Party.

Criminal Misc. Revn. No. 137 of 1933, Decided on 15th November 1933.

(a) High Court — High Court does not remedy injustice in the abstract.

High Court does not remedy injustice in the abstract. It only enforces legal rights and remedies legal wrongs. [P 260 C 1]

(b) Criminal P. C. (1898), S. 491—Habeas corpus,

Section 491 displaces the writ of habeas corpus: *A I R* 1927 *Cal* 496, *Foll.* [P 264 C 2]

(c) Criminal P. C. (1898), S. 491—S. 491 is not ultra vires.

Section 491 in so far as it displaces writ of habeas corpus is not illegal: *A I R* 1927 *Cal* 496, *Foll.* [P 264 C 2]

(d) Bengal Prisons Amendment Act (6 of 1930)—Act is not ultra vires.

Bengal Act 6 of 1930 is legal and not ultra vires: *A I R* 1927 *Cal* 496, *Foll.* [P 264 C 2]

(e) Bengal Prisons Amendment Act (6 of 1930) — Executive is invested with final power.

Under Bengal Act 6 of 1930, the executive is invested with the final power to determine which members of the class are to be dealt with under the statute. [P 266 C 1]

(f) Bengal Prisons Amendment Act (1930) — Fraud — Proof of — Upon Act, must be proved with precision.

Mere suggestion that certain officials were actuated by ill-will or might have supplied false information during the course of the inquiry is inadequate to found a case of fraud upon the Act: *Sirron's case* (1916), 2 *K B* 742, *Ref.* [P 267 C 1]

(g) Bengal Prisons Amendment Act (6 of 1930)—Act empowers Local Government to detain persons on reasonable ground—High Court has no power to entertain question of reasonableness of the grounds.

Whether the Government was right in detaining a particular person is not a question is for the High Court to determine. The statute leaves the decision entirely to the Local Government. If the Local Government is of opinion that there are reasonable grounds to proceed under Act 6 of 1930 they may. No discretion is left to the High Court to enter into the question whether the Local Government have reasonable grounds for their action. [P 268 C 1]

B. K. Chaudhury and *Purnendu Sekhor Basu*—for Petitioner.

Khondkar—for Opposite Party.

Ameer Ali, J.—We are called upon to consider certain action of the executive taken in pursuance of S. 2, Act 6 of 1930. Mr. Chaudhury pressed us not to allow our decision to be influenced by the fact that in one event the executive might be embarrassed. His apprehension was and remains groundless. We are not concerned with the necessities either of the executive or of the subject. We are concerned only to weigh the legal rights of the subject against the legal rights of the executive. I am prepared further to assume that the exercise cf powers under emergency legislation in spite ef every precaution is likely in certain cases to produce hardship. This may or may not be such a case. This Court, however, does not remedy injustice in the abstract. We are here to enforce legal rights and to remedy legal wrongs. It will, I think, be convenient first to summarize the facts in order of date. I will state first the actual facts, either established or conceded, and then the inferences which Mr. Chaudhury has asked us to draw, and upon which he has based his case.

The actual facts are as follows: The petitioner is a shop-keeper at Ranchi. On 15th February 1933, he was arrested without a warrant at Ranchi in pursuance of a letter dated 13th February 1933, merely stating that his arrest was required in connexion with a conspiracy case in Calcutta. On 16th February he was brought to Calcutta and remained under police custody. On 3rd March 1933 he was sent to Alipore Jail. On 3rd March 1933 an application by him for bail before the Chief Presidency Magistrate was refused. The case was fixed for 9th March and it is said without notice to the petitioner's lawyers, he was discharged on 4th March. On the same day or a day later he was sent up before the Additional District Magistrate of Alipore and an application for bail was made to that Magistrate and was again refused. On 1st April 1933 he was discharged. He was then arrested under S. 4 (1), Act 6 of 1930 and was committed to jail under an order which is Ex. A to the affidavit in opposition. The period of his custody was extended under orders which are also exhibited. On 9th May 1933 the order under S. 2 of the Act (the main object of attack in this case) was issued over the signature of the Officiating Additional Secretary to the Government of Bengal. That order is Ex. D. On 12th June there was a supplementary order (Ex. E) transferring the petitioner to Hijli. He was, in fact, removed on 7th July 1933. On 8th July 1933 took place the incident at Alipore Jail which has been referred to by my learned brother. On 10th July 1933 an application on behalf of the petitioner was made by his father. This is miscellaneous case No. 113 of 1933. It was headed:

"In the matter of S. 491, Criminal P. C., and in the matter of a writ of habeas corpus."

A rule was issued and the matter was heard on 28th August 1933 by C. C. Ghose, and Henderson JJ., who dismissed the application. The judgment is before us and has been relied on by the Crown. On 29th August 1933 the present petition was filed by the detenue himself and is miscellaneous case No. 137 of 1933. The allegations contained in the petition are almost identical, with a significant addition to para. 18 to which I shall refer again. There is, however, a difference as regards the reliefs claimed and a Rule was issued in the following form; first, to show cause why the petitioner should not be released; second, to show cause why a writ of habeas corpus should not be issued; and third, to show cause why an inquiry should not be made whether an offence under S. 124 (1), Government of India Act, had been committed. On the foundation of the actual facts above stated Mr. Chaudhury has built a superstructure of inferences. Mr. Chaudhury points first to the arrest at Ranchi and he contends, [relying upon the case of *Subodh Chandra* v. *Emperor* (1)] that the arrest was in itself illegal. He relies further upon events in Calcutta and Alipore especially the successive remands, the refusal of the applications for bail, and the fact that his client was twice discharged. Finally, he relies upon the incident at Alipore Jail on 8th July 1933. He contends that from these facts it should be inferred, first, that the police, in particular the Intelligence Branch, were the real movers in the matter from beginning to end; secondly, that the Intelligence Branch was actuated throughout by some wrong motive

1. A I R 1925 Cal 278=85 I C 913=26 Cr L J 625=52 Cal 319.

or malice; thirdly, that the whole series of events is to be regarded as a single transaction tainted throughout with the malice in question; and, lastly, that this Court should infer that full and fair information was not put before the authorities who under the Act in question are charged with the duty of scrutinizing the case of the detenue. He goes so far as to suggest the possibility of the Intelligence Branch being itself misled by inaccurate information supplied by informers.

I am not now considering whether these inferences are reasonable or legitimate. This must be postponed in favour of the important questions of law discussed before us. It will be seen that there are two main branches of the present application. The first is attack: that is to say, criminal proceedings in respect of an offence under S. 124, Government of India Act of 1919. The second is defence; relief either under S. 491, Criminal P. C., or alternatively by means of a writ of habeas corpus. The first is new matter and Mr. Chaudhury, by placing it in the forefront not only emphasized the difference between this application and the last application, but also succeeded in introducing an element of novelty into the second branch of his case, which has already been considered by more than one Bench of this Court. The two branches are however quite distinct and I propose to treat them separately. I will deal first with the branch of the case based directly upon S. 124, Government of India Act, in regard to which Mr. Chaudhury commenced and concluded his address. Until the conclusion of the hearing Mr. Chaudhury's argument took one form—a form which might be called quasi complaint, i. e., he was not prepared to prefer a definite complaint. His argument may be summarized as follows: (1) the subject alleges that the "misdemeanour" or "oppression" mentioned in S. 124, Government of India Act has been committed by certain persons unknown; (2) the subject contends that without substantive criminal proceedings the Court has power to hold a supplementary inquiry as to the legality of the subject's detention; and (3) that if on such an inquiry a prima facie case of illegal detention is made out this Court will order his release. Mr. Chaudhury himself has referred to this as "incidental relief."

Now, the answer to this particular aspect of this branch of Mr. Chaudhury's case is, I think, plain. Assuming that this Court will entertain a complaint for the misdemeanour of oppression, without a complaint, I know of no method by which, or principle on which, this Court will hold such a supplementary inquiry. Secondly, before the main criminal proceedings are concluded in which the vital question is whether the detention is or is not illegal, I consider it premature and illogical to ask this Court to order a release. This is not a case of an accused asking to be released on bail. The detenu is a complainant. At the last and in view of the difficulties indicated, Mr. Chaudhry expressed himself ready to prefer a complaint of "misdemeanour" under S. 124. The three persons against whom Mr. Chaudhury was ready to complain were, the officer responsible for the original arrest, the officer responsible for sending up the accused before the Magistrate in Calcutta and lastly the only respondent to the application the commandant of the Hijli Detention Camp. The Crown, through Mr. Khondkar, very properly offered to furnish the actual names of the officers concerned, as to which therefore there is no obstacle.

The answer of the Crown to this aspect of this branch of the case is as follows: first, that there is no jurisdiction given to this Court by the Government of India Act; secondly, that this Court on appeal is not the proper forum for a criminal complaint; thirdly, that there is no appropriate procedure; and, fourthly, that the complaint is frivolous and should be rejected. With regard to the first point, I agree with counsel for the Crown that the statute confers no new jurisdiction, but it appears to me that the Supreme Court by virtue of S. 14 of 13 Geo, 3, c. 63, did have jurisdiction to entertain complaints of misdemeanour in the same manner as the Court of King's Bench in England, and that such jurisdiction has descended to the High Courts. The matter has not been discussed before us, but as at present advised I see no reason to differ from the decision in *Faqir Singh* v. *Ali Mohammad* (2). The objection with regard to forum

2. AIR 1929 Lah 217=115 IC 428=30 Cr L J 460.

as also the question of procedure I propose to disregard. With regard to the latter, it appears to me that the complainant might have sought in aid S. 561-A, Criminal P. C.

Lastly, with regard to the merits or bona fides of this complaint, I agree with my learned brother that it should be rejected. The reasons will I think appear from that portion of my judgment relating to the second branch of Mr. Chaudhury's case under the head "propriety of the action" taken by the executive. I now come to the second branch of Mr. Chaudhury's argument, i. e., that based on the right of the subject to liberty or, in other words, the right of the subject not to be imprisoned without a trial. On this branch of the case a great deal of ground has been covered. Consequently I have found it necessary in the interest of perspective as also to distinguish what we have to decide, and what we have and what we have not decided, to formulate in a systematic manner the various contentions on either side. As the appropriate method, I have followed the analogy of pleadings in a civil action.

1. The subject alleges that he has an inherent right to freedom unless he has been imprisoned after lawful trial and that this right has been infringed.

2. The executive admits the right and the infringement, (i. e., it has not been contended in this case as it was in the case of *Girindra Nath Banerjee* v. *Birendra Nath Pal* (3) that there is no detention), but the executive claims to have acted in pursuance of statutory authority Act 6 of 1930.

3. The subject replies admitting that as a matter of form the action taken is authorized by the statute in question but alleging:

(a) that the statute itself is illegal, ultra vires. Alternatively, (b) that the action taken is an illegal use of the power provided by the statute. Alternatively, (c) that the action, oven if legal, constitutes an "improper" use of the power.

4. The executive in further reply, admits that ordinarily the Court has jurisdiction to investigate the three questions mentioned in the preceding paragraph, but in this case demurs to jurisdiction on the following grounds: (1) that there are only two methods of approach to the Court of law—writ of habeas corpus or alternatively S. 491, Criminal P. C.; (2) that writ of habeas corpus in India has been displaced—I use the word advisedly—by S. 491, Criminal P. C.; and (3) that S. 491 has been in turn shut out by S. 4, Act 8 of 1932, the Supplementary Act.

In the interest of clearness I have omitted two further preliminary points: first, that any application of this nature should be made to the original side of this Court. Second, that this application is barred by reason of *Application* 113 *of* 1933 having been heard and dismissed. With neither of these points, although for diffrent reasons, do I propose to deal.

5. The subject replies to the demurrer: (1) that S. 491 cannot displace the writ of habeas corpus and in so far as it purports to do so it is ultra vires; (2) that if it does displace the writ of habeas corpus then S. 4, Act 8 of 1932 in displacing S. 491 is ultra vires; and (3) again in the alternative that if the Supplementary Act is not ultra vires in displacing S. 491 then from the nature of the writ of habeas corpus jurisdiction to issue such writ must be taken to revive. Point (3) is really involved in point (1) and I do not propose to treat it separately.

6. The executive replies finally, first, that point 5 (1), that is to say whether S. 491 can lawfully displace the writ of habeas corpus, has been decided against the subject by this Court in the case of *Girindra Nath* v. *Birendra Nath Pal* (3); secondly, that point 5 (2) whether S. 4, Act 8 of 1932, is ultra vires, has also been decided by this Court in *Misc. Case* 113 *of* 1933.

7. Further, and in the alternative, i. e., assuming that the Court has jurisdiction to consider any of the three questions set out in the above, (1) that the main statute, i. e., Act 6 of 1930 is not ultra vires: decided by *Girindra Nath* v. *Birendra Nath* (3); (2) that the action taken was not illegal, and cannot be illegal: see *Pramila Gupta* v. *W. S. Hopkins* (4); and (3) that the action taken was not improper (that being the only question not covered by authority, and a question of fact).

3. AIR 1927 Cal 496=102 I C 647=54 Cal 727 =31 C W N 593.

4. AIR 1932 Cal 470=1932 Cr C 460=138 I C 358=33 Cr L J 609=36 C W N 669.

That, if I may so express it, is the state of the matter on the pleadings. It will be seen that there are in all 8 debatable points, 4 (2), 5 (1), 6 (1), 6 (2), 7 (1). 7 (2), 7 (3).

It will be seen further that it is contended by the Crown that the points relating to the preliminary objection to jurisdiction, i. e., 4 (2), 5 (1), 5 (2), 6 (1) and 6 (2) and two of the points relating to the merits, namely, as to the legality of the main statute, and the legality of the action, 7 (1) and 7 (2), have also been decided against the subject. In order to see how far this contention is correct I propose very shortly to examine the cases relied upon.

Ameer Khan's case (5) at pp. 438 to 444, 455 and 477, a case decided in relation to detention under Regulation 3 of 1818. It is nct for the moment necessary for me to discuss this case beyond noting Norman, J's decision that the power to issue a writ of habeas corpus is not confined to Presidency towns.

Rudolph Stallman's case (6), which related to action by the Executiue under S. 3, Act 15 of 1903, the Extradition Act. The point argued in that case by the Advocate-General was that the right to relief under S. 491 was displaced by implication owing to the existence of alternative procedure provided in the Extradition Act. The question whether a statutory provision expressly excluding exercise of powers under S. 491 would be legal or otherwise was not considered. *Sarno's* case (7) I shall discuss in dealing with "propriety of the action". *Govindan Nair* v. *Emperor* (8). Action had been taken by the Executive under Ordinance 2 of 1921. A writ of habeas corpus was issued by the Madras High Court to the jailor of Bellary, outside the Presidency town. The Madras Court took the view that jurisdiction to issue a writ of habeas corpus had not been displaced by any provision of the Criminal Procedure Code, and that S. 491 merely substituted a different form of procedure. Incidentally, at p. 924, the learned Judges refer without comment to S. 16 of that Ordinance which contains a bar identical in effect with that contained in the Supplementary Act. In 1927 the case of *Girindra Nath* v. *Birendra Nath* (3) was decided by this Court. The petitioner in that case was ordered under S. 11, Criminal Law Amendment Act, 1925, to reside under the surveillance of the respondent, a police officer residing in Canning Town. The petitioner applied to the Original Side of this Court for a writ of habeas and the respondent denied the fact of detention (See p. 596 of 31 *C W N*) Buckland, J., held that there was no custody or detention in fact. An appeal was preferred, and the Advocate-General on behalf of the Crown took a preliminary objection that the application to the Original Side being solely under S. 491, Criminal P. C. and therefore purely a criminal matter, no appeal lay (see p. 598 of 31 *C W N*).

The questions discussed on appeal, as will appear from the bottom of p. 606, (of 31 *C W N*) were four: (a) right of appeal, depending upon whether a writ of habeas Corpus had been displaced by S. 491; (b) whether a writ of habeas corpus could issue to the respondent, he being outside the jurisdiction; (c) whether the Act of 1925—the main Act was ultra vires; and (d) the question of fact, whether or not there was detention. It is desirable to see how these matters were treated in the judgment. The Chief Justice dealt first with question (c), whether the Act of 1925 was or was not ultra vires and answered it in the negative. (The discussion is from p. 606, Col. 2 to p. 611, Col. 2 of 31 *C W N*) He dealt secondly with question, (a) whether writ of habeas corpus had been displaced by S. 491, Criminal P. C. The discussion is from p. 611. Col. 2 to p. 614, Col. 1 (of 31 *C W N*). This question he answered in the affirmative. Question (b), whether a writ of habeas corpus could be issued outside the Presidency towns was referred to at p. 614, Col. 2 (of 31 *C W N*), but it was not decided. Question (d), detention or no detention was dealt with at p. 614, Col. 2 (of 31 *C W N*) and the finding of Buckland, J., upheld.

Parenthetically at p. 616 (of 31 *C W N*,) the Supplementary Act of 1925, which contains a provision similar

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5. (1870) 6 Beng L R 392
6. (1911) 39 Cal 164=12 Cr L J 505=12 I C 273.
7. (1916) 2 KB 742=86 L J K B 62=80 J P 389 =32 T L R 717=14 L G R 1060=115 L T 608.
8. A I R 1922 Mad 499=68 I C 838=23 Cr L J 614=45 Mad 922 (F B).

to that in the Supplementary Act 8 of 1933, was referred to but for reasons which I think are apparent, it was not necessary to discuss the validity of that provision. On 11th February 1931 *Bhagat Singh* v. *Emperor* (9) was decided by the Board. In my opinion it has no very direct bearing on the question before us. The short point was that S. 72, Government of India Act gave the Governor-General power in cases of emergency to issue Ordinances. He issued an Ordinance creating a special Court. A prisoner tried by such a Court applied to be released and contended that there was no emergency and that the Court should investigate this fact. The Board held that by the terms of the statute the Governor was made the sole authority to determine whether there was or was not an emergency.

In the same volume is to be found *Eshugbayi* v. *Officer Administering Government of Nigeria* (10). I shall discuss this case when dealing with the question of the "legality of the action" of the Executive. On 24th March 1932 *Pramila Gupta* v. *W. S. Hopkyns* (4) was decided by Panckridge and my learned brother now sitting with me. That was a case of action taken under the statute with which we are now concerned. It appears that it was conceded that there was no bar to the application of S. 491, Criminal P. C. (see p. 671, Col. 1 (of 36 *C W N*). In this case, *Eshugbayi's* case (10) was considered and distinguished. The last case, that of *Jitendra Nath Ghose* v. *Chief Secretary to the Government of Bengal* (11) was decided by this Court on 7th July 1932. It was again a case of action taken under Act 6 of 1930. The Supplementary Act had received the sanction of the Governor-General in Council on 5th April 1932, but was not relied npon, it being again conceded: see p. 1096, Col. 1 (of 36 *C. W. N.*) that S. 491 was available. The three points taken by the appellant were, illegality of the main statute, illegality of the action taken, and the "impropriety" of the action taken. On the first point, see p. 1097 (of 36 *C. W. N.*) Remfry, J., followed *Girindra Nath* v. *Birendra Nath* (3). On the second point, again distinguishing *Eshugbayi's* case (10) and following *Pramila Gupta's* case (4), Remfry, J., held that by the terms of the statute the Governor-General was the final authority to determine the class to which the Act should be applied, p. 1098, Col. 2 (of 36 *C. W. N.*). Lastly, with regard to the question of impropriety he pointed out that no proper case of impropriety had been pleaded or put before the Court, p. 1100, Col. 2, (36 *C. W. N.*).

In the light of the authorities above discussed I now proceed to give my decision on the debatable points already enumerated. On point 4 (ii), (the question whether S. 491 displaces the writ of habeas corpus) Mr. Chaudhury has *Govindan Nair* v. *Emperor* (8) in his favour and *Girendra Nath* v. *Birendra Nath* (3) against him. He has attempted to displace the latter case by reliance in particular on the repeal of Acts of 1872 and 1875, and also upon the English statute, the Habeas Corpus Act of 1862. Without the assistance of the discussion already referred to at pp. 611 to 614 (of 31 *C. W. N.*) it may be that I should not on this point have arrived at the same conclusion. In any event the decision is adverse to Mr. Chaudhury and is binding upon us. The second debatable point 5 (i), (whether S. 491, Criminal P. C., in so far as it displaces writ of habeas corpus is illegal) is again covered by the authority of *Girindra Nath* v. *Birendra Nath* (3). It is, I think, desirable to point out here that Mr. Chaudhury relies upon the taint of ultra vires at three distinct stages. First in order to show that S. 491 cannot legally displace the writ of habeas corpus (the point immediately under consideration), secondly in order to show that S. 4, Supplementary Act, is beyond the power of the legislature, lastly to show that the main Act is ultra vires. In each case the nature of the taint is substantially the same. In order to establish that taint Mr. Chaudhury was not content merely to repeat and elaborate the argument of Mr. B. C. Chatterjee in *Girindra Nath* v. *Birendra Nath* (3) based upon S. 80, Government of India Act. The new matter introduced included (1) S. 124, Government of India Act, 1919. (2) S. 65, Govern-

9. A I R 1931 P C 111=131 I C 415=58 I A 169=12 Lab 280 (P C).
10 A I R 1931 P C 248=132 I C 739 (P C).
11 A I R 1932 Cal 753=1932 Cr C 796=141 I C 866=34 Cr L J 245=60 Cal 364=36 C W N 1088.

ment of India Act, 1919. (3) The Habeas Corpus Act, 1862. With regard to S. 124, Government of India Act, Mr. Chaudhury's argument is roughly this: The main statute is "affected" because without S. 491 the machinery to render S. 124 effective will be wanting. Even if this be so, (and I am not clear that it is) such a circumstance would not, in my opinion, "affect" the statute.

With regard to S. 65 "the unwritten law, etc., etc."—the argument of Mr. Chaudhury is based upon the interdependence of allegiance with the right to freedom. The view contended for was accepted by Norman, J., in *Ameer Khan's* case (5) and was rejected by Phear, J., upon appeal from that decision. I am unable to agree that any of the matters now under discussion affect the law which has been saved by S. 65, Government of India Act. With regard to the Habeas Corpus Act, 1862 it is not entirely clear that that statute relates to India. Assuming that it does, in my opinion, the statute confers no jurisdiction. It is merely a preventing or disabling enactment. In my view, had this statute been relied upon before the Chief Justice in *Girindra Nath* v. *Birendra Nath* (3) the decision would not have been different. I am therefore of opinion that on the point now under discussion we are again bound by that decision. The next debatable point is 5 (ii), (whether S. 4, Act 8 of 1933 in so far as it purports to deprive the Courts of all powers to investigate and interfere is ultra vires). There is no question here of implied displacement as in *Rudolph Stallman's* case (6). The language is specific.

In *Govindan Nair* v. *Emperor* (8) and *Girindra Nath* v. *Birendra Nath* (3) express prohibitions of similar nature were referred to but not considered. In Misc. Case No. 113 of 1933 however as I read the judgment, the application was dismissed on the ground that S. 4, Supplemental Act, constituted a valid bar to jurisdiction. On this question it appears to me, first of all, that logically nothing can deprive this Court of the power to examine the legality of the Supplementary Act. Indeed, whether the prohibition be contained in the main Act or in a Supplementary Act the prchibition itself must always be exposed to the scrutiny of the Court. But apart from this mechanical circumstance, in my opinion the fundamental question whether this Court can be thus deprived of its powers requires the most anxious consideration. The judgment in Misc. Case No. 113 of 1933 contains no reasoning and, speaking entirely for myself, had it been necessary to decide this question, I should not have been prepared, without the support of my brothers of the Full Bench to be a party to an abdication of power so absolute and so unconditional.

It is, as I have indicated, unnecessary to decide the point because the other question, i. e. with regard to the legality of the main statute is determined by authority, because further the question of the legality of the action has been decided by authority, and because, in my view, the question of "the propriety" of the action presents in this case no difficulty. The legality of the main statute [debatable point 7 (1)[has been established by the decision in *Girindra Nath* v. *Birendra Nath* (3). The argument to the contrary I have already referred to in dealing with the questions relating to the preliminary objection as to the jurisdiction. The legality of the action [debatable point 7 (ii)] is a matter which I have not yet discussed. There appear to me at least two possible lines of attack on the legality of action taken in pursuance of a statute: (1) That the action taken is on the face of it outside the powers given by the Act. That is not suggested here. (2) That on an examination of the facts it will be found that the particular individual dealt with is not a proper subject for the application for the Act.

The point taken with reference to the enactment in question may be expressed as follows: The subject asserts: "I am in fact not a conspirator and if the executive says I am, the executive must prove it." The executive replies "The legislature has made me the sole judge of that fact." The subject relies upon *Eshugbayi's* case (10). This case was relied upon for a similar proposition in the two cases in *Pramila Gupta* v. *W. S. Hopkyns* (4) and was distinguished, but, as pointed out by counsel for the Crown, the full nature of the difference between that case and a case of the kind before us was not fully demonstrated. In *Eshugbayi's* case (10) the statute defined

the class or object to which it was to be applied as follows: (a) Native Chiefs, (b) deposed, (c)-1 required by local custom to depart, alternatively (c)-2 considered by the Government undesirable. (a), (b) plus either (c)-1 or (c)-2 were essential ingredients. The executive notified (a), (b) and (c) 1. They did not exercise their jurisdiction under (c)-2. The subject contended:

"I am neither (a) nor (b) nor (c)-1. The point at issue in cases of the kind before us would have arisen if the Government had acted under (c)-2 and (a) and (b) had either been proved or admitted. To make the point clear suppose this particular Act read" Any member of the Bhadralok class believed by the executive to be a conspirator."

The two elements necessary would be that the man affected was (a) of the Bhadralok class, (b) the belief of the executive that he was a plotter. The subject would be entitled to assert : "I do not belong to the Bhadralok class" and that would be a matter for the Court to decide. The belief of the executive would not. This is the angle from which Remfry, J., has discussed the matter in *Jitendra Nath Ghose* v. *Chief Secy. to Govt. Bengal* (11) at p. 1098, Col. 2 of 36 *C. W. N.*). I myself prefer to regard it from a slightly different angle. The class affected is the Bhadralok class. The executive is invested with final power to determine which members of that class are to be dealt with under the statute. From whatever angle the matter be regarded, the decision in *Jitendra Nath* v. *Chief Secy. to Govt., Bengal* (11), covers the point, and I agree with the reasoning which underlies it. The last debatable point, 7 (iii), is the question of the "impropriety" of the action taken. I have already referred to the inferences of fact which Mr. Chaudhury has asked us to draw in order to support this aspect of his case. I will deal with them in a moment, but before doing so, desire to say something on the question of principle. Mr. Chaudhury contends that the Court has jurisdiction to investigate and decided whether the power although legally exercised has been exercised bonafide. He refers to the word "improper" in S. 491 and to the decision in *Sarno's* case (7). *Sarno's* case (7) was followed by Remfry, J., in *Jitendra Nath* v. *Chief Secy. to Govt., Bengal* (10), when the phrase used is "fraud upon the Act." It is apparent that the English Courts in their anxiety to do justice between the subject and executive have asserted and maintained a residuary power to interfere in certain cases notwithstandiug that the action taken is technically legal.

It seems to me that the following may be distinguished upon principle— wrong information, whether intentionally false or otherwise, malice or ill-will on the part of some officer in the departments or services concerned— improper or dishonest application of the statute itself, i. e., use of the statute for a purpose not contemplated by the statute. As regards wrong information this must normally constitute a case of "illegal exercise" of power and be governed by principles already discussed. As regards malice. I agree with Mr. Chaudhury that under certain circumstances the malice of a subordinate would fall to be imputed to the higher authorities, but under what circumstances and what kind of malice; *Sarno's* case (7) affords some answer to these questions. The point in that case was this : An alien had been externed under certain wartime legislation. The man had been shown to be an immoral scoundrel. He applied for habeas corpus on the ground that from the preamble and certain sections of the Act it was apparent that the statute was directed against aliens dangerous to the realm. He said :

"The executive has shown me to be a scoundrel, but it has not shown me to be dangerous. The statute has been misused."

The Chief Justice, while affirming the jurisdiction to investigate this question, disposed of or circumvented the application by holding that, in time of war, a mere scoundrel constituted a menace to the realm because he would monopolize forces of the Crown required for more essential services. This decision appears to me to indicate the type of case to meet which the English Courts have asserted jurisdiction, i. e., cases involving some eletment cf misuse of the statute itself. I conclude with an example, in itself trifling but which illustrates the distinction I have in mind. Suppose that by statute the Commissioner of Police is empowered to extern any dancer whose performance is in his opinion likely to offend public

taste. Information is given by an Inspector out of revenge. That would not constitute a case of "fraud upon the statute. The dancer might prove that her performance was perfectly proper. That again, in itself, would not be enough, nor would it enable the Court to investigate the correctness or otherwise of the opinion of the Commissioner of Police. But supposing it came to the knowledge of the Commissioner of Police that the information was false, but that he had other reasons for desiring to extern the person in question, e. g., for writing inflammatory literature. The person in question had been sent for and told "unless you stop your inflammatory writing you will be externed." If such a case was made out in the petition, I conceive that the Court would proceed to investigate the matter and if true would not hesitate to interfere.

If I am correct on principle, I am of the opinion that the nature of the allegations here are not sufficient to found a case of fraud upon the Act. The mere suggestion that certain officials were actuated by ill-will or might have supplied false information during the course of the enquiry is, in my opinion, inadequate. Further, as pointed out by my learned brother, such allegations as there are, are of the vaguest character. In this respect I entirely agree with the observations of Remfry, J., in *Jitendra Nath* v. *Chief Secretary to the Government, Bengal* (11) as to the necessity for precision. Notwithstanding the above objections both on the matter of principle and on the matter of form, we have considered the facts and have come to the conclusion that the inferences which we have been asked to dra ware not justified. I refer specially to para. 18 of both petitions. That paragraph of the first petition contained an allegation that the police had taken action "in order to ruin the business of the detenu." The same paragraph of the second petition contains the following addition : "To ruin the business if the detenu does not give further information." No single fact has been proved in support of the charge in either form. The legality of the arrest at Ranchi is not in point. Indeed, the very facts upon which Mr. Chaudhury was reduced to rely established the absolute inadequacy of the materials at his command to found a case of fraud upon the statute. I refer to the incident, so much discussed, of Alipore Jail. On the merits therefore I agree with my learned brother that there has been no "improper exercise of power" adequately alleged or at all proved. The Rule therefore will be discharged.

M. C. Ghose J.—This is a petition by Pratul Chandra Mitra, who is detained in Hijli Detention Camp. His case is that he is being illegally and improperly detained there. Upon this petition a Rule was issued calling upon the Commandant, Hijli Detention Camp, to show cause why, (1) the petitioner Pratul Chandra Mitra should not be released ; (2) a writ of habeas corpus should not be issued for the productien of the body of the said petitioner in Court to be dealt with according to law; and (3) an enquiry should not be made whether an offence under S. 124 (1), Government of India Act has been committed, or why such other or further order should not be made as to this Court may seem fit and proper.

Mr. Chaudhury on behalf of the petitioner has given us an elaborate disquisition on the history of the prerogative writ of habeas corpus. But S. 4, Government of India Act 8 of 1932 lays down that

"the powers conferred by S 491, Criminal P. C., 1898, shall not be exercised in respect of any person arrested, committed to or detained in custody"

under the Bengal Criminal Law Amendment Act 1930, and the said Act as supplemented by Act 8 of 1932. This provision clearly excludes the petitioner from the benefit of S. 491, Criminal P.C. It is argued however by Mr. Chaudhury that independently of S. 491, Criminal P.C , it is open to the petitioner to make this application for the prerogative writ of Habeas Corpus. This question was fully discussed by Sir George Rankin, C. J., in the case of *Girindra Nath* v. *Birendra Nath Pal* (3), Relying upon that decision I have no hesitation to hold that in this case the petitioner has no right for a writ of Habeas Corpus apart from the provisions of S. 491, Criminal P. C. He was arrested by an order of the Governor in Council and ordered to be detained in Hijli Detention Camp under the powers provided by Bengal Act 6 of 1930 as supplemented

by India Act 8 of 1932, Act 6 of 1930 empowers the Local Government, whenever they are of opinion that there are reasonable grounds for believing that any person answers to a certain description as belonging to a certain criminal association etc., to have him by an order in writing detained in a detention camp. So long as that statute remains in force, it cannot be said that the petitioner's detention in Hijli Detention Camp is illegal or improper. Whether the Bengal Government were right in their decision to order the detention of the petitioner is not a question which is for us to determine. The statute leaves the decision entirely to the local Government. If the local Government be of opinion that there are reasonable grounds to proceed, they may proceed under the Act. No discretion is left to the High Court to enter into the question whether the local Government have reasonable grounds for their action. Grounds (1) and (2) of the Rule therefore fail.

The learned Deputy Legal Remembrancer has brought to our notice that a similar petition made by the father of the petitioner on his behalf was rejected on 28th August last by a Bench of this Court consisting of the Acting Chief Justice and Henderson, J. Mr. Chaudhury has commented on the facts of the arrest of the petitioner and urged that the police acted mala fide in respect of him and this Court ought to order an inquiry whether an offence under S. 124 (1), Government of India Act, has been committed. The facts in short are as follows : The petitioner is a young man who used to reside in Ranchi. He was arrested there on 15th February 1933 by the Police at Ranchi upon a request in writing which they received from the Calcutta Police. He applied for bail at Ranchi but his application was rejected by the Magistrate of Ranchi. It is urged that the Police at Ranchi had no authority to arrest the petitioner upon a mere request from the Calcutta Police without a proper warrant issued by a Magistrate and that the Magistrate of Ranchi acted illegally in not granting him bail. These criticisms against the police and the Magistrate of Ranchi do not touch the merits of the present case, namely, whether the petitioner is lawfully detained at Hijli Detention Camp.

On the material before us it cannot be held that the police or the Magistrate of Ranchi acted illegally. Upon arrest at Ranchi he was duly sent to Calcutta where the Calcutta Police on 16th February 1933 produced him before the Chief Presidency Magistrate on an allegation that they were investigating into a case of a serious criminal conspiracy and that they had reason to suspect that the petitioner was a member thereof. He was remanded to Hajat in Presidency Jail until 4th March when the police, it is said, were advised to lay their conspiracy case not before the Chief Presidency Magistrate of Calcutta but before the Magistrate of Alipore whereupon at the request of the police the case was withdrawn from the Court of the Chief Presidency Magistrate and the accused and the other men arrested in that case were taken to the Magistrate of Alipore who ordered their detention in prison until 1st April last when, it is said, the police had sufficient evidence against certain of the accused men against whom a charge-sheet was eventually submitted, but they had not sufficient evidence against the petitioner to put him on trial. They had however sufficient evidence against him to apply to the Local Government to pass an order of detention under Act 6 of 1930. It may be noted that under that Act the Local Government do not pass final order of detention without the opinion of two judicial officers of the rank of a District and Sessions Judge, who peruse all the papers and advise the Local Government on the matter. Upon these facts it cannot be said that any of the officers acted illegally or improperly so as to come under the provisions of S. 124 (1), Government of India Act.

It was urged that the father of the petitioner who wanted to interview his son was treated badly by the police and the jailor of the Presidency Jail. It appears that the father applied for an interview with the petitioner and some police officer wrote to him that he might interview his son at Presidency Jail on 8th July. Accordingly, on 8th July he went to the Presidency Jali and there he was told that he could not interview the prisoner unless a police officer was present but no police officer came and the poor father had to depart after waiting for about two hours and it further appears that the petitioner on 8th

July was not at all in the Presidency Jail but that he had been on the previous day sent to Hijil Detention Camp. These facts show that there were certain unfortunate mistakes by which the father of the petitioner suffered. These facts however do not touch the legality or propriety of the detention of the petitioner by the Local Government in Hijli Detention Camp. I am of opinion that all the grounds fail and this Rule must be discharged.

R.K. *Rule discharged.*

A. I. R. 1934 Calcutta 269

GUHA AND BARTLEY, JJ.

Habibulla Gazi—Appellant.

v.

Ananda Charan Kajuri and *others*—Respondents.

Appeals Nos. 1883, 1884 and 1887 of 1931, Decided on 24th August 1933, against decrees of Sub-Judge, Khulna, D/- 28th February 1931.

(a) Bengal Tenancy Act (1885)—Rent suit against registered tenant of permanent tenure fully representing tenancy—Estate created wakf and tenant appointed muttawalli but not redescribed in rent suit—Rent decree is effective.

Rent decrees were passed against *M* the registered tenant in respect of a permanent tenure; and this *M* who was the muttawali of a wakf estate created by his father, fully represented the tenancy in question, so far as the landlords were concerned, *M* was sued as the tenant responsible for payment of rent due in respect of the tenancy which appertained to the wakf estate of which *M* was the muttawali.

Held: that the fact that *M* was not described as the muttawali, was of no consequence, seeing that the tenancy was completely represented by *M* and the decrees passed against *M* were effective rent decrees and sales held in pursuance of those decrees were sales held in execution of rent decrees as contemplated by Bengal Tenancy Act.

[P 270 C 1]

(b) Practice—Second Appeal — Additional evidence by lower appellate Court not affecting right decision—High Court will not interfere—Civil P. C. (1908), O. 41, R. 27.

Where the reception of additional evidence by a lower appellate Court does not affect the right decision of question in appeal there is no question of interference by High Court in second appeal.

[P 270 C 2]

Syed Nasim Ali and *Radhicaranjan Guha*—for Appellant.

Brojolal Chakravarti, *Panchanon Ghosal* and *Mookunda B. Mallick*—for Respondents.

Judgment.—*S. A. No.* 1883 *to* 1888.—The plaintiffs in the suits out of which these appeals have arisen, prayed for khas possession of the lands in suit, on declaration of their title to the same. Halves of the lands cover the subject-matter of the suit in which Second Appeals Nos. 1884, 1885 and 1887 have arisen while the other halves were covered by suits giving rise to Second Appeals Nos. 1883, 1886 and 1888. The claims made by the plaintiffs in the suits were resisted by the contesting defendants; whose case was that the plaintiffs were not entitled to get khas possession of the lands in suit. According to the defendants the decrees in execution of which the lands in suit were purchased by the plaintiffs were not rent decrees, and the sales held in execution of those decrees were not rent sales, and did not pass the tenures to which the lands in suit appertained. The defendants further contended that they had protected interests in the lands in suit, and their interests were not affected by the sale of the tenures.

The Court of first instance dismissed the suits giving rise to Second Appeals Nos. 1884, 1885 and 1889 on the ground that regard being had to the proceedings in execution of rent decrees obtained against Mafijuddin in which there was an amendment of the decree sought to be executed, the amendment having been ultra vires, it rendered the sale in execution of the decree a nullity. There was therefore no sale under the law, in which the plaintiffs could be said to have purchased the lands in suit. The decision come to by the trial Court was reversed on appeal, and the learned Subordinate Judge in the Court of appeal below held on the materials before him, that the amendment made at the instance of Mafijuddi against whom the decree for rent was obtained, had not the effect of making the sale in execution of the decree a nullity. On the merits of the cases, the Court of appeal below came to the conclusion on evidence before it, that the defendants had not established that they had protected interests in the lands in suit, and passed decrees for khas possession against the contesting defendants.

The position which is clear from the judgments of the Courts below is that rent decrees were passed against Mafijuddi, the registered tenant in respect of a permanent tenure; and this Mafijuddi who was the muttawali of a wakf

estate created by his father, fully represented the tenancy in question, so far as the landlords were concerned. Mafijuddi was sued as the tenant responsible for payment of rent due in respect of the tenancy which according to the case of the contesting defendants appertained to the wakf estate of which Mafijuddi was the muttawali. If the tenancy was represented by Mafijuddi, as it was the case, upon the findings arrived at by the Court of appeal below, the tenancy passed at the sale held in execution of the decrees for rent payable by Mafijuddi in respect of the same. The fact that Mafijuddi was not described as the muttawalli, was of no consequence, seeing that the tenancy was completely represented by Mafijuddi. The position created by Mafijuddi's own acts, he having been anxious to have the decree for rent executed against him as the muttawali, could not change the nature of the rent decree passed against him representing the tenancy. In the above view of the cases, the suits in which Second Appeals Nos. 1884, 1885 and 1887 and the other suits giving rise to Second Appeals Nos. 1883, 1886 and 1888 stand on the same footing. The decrees for rent obtained by the landlords against Mafijuddi, without the addition of the description muttawali, were effective rent decrees, and the sales held in pursuance of those decrees were sales in execution of rent decrees as contemplated by the Bengal Tenancy Act. The sales held, passed the interest of the contesting defendants, unless it was in the nature of protected interest which could not be avoided by purchases in the position of the plaintiffs in the different suits in which these appeals have arisen. So far as the nature of the interest of the contesting defendants were concerned the Court of appeal below has on a review of the materials on the record come to the conclusion on facts that the contesting defendants in the suit had failed to establish their case before the Court that they had any interest which could be called protected interest under the law, in any portion of the lands in suit, excepting so much of the C. S. Plot No 1707 as is covered by P. S. Plot No. 104. The above exception relates to the lands in suit in which Second Appeals Nos. 1885 and 1886 have arisen.

The conclusion based on findings of fact arrived at by the Court of appeal below could not be challenged; but it was argued in support of Second Appeals Nos. 1884, 1885 and 1887, that the lower Appellate Court having reversed the decision of the trial Court on a preliminary point, should have sent the case back to the Court of first instance for decision on the merits. In view of the connection of the different suits before the Court with each other, and regard being also had to the position that the evidence on the record was complete in regard to all the cases, no useful purpose could have been served by directing a remand and we are convinced that the procedure was correct, regard being had to the fact and circumstances of the cases before us. The conclusions arrived at by the Court of appeal below on the evidence before it, appear to us to be unimpeachable in second appeal.

A point was raised in support of the Second Appeals Nos. 1884, 1885 and 1887, that there was no justification for the Court below in the matter of reception of additional evidence at the appellate stage It appears that records in execution proceedings were before the Court, and parts of those records were admitted in evidence and marked as exhibits by the lower appellate Court. All this was done with a view to ascertaining the real position so far as the so-called amendment of the decree for rent passed against Mafijuddi in which he was not described as the muttawali. In view of the decision arrived at by us on the question of the representation of the tenancy in question by Mafijuddi as indicated above, we do not attach any importance to the state of things showing clearly that it was at Mafijuddi's instance that the amendment of the description was made by the Court, executing the decree for rent. In our judgment the reception of additional evidence of the nature mentioned above, did not vitiate the decision of the lower Court in any way, and we are not also of opinion that the additional evidence referred to by the Court below could affect the right decision of the question of representation of the tenancy in question. The result of the conclusions arrived at by us, on the question raised in support of the appeals is that the appeals fail, and are dismissed with

costs to the plaintiffs-respondents. The hearing fee is assessed at 1 gold mohur in each of the six appeals.

S. A. No. 1889.—This appeal has arisen out of a suit for rent, in which the question in controversy between the parties concerned was whether the relationship of landlord and tenant existed as between the plaintiffs and the defendants in the suit. The question so raised was dependent on the decision on the question of title to the lands in respect of which rent was claimed, as raised in the suits out of which Second Appeals Nos. 1883 to 1888 of 1931 arose. In view of our decision in those appeals, and regard being had to the concurrent findings of fact arrived at by the Courts below against the plaintiffs-appellants to this Court, this appeal must be dismissed; and we direct accordingly. There is no order as to costs in this appeal.

V.B. *Appeal dismissed.*

A. I. R. 1934 Calcutta 271

MALLIK, J.

S. R. Varma and *another* — Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 168 of 1933, and Criminal Revn. No. 346 of 1933, Decided on 1st August 1933.

Calcutta Police Act (4 of 1886), S. 44—Dart game—Betting—Staking something valuable on thrower hitting certain mark is betting.

In the game of dart throwing there is no skill on the part of a person who stakes his money or something valuable on throwers hitting a certain mark. Staking money or something valuable on some future contingency or the happening of a certain event is betting : *A I R* 1933 *Cal* 8, *Expl.* [P 272 C 1]

S. K. Sen and *Probodh Chandra Chatterjee*—for Appellants.

S. K. Sen and *Satindra Nath Mukherjee*—for Petitioners.

Bir Bhusan Dutt—for the Crown.

Judgment. — These two cases were heard together. One is an appeal and the other is a revision case. In the appeal case, two men, S. R. Varma and Major Cunington, the former the proprietor and the latter the manager of a Carnival known as the Happy World, have been convicted under S. 44, Calcutta Police Act, and sentenced—Varma to a fine of Rs. 250 and Cunington to a fine of Rs. 75 by a Presidency Magistrate. In the revision case, two men S. M. Sen and Captain Tatum, the former the proprietor and the latter the manager of another Carnival known as the Victoria Carnival have been convicted by the same Magistrate under the same section and sentenced S. M. Sen to a fine of Rs. 75 and Tatum to a fine of Rs. 40. The two cases, it would appear, were with the consent of parties in a way heard together and the judgment was given to cover both the cases. This was done apparently because the charges were the same, the evidence practically the same in the two cases; the main points involved in both were the same and there were the same arguments in both the cases. Before me also, the two cases were heard together and this judgment will govern both the cases

What happened in the cases was this: on 16th January last, the police raided the two Carnivals and found going on in them what is known as the "dart-game". The modus operandi of the game was this: there was a fixed board with the numbers 1, 2, 3 . . . 10 displayed on it in several rows and there was a table also with the numbers 1-10 marked on it. Tickets, which would be purchased at the Victoria Carnival for Re. 1 each and at the Happy World at eight and four annas each, were placed on the table to cover some numbers on it by the thrower the man who would throw the darts as also by others who were holders of tickets. The thrower who also was one of the ticket-holders was given 5 darts with which to try to hit a number on the board. If any of the numbers covered on the table was hit, the holder of the ticket by which the number had been covered was to receive double the value of the ticket. Each holder of a ticket was entitled to get as many as 5 darts with which to try to hit a number on the board, but when more than one number was covered on the table, the total number of darts supplied was only 5 and could not be more than 5. When the police raid took place there were at the Happy World Carnival one A. B. Banerjee as the thrower and one Sachindra Chakrabartti as the other man who had covered with their tickets Nos. 8 and 3 respectively on the table and at the Victoria Carnival one Ratan Chand as the thrower and one Loke Chand Mohan as the other man who had covered with

their tickets Nos. 2 and 3 respectively on the table. So far as Sachindra Chakrabarty at the Happy World and Loke Chand Mohan at the Victoria Carnival were concerned, they took no part in the throwing of the darts and their only chance lay in the thrower hitting their number, namely on the board 3, they themselves having no hand whatever either in the throwing or hitting. There was no question of skill of any kind on their part so far as they were concerned.

Now, if a person stakes money or something valuable on some future contingency or the happening of a certain event he is said to "bet". In the present case, Sachindra and Loke Chand by purchasing their tickets staked their money on the happening of a certain event, viz., the thrower hitting not his own number but their number, viz., 3, on the board. This was clearly "betting" and Mr. Sen with his usual fairness and frankness admitted that it would be so. But his contention was that these men were acting in concert with the thrower, that Sachindra and Banerjee at the Happy World and Ratan Chand and Loke Chand at the Victoria Carnival had pooled their resources together and that as the dart-game has in the case of *Saligram Khettry* v. *Emperor* (1) been held to be a game of skill, the action of Sachindra and Loke Chand amounted to no offence and that being so, there was no betting going on at the time and the convictions under S. 44, Calcutta Police Act, were wrong. I could understand the force of this argument if there were sufficient materials on the record of the cases to show that the two men Sachindra and Loke Chand were acting in concert with the throwers and had pooled their resources together having come to an arrangement that all the profits and losses would be shared by them with the throwers. But beyond the statement of the accused themselves and the fact in the Victoria Carnival case that Ratan Chand and Loke Chand Mohan were residents of the same place there was nothing on the record to indicate any such arrangement. In the absence of sufficient materials on the record from which a reasonable inference could be drawn that Sachindra Chakrabarty and A. B. Banerjee in the Happy World case and Ratan Chand and Loke Chand Mohan in the case of the Victoria Carnival had pooled their resources together and had come to an arrangement that the profits and losses were to be shared by them, there was no escape from the mischief of the offence of betting. I would therefore hold that there was betting and that being so, the appellants in the Happy World case and the petitioners in the Victoria Carnival case were rightly convicted under S. 44, Calcutta Police Act. The appeal is dismissed and the rule is discharged.

R.K. *Appeal dismissed.*

1. A I R 1933 Cal 8=1933 Cr C 25 = 141 I C 593=34 Cr L J 168.

A. I. R. 1934 Calcutta 272

GUHA AND BARTLEY, JJ.

Emperor

v.

P., a pleader

Civil Ref. No. 5 of 1933, Decided on 27th July 1933.

Legal Practitioner — Allegation against pleader making him liable to criminal prosecution—Action should be by prosecution and not under Legal Practitioners Act.

Where the allegation against a legal practitioner amount to a charge rendering him liable to criminal prosecution, the correct procedure to be followed is that proceedings under the Legal Practitioners Act should not be taken, but that if it was thought necessary to take action it should be by way of criminal prosecution.

[P 272 C 2]

S. C. Basak—for Reference.

Phani Bh. Chakravarti—for Pleader.

Judgment.—On the facts of the case we are not inclined to accept the recommendation made by the learned District Judge for suspension of the pleader concerned. The facts of the case as also the decision recorded by the learned Judge make it clear that the misconduct for which the pleader was charged rendered him liable to criminal prosecution. In consonance with the view taken by this Court in cases of this description, we hold that where the allegation against a legal practitioner amounted to a charge of criminal prosecution, the correct procedure to be followed is that these proceedings should not be taken but that, if it was thought necessary to take action, it should be by way of criminal prosecution. We are clearly of opinion that the facts and circumstances of the case as they appear from the materials placed before us, do not justify institution of criminal proceeedings against the

pleader. In our judgment the proceedings initiated by the learned District Judge under the Legal Practitioners Act in the case before us should not have been started at all; and in that view the Reference is rejected. It is stated to us that the pleader concerned is already under suspension under orders of the learned District Judge. The ad-interim order of suspension made by the learned Judge is cancelled.

R.K. *Order accordingly.*

A. I. R. 1934 Calcutta 273

LORT-WILLIAMS AND M. C. GHOSE, JJ.

Ram Sumer Ahir and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 210 of 1933, Decided on 26th July 1933, from order of Addl. Sess. Judge, Alipore.

(a) Criminal Trial — Charge to jury — Personal attacks on the complainant in veiled language—No connected narrative in charge—No attempt to marshall and sift evidence against accused—No direction about relative values of evidence—It is misdirection to the jury.

Where in a criminal trial while charging the jury the Judge attacks in veiled language with double meaning, the character of the complainant in order to disparage him and his case in the eyes of the jury, gives no connected narrative nor makes any attempt to marshall and sift the evidence against the accused nor directs the jury about its relavence or value or what offences it discloses it is a misdirection to jury. [P 275 C 1]

(b) Criminal Trial—Private defence—Right of stranger putting furniture in the house—Owner can put it out without going to any Court—Force can be used to resist trespassers if necessary and no question of private defence on the part of trespassers arise.

In pursuance of a civil decree the complainant took possession of a certain building and put their locks on. After some days the locks were found to be broken open and some furniture put in. The complainant put out the furniture and occupied the building peacefully and easily, whereupon the accused persons came along with lathis and iron bars. The complainant and his men used force to resist the trespassers :

Held : that the complainant was within his rights to remove the furniture in a peaceful manner without going to any Court either civil or criminal, as there was no question of retaking possession and there could not be any question of resistance, which might lead to a breach of the peace. If anyone tried to come upon the premises while the complainant's men were there they would be trespassers and his men would have every right to use force if necessary to resist them. The accused who were trespassers could not avail themselves of the right of private defence. [P 276 C 1, 2]

Cammel and *Bir Bhusan Dutt*—for Appellant.

Khundkar and *Nirmal Chandra Chakravarty*—for the Crown.

Lort-Williams, J. — The appellants were charged with offences under Sections 147, 148, 302 and 147/109, Penal Code. They were tried with two other accused by the Additional Sessions Judge at Alipore and a jury. Ram Sumer Ahir alias Matabadal was convicted of offences under Ss. 148 and 323, and sentenced to imprisonment for two years and one year respectively, to run consecutively, the other appellants were convicted under S. 147 and sentenced each to imprisonment for two years, and the other two accused were acquitted.

The case for the prosecution was, that the complainant Mr. J. Choudhury, who is a member of the English Bar, an Advocate of the Calcutta High Court, Editor of the Calcutta Weekly Notes and a respected citizen of Calcutta, is the owner of certain property called Nos. 1, 2 and 3 Sarba Mangala, Hat Lane. He obtained a civil Court decree for ejectment and vacant possession against one Ram Gopal, and on 3rd July 1932 the Nazir having obtained specific instructions from the Court, removed the furniture and live-stock into the road adjoining and gave vacant possession to Mr. Choudhury's pleader, Mr. Manujendra Dutta, and his accountant Sanat Kumar Bose, and they locked up the premises, erected fences and put two Nepali durwans in charge. Later the same day, one of the accused who was acquitted, Gobinda Singh the father of Ram Gopal, came with others broke the locks and the fences, chased the Nepali durwans away, and put back into the premises some of the furniture and cattle which had been removed by the Nazir. Mr. Choudhury reported these matters to the police at Chitpur saying that he had given orders to replace the locks, and asked for protection, and that Gobinda be warned not to trespass on the premises. Owing to the Rath Jatra holiday, the police did nothing until 7th July.

The decree for ejectment was the culminating step in a long series of harassing proceedings which Mr. Choudhury had been compelled to institute, in order to enforce his rights against Govinda. In 1920, Govinda had mort-

gaged these and other properties to Mr. Choudhury for about a lakh of rupees. In 1925 Mr. Choudhury obtained an order for possession and the Nazir had to forcibly eject Gobinda's tenants. The premises remained vacant under guard until 1927, when Mr. Chaudhury allowed Ram Gopal to re-enter on agreeing to re-purchase the properties, but he failed to pay, which resulted in another suit, followed by further proceedinge in ejectment. Later in 1927 Mr. Choudhury obtained a mortgage decree for 1½ lakhs, and brought the properties at auction in part execution of the decree out of which Gobinda still owes him Rs. 13,000.

On 7th July, Mr. Choudhury sent his men in charge of his accountant Sanat, to replace the locks and the fences, and he sent his pleader Mr. Manjendra Dutta to see that everything was done in accordance with law, and with instructions to send for the police if any one was found living on the premises. Also he sent his Nepali durwans to protect his property and his men, in case they were attacked. In all about a dozen men were taken, including Nepali and Hindu durwans and coolies, Gangadhari his head durwan, who had been in Mr. Choudhury's service for 35 years, Sanat and the pleader Mr. Dutta. One or two of the Nepalis carried Khukris, as is their custom.

Sanat went first to the thana and two constables were deputed to accompany them. When they got to the premises they found no one there, but the locks and fences had been broken, and some broken furniture had been put back into one of the huts in No. 3, and some cattle were in the compound. Sanat told the men to remove them and take them to the thana, but the police disapproved of this procedure because no order had been obtained for this, and they returned to the thana. Just as the men began to remove the things, the appellant Matabadal came up with an iron pipe in his hand and objected to the removal. No notice was taken of him, so he immediately called up a dozen or more carters who entered No. 3 armed with lathies, dhandas or iron rods, whips and sticks, shouting "*maro sala*" and "*sala loke nikalo*." They said they were Govinda's men. Soon after Govinda arrived with 20 or 25 more men. He told them to beat the durwans. Matabadal first struck the pleader on the forehead with the iron rod, then others hit him with a lathi and he became unconscious. Afterwards Matabadal struck down Gangadhari in the yard with the iron rod, and he fell senseless, with a fractured skull, from which injury he died in hospital during the afternoon of the same day. Most of Mr. Choudhury's men ran away when the attack commenced. There was no evidence that any of them used arms on their aggressors, even in self-defence. One of the Nepalis flourished his khukri to prevent a number of men from attacking him with lathis and iron bars. Eventually, Govinda's men went away, and the matter was reported to Mr. Choudhhry, and by him to Mr. Colson, the Commissioner of Police.

In this case there has been a serious miscarriage of justice and this has been brought about owing to the unusual and improper bias and partiality shown by the Judge, his misconception of the law, his mismanagement of the trial and his misdirection of the jury. Owing to these errors, he seems to have allowed himself to become obsessed with resentment at some supposed misdeeds on the part of the complainant and his agents and servants, and this obsession obscured his vision and filled his mind with a completely distorted conception both of the law and the facts. In fact he appears to have realised this himself, because he thought it necessary at one point in his charge to reassure the jury, and tell them that they must not think that he was summing up against the prosecution in order to bias them in any way. Thus he refers to Mr. Choudhury as,

"a man of some eminence in the world (but you are not concerned with that) with considerable knowledge of law and a great deal of wealth,"

in a way which was certainly not intended to improve his position in the eyes of the jury. The accountant Sanat is referred to as "one of his underlings." The furniture was "dumped" on the road. The police "decline to countenance this procedure at all."

"The first thing he did remarkable was that he went to Mr. Colson, the Commissioner of Police. Why did Mr. Chaudhury go to the Commissioner of Police? A suggestion has been put forward by the defence and the expression unholy alliance between Mr. Chaudhury and the Police has been used Gobinda.

is an aged and influential person. We know that he was a person of considerable means because Mr. Choudhury is now the possessor of a plot of land worth 1 lacs of rupees which formerly had been Gobinda's. It is in evidence that Mr. Choudhury has not taken all his properties by taking Nos. 1, 2 and 3."

All these remarks were meant to disparage Mr. Choudhury and the case for the prosecution in the eyes of the jury, and there was no justification in the evidence for the double meaning, which they were intended to convey. Owning to this strong bias, the Judge has omitted to charge the jury properly. There was no connected narrative in his charge nor any sufficient attempt to marshall and sift the evidence against each of the accused, nor to direct the jury about its relevance or value, or what offences it disclosed. Much of the cross-examination was irrelevant and I can find no sign that any attempt has been made to check it. The result is that the essential facts which were really very simple, have been smothered and obscured under a mass of irrelevancy. The result was that Gobinda, against whom there was clear evidence that he was a participator in, and the prime instigator and director of this disgraceful affray, was acquitted and his servants and agents who simply obeyed his illegal orders were condemned, and even these could not be convicted of the offences, which according to the evidence, they had committed. The Judge commenced by withdrawing the charge of murder against Matabadal, and directing his acquittal on this charge, on the ground that there was no evidence against him. He had no right whatever to do this. There was clear and ample evidence of murder against Matabadal in the depositions of Amar Bahadur Nepali and Man Bahadur Nepali alone. What the Judge meant is incomprehensible unless he had forgotten that a person is presumed to intend the reasonable and natural consequences of his acts. To make matters worse he directed the jury that culpable homicide does not amount to murder if the accused,

"has been moved beyond himself by some zulum provided he has not put himself in it. It is not murder when it is provoked, if provocation is not sought. It is not murder when it is not intended, and it is not murder when the act in itself neither is likely nor is intended to cause death or such grievous hurt as may result in death."

This without any explanation of these excuses or any direction about what evidence (if any) there was upon which these excuses or any of them could be raised. There was not a tittle of relevant evidence to suppert any of them. The accused was the aggressor and in fault throughout. The provocation (if any) was not that which the law recognizes. His intention in view of the evidence ought to have been presumed. The result of this mishandling was, that this accused, for causing the death of Gangadhari, was not even convicted of an offence under S. 304, or even under Ss. 324, 325 or 326, but for simple hurt under S. 323, a verdict which was dishonest, perverse and wholly contrary to the evidence. On the question of possession, and the rights of an owner of property the Judge first misdirected himself and then the jury. Because Gobinda's men drove Mr. Choudhury's durwans away, and put a few sticks of furniture back into the premises, he seems to think that they regained possession, and that the furniture could not be removed legally, without a further decree, and further ejectment proceedings, and so on ad infinitum. The law is not quite so absurd as this. Thus he says that according to the prosecution case "Gobinda's party were in physical possession of the property" from 3rd June.

"You are not concerned with who is the legal owner of it you are concerned with actually who was in physical possession of it."

"Choudhury has no right to dispossess anybody whether rightly or wrongfully in possession, and to break the King's peace."

"Chaudhury's men were dispossessed on the 3rd according to the Crown case." And when the jury asked:

"If it is ascertained that the possession was taken before the 7th by Govinda's men, would then S. 147 apply against them,"

the Judge answered:

"The question of possession is material for this reason that if Gobinda's men had possession before the 7th, Choudhury had no right whatever to go and turn them out. His proper course was to go to the Magistrate, or to apply to the Courts, and if Gobinda's men, assuming that they were there, had no unlawful intention, or they did not intend to do a lawful act by unlawful means, there cannot be unlawful assembly.',

It would be difficult to imagine statements more inaccurate and more misleading than these. There was not a scintilla of evidence that Gobinda's

party were in possession, legal or physical, or that Mr. Choudhury was dispossessed after 3rd June, or that his men dispossessed anyone on the 7th, or that they broke the King's peace. Nor was it possible that Gobinda's men on the 7th, in what they did, could have had no unlawful intention, or did not intend to do a lawful act by unlawful means. There was no evidence to show who put back the furniture on the 3rd or subsequently, when Mr. Choudhury's men came on the 7th no one was on the premises nor did Gobinda's men claim that the furniture belonged to them. From their words and actions it might be inferred that they were protesting and acting in the interest of others who were absent. Whoever put the furniture in, were trespassers and had trespassed on Mr. Choudhury's property, and he had every right to put it out, without going to any Court, either Civil or Criminal. No one being upon the premises no question of retaking possession arose, and there could be no question of resistance, which might lead to a breach of the peace. And if anyone tried to come upon the premises while Mr. Choudhury's men were there, clearly they would be trespassers, and his men would have every right to use force if necessary to resist them.

But even assuming that some one had taken possession of the premises on the 3rd, and had put some furniture in and left it there, and Mr. Choudhury's men went in on the 7th and put it out, in their absence, their action would be in accordance with law. The law upon this point is discussed in Mayne's Criminal Law of India, Edn. 3, p. 531 and is contained in S. 141, I. P. C., Cl. 4. It is founded upon 5 Ric. 2, Ch. 7 which runs:

> "and also the King defendeth, that none from henceforth make any entry into any lands and tenements, but in case where entry is given by law, and in such case not with strong hand, nor with multitude of people but only in peaceable and easy manner."

Thus if anyone is in wrongful possession of his property, the landlord in taking or obtaining possession must not do so by means of criminal force or show of criminal force. But if he can obtain it in a peaceable and easy manner, he has every right to do so, even though this may involve the "peaceable and easy" ejectment of anyone found on the premises.

In the present case even if it be assumed that Mr. Choudhury lost possession on the 3rd, and that the presence of the furniture constituted the possession of another, he regained possession both peaceably and easily, because no one was on the premises to resist, no one was present upon whom criminal force or show of criminal force could be imposed. It was after possession had been obtained that the affray commenced which was the subject matter of these proceedings and it is this vital distinction that the Judge failed to appreciate. Gobinda's men were not in possession, they came from outside. They trespassed upon Mr. Choudhury's property, of which his men had regained possession and brutally attacked them. All that the latter did was either to defend themselves or to run away. It is clear therefore that no question of private defence such as has been argued on appeal could arise.

In spite of the Judge's charge, which fell little short of a direction to acquit all the accused, the jury convicted some of them, as already stated, and though the Judge was constrained to admit that the verdict substantially confirmed the case for the prosecution, he felt it his duty to comment severely upon the conduct of Mr. Choudhury "who appears to have forgotten his duties as an officer of the High Court of Justice of England" and that of Manujendra Dutta, pleader, which "was unprofessional and highly reprehensible." There was no justification whatever for this castigation, both Mr. Choudhury and Mr. Dutta having acted with propriety, under great provocation. What Mr. Choudhury's duties were as an officer, and how and why he could be described as an officer of the High Court of Justice of England, is as difficult to understand, as the Judge's attitude throughout this trial.

The only question which remains to be decided is, whether this case ought to be sent back for a new trial. In view of the fact that the Chief offender Gobinda has been acquitted and cannot be retried, and that further proceedings would entail much inconvenience, delay and expense, which ought not to have been necessary we will not direct a new trial but dismiss this appeal. The ap-

pellants who are on bail, will surrender and serve out the remainder of the sentences imposed upon them.

M. C. Ghose, J.—I agree.

R.K. *Appeal dismissed.*

A. I. R. 1934 Calcutta 277

GUHA AND BARTLEY, JJ.

Nijibal Islam Molla—Plaintiff—Appellant.

v.

Golam Afsar Molla and *others*—Defendants—Respondents.

Second Appeal No. 2103 of 1931, Decided on 4th July 1933, from decree of Addl. Dist. Judge, 24-Parganas, D/- 31st March 1931.

Civil P. C. (1908), S. 47—Rent suit—Cosharer landlord impleaded as defendant obtaining kabula from tenant before sale of tenancy in execution of rent decree—Plaintiff purchasing tenancy in execution of decree and suing for khas possession—Suit is not barred by S. 47 as against co-sharer—Bengal Tenancy Act (8 of 1885), S. 148-A.

The plaintiff landlord had impleaded as defendants, in a suit for rent, the tenants as well as cosharer landlord. Before the sale of the tenancy in execution of the rent decree, the cosharer defendant obtained a kabula from the tenant. The plaintiff himself purchased the tenancy in Court auction and sued for khas possession of the lands.

Held: that as between plaintiff and the cosharer landlord there cannot be any, and there was no question relating to the execution of the rent decree, nor was there any question relating to the discharge or satisfaction of the rent decree. The decree was for rent, and the liability to satisfy the decree was in the tenant defendant or her representatives, and not in defendant 1 the co-sharer landlord. If, therefore, there was no liability in defendant 1 to satisfy the decree for rent, as there was none, no question of execution, discharge or satisfaction of the decree could possibly arise as between the plaintiff on the one hand and defendant 1 on the other. Hence the suit for khas possession, so far as it was directed against defendant 1, could not be held to be one barred by the provisions contained in S. 47: *A I R* 1926 *Cal* 793 (*F B*), *Dist.*

[P 278 C 1, 2]

Brajalal Chakrabarti and *Heeralal Chakrabarti*—for Appellant.

Nasim Ali, *Farhat Ali*, *Sarojekumar Maiti* and *Birajmohan Majumdar*—for Respondents.

Judgment.—The plaintiff in the suit, in which this appeal has arisen, prayed for khas possession of the lands in suit, appertaining to a tenancy held at one time by Gandhari Bewa, predecessor-in-interest of defendants 2 and 3. According to the plaintiff, the lands appertaining to the tenancy were sold in execution of a rent decree obtained by him, in which defendant 1 in the present suit was made a defendant, as a co-sharer landlord, with a view to the plaintiff's obtaining an effective rent decree, in execution of which the tenancy could be sold. Defendant 1, it appears obtained a kabula from Gandhari Bewa, the tenant, before the tenancy was put to sale in execution of the decree for rent obtained by the plaintiff against Gandhari Bewa. It further appears that a suit brought by defendant 1 for a declaration that the sale in execution of the decree for rent obtained by the plaintiff was not binding on him was dismissed. Defendant 1, however, succeeded in getting possession of the lands in suit, after they were sold in execution of the rent decree against the tenant, Gandhari Bewa. The sale in execution of the decree in favour of the plaintiff, at which the plaintiff was the purchaser, was held on 16th July 1919, and it was confirmed on 4th September of that year.

The suit, out of which this appeal has arisen, was instituted by the plaintiff on 6th October 1928. In view of the question for consideration in this appeal by the plaintiff, whose suit has been dismissed by the Courts below, on the ground that S. 47, Civil P. C., was a bar to the same, it is not necessary to consider the defence of the contesting defendants in the suit, other than the one raised by defendant 1. The defence raised by this defendant was that the plaintiff as a decree-holder auction-purchaser should have come in under S. 47, Civil P. C. for possession of the lands in suit, and as such, the suit as instituted by the plaintiff was not maintainable. The Courts below have, on the authority of the decision of a Full Bench of this Court in *Kailash Chandra* v. *Gopal Chandra* (1), held that the question for determination in the present case was a question arising between parties to the suit for rent brought by the plaintiff, and was also a question arising between parties relating to the execution, discharge or satisfaction of the decree obtained by the plaintiff; and, as such, it was incumbent upon the plaintiff, the decree-holder auction-purchaser, to come in by a proceeding under S. 47, Civil

1. A I R 1926 Cal 793=95 I C 494=53 Cal 781 (FB).

P. C., for delivery of possession, and he not having done so, the suit, as instituted, was not maintainable, and was, in that view of the case, dismissed.

There is no doubt that the suit, as between the plaintiff and defendants 2 and 3 was concerned, was clearly barred, as they were the representatives of Gandhari Bewa, the tenant against whom the decree for rent was obtained by the plaintiff, and the lands appertaining to which were in due course purchased by the plaintiff at a sale in execution of the rent decree. The question, arising for consideration in this appeal, is whether defendant 1 in the suit could raise the defence that the plaintiff's suit for possession against him was not maintainable, regard being had to the provisions contained in S. 47, Civil P. C. In the absence of any authority of decided cases bearing on the subject, the point has to be decided as a question of first impression, the decision depending mainly upon the statutory provision as contained in S. 47, Civil P. C. The position has to be kept in view that defendant 1 was made a party defendant in the suit for rent, brought by the plaintiff against the tenant Gandhari Bewa, for the purpose of obtaining an effective decree for rent, regard being had to the provisions contained in S. 148-A, Ben. Ten. Act. There is no doubt that defendant 1 was a party to the suit for rent, and a necessary party too, according to the provisions of the law, to which reference has just been made. The question arising for determination in the present case, therefore, was a question between the parties to the suit for rent or their representatives.

The material question then is whether the relief claimed by the plaintiff related to execution, discharge or satisfaction of the decree for rent, as contemplated by S. 47, Civil P. C. In our judgment, the answer to the question must be in the negative. As between the plaintiff, who succeeded in obtaining a decree for rent against the tenant, and defendant 1—a co-sharer landlord, who was joined as a party defendant in the suit for rent for satisfying the requirements of law, as contained in S. 148-A, Ben. Ten. Act—there could not be any, and there was no question relating to the execution of the rent decree, nor was there any question relating to the discharge or satisfaction of the rent decree. The decree was for rent, and the liability to satisfy the decree was in the tenant defendant or her representatives, and not in defendant 1, the co-sharer landlord. If therefore there was no liability in defendant 1 to satisfy the decree for rent, as there was none, no question of execution, discharge or satisfaction of the decree could possibly arise as between the plaintiff on the one hand and defendant 1 on the other. In the above view of the point arising for consideration in the case before us, the decision of the Full Bench of this Court in *Kailash Chandra Tarapdar's* case (1), referred to above, has no application; and we fail to appreciate how reliance could be placed on the same by the Courts below.

As indicated above, the suit for khas possession, as brought by the plaintiff, so far as it was directed against defendant 1, could not be held to be one barred by the provisions contained in S. 47, Civil P. C. The decision given against the plaintiff appellant in this Court, dismissing his suit, must accordingly be set aside, and we direct that the plaintiff's suit be tried out, on the merits, in accordance with law. In the result the appeal is allowed, and the case is remanded to the Court of first instance for trial. The plaintiffs-appellants are entitled to get their costs in the litigation up to the present stage, including the costs in this appeal. Future costs after remand will be at the discretion of the trial Court.

K.S. *Appeal allowed.*

A. I. R. 1934 Calcutta 278

JACK AND NAG, JJ.

Raja Kirtyananda Singh Bahadur and *others* —Defendants—Appellants.

v.

Radha Benode Gupta—Plaintiff—Respondent.

Appeal No. 3067 of 1930, Decided on 30th August 1933, from decree of Sub-Judge, Malda, D/- 23rd August 1930.

(a) Hindu Law — Onus of proof — Prima facie absolute ownership of widow—Onus to prove that she had only widow's estate is on party who alleges it.

Where it was found on evidence that the widow held the land in absolute ownership and that her will bequeathing the property to her nephew was not contested by reversioners.

Held : that the onus to prove that she had only the widow's interest is on the party who alleges it. [P 280 C 1]

(b) Bengal Tenancy Act (1885), S. 148-A—(Before amendment)—Non-jonder of some of the cosharers as defendants in a suit for a declaration of title—Suit held not bad for non-joinder.

The plaintiffs brought a suit against defendants 1 to 5 (co-sharers of a zamindari) for a declaration of title to a certain land. The defendants 1 and 2 claimed that they had obtained the said land in rent suit brought by them alone against the predecessor in title to the plaintiff. The lower Court dismissed the suit against defendants 3 to 5. In appeal the remaining defendants 1 and 2 contended that the suit was bad for non-joinder of other defendants.

Held : that in the circumstances the suit was not bad. The rent decree was obtained by defendants 1 and 2 alone and they purchased the land in execution of that decree. The other defendants would not be bound by the decree in the present suit. The decree obtained by defendants 1 and 2 had the effect, under S. 148-A of a decree obtained by the entire body of landlords only as regards the remedies for enforcing it. So that the effect of the decree obtained under S. 148-A was not to make defendants 3 to 5 necessary parties in the suit. [P 279 C 2]

S. N. Banerjee and *Bijon Behari Mitter*—for Appellants.

Jatindra Mohan Chowdhury and *Amarendra Mohan Mitra*—for Respondent.

Jack, J.—This appeal has arisen out of a suit for a declaration of the plaintiff's title to the land in suit and for confirmation of possession therein. The plaintiff's allegation was that the land was originally held by one Dayamayi. Dayamayi had a nephew named Sibcharan who had two sons Tarini and Annada. The plaintiff purchased the interest of Tarini, Dayamayi having bequeathed her interest to Tarini. At the survey and settlement operation in 1891-92 the land was recorded as being held by one Sibcharan. Defendants 1 and 2 claim that the land is within the ambit of their zamindari and in 1914 they instituted a rent suit against Tarini and Annada and got a decree. In execution thereof they purchased the land and took symbolical possession through the Court. The plaintiff now maintains that the decree obtained by defendants 1 and 2 was fraudulent and collusive and that the land had been held by himself and his predecessors Dayamayi and Tarini all along rent-free and that he is still in possession rent free and his right cannot be affected by the decree and the sale. The suit was decreed by both the Courts below as against defendants 1 and 2..

In this appeal it is contended that the suit should be dismissed for defect of parties and inasmuch as the property being within the ambit of the zamindari of defendants 1 to 5 and the suit having been dismissed against defendants 3 to 5, it was not maintainable owing to defect of parties, against defendants 1 and 2 only. In the circumstances of the case I do not think that the suit should be dismissed owing to defect of parties. As pointed out by the Court of appeal below, the rent decree was obtained by defendants 1 and 2 alone and they purchased the land in execution of that decree. Defendants 3 to 5 of course will not be bound by the decree that the plaintiff appears to have the right of a declaration that he is in possession of the land and that he is not liable to pay any rent to defendants 1 and 2, that is all he obtained in this suit in the absence of defendants 3 to 5 and that is all he can claim. The plaintiff certainly has not obtained a declaration of his Nishkar title as against the other defendants 3 to 5 and they will not be in any way bound by this decree. Under the provisions of S. 148-A, Bengal Tenancy Act, before the amendment, which is applicable to this case, the decree obtained by defendants 1 and 2 has the effect of a decree obtained by the entire body of landlords, only, as regards the remedies for enforcing it. So that the effect of the decree obtained under S. 148-A is not to make defendants 3 to 5 necessary parties in the present suit. This matter was discussed at length when the Review Rule was decided.

The next point raised was that the onus was on the plaintiff to show that Dayamayi had an absolute estate. As regards this matter, in the first place, it has been pointed out that this is not a suit for ejectment or for establishment of any title except the right to possess the land rent free as against defendants 1 and 2 the plaintiff being admittedly in possession. It has been found that the predecessor of the plaintiff and the plaintiff have been in possession since Dayamayi's death in 1304 B. S., the plaintiff having been in possession since 1315, they have been claiming lakheraj right in the land. It is also found that he and his predecessor never paid any

rent for the land. So that even if it be held that the plaintiff's predecessor had no valid title in the land, the plaintiff appears to have established his right to hold the land free from rent by adverse possession. It is urged that the question of adverse possession was not taken in the trial Court and that the plaintiff should not be allowed to raise it at this stage. But we find that though relief was not claimed in the plaint on the ground of adverse possession it was stated in the plaint that plaintiff is holding the land adversely on a claim of lakheraj title for many years. In the circumstances I do not think that the defendants have been prejudiced by the fact that no issue was framed as to adverse possession in the trial Court.

Even if the onus be placed on the plaintiffs to establish the fact that Dayamayi had an absolute estate, the findings of fact seem to make it so probable that Dayamayi held an absolute estate, as to amount to proof. The will was executed in 1304. Dayamayi died that year and although there were admittedly reversioners, no claim was made by any of them as against either the plaintiff or his predecessor. In the circumstances there can be no doubt that Dayamayi's interest was not merely a life interest. She might have obtained the property by gift from her husband or otherwise and there is no necessary presumption that her right was merely a life interest. Another point raised was that the decree for rent against Sib Charan was res judicata. But the finding is that that decree was obtained by fraud. In any case the lower appellate Court has found that it has not been proved that the defendant in that suit was Sib Charan, the nephew of Dayamayi and the predecessor of the plaintiff. So that on this finding res judicata has not been established in this suit. The appeal therefore in so far as the plaintiff's claim to hold the land free from rent as against defendants 1 and 2 is concluded by findings of fact and this appeal is accordingly dismissed with costs.

Nag, J.—I agree.

R.K. *Appeal dismissed.*

A. I. R. 1934 Calcutta 280

GUHA AND BARTLEY, JJ.

Srish Chandra Ganguly — Plaintiff—Appellant.

v.

Esom Mussalli and *others* — Defendants—Respondents.

Appeal No. 1103 of 1931, Decided on 11th August 1933, from appellate decree of Addl. Dist. Judge, Jessore, D/- 17th November 1930.

(a) Bengal Tenancy Act (1885), Ss. 23, 25 and 155—Suit under S. 25 for ejectment—Tenant building public mosque on homestead land—User is not connected with agriculture.

Permissible user must be user connected, directly or indirectly, with the purposes for which tenancy was originally created. and attributable to the special needs of the tenant as an agriculturist. The erection of an edifice intended for public worship, whether such edifice is constructed on homestead or on agricultural land, cannot be held to be such user and in such a case. a landlord is entitled to an ejectment decree under S. 155 : 37 *I C* 249 and *AIR* 1920 *Cal* 263, *Foll.* [P 281 C 1, 2]

(b) Bengal Tenancy Act (1885), Ss. 25 and 155—Suit under S. 25 — Decree should be drawn in accordance with provisions of S. 153.

In a suit under S 25 for ejectment the decree should be drawn in accordance with S. 155. An injunction restraining a party permanently from allowing the public to acquire any right on the plaint lands is not a valid form of prohibition. [P 2 1 C 2]

Bireswar Bagchi and *Nirod Bandhu Roy*—for Appellant.

Nasim Ali and *Farhat Ali*— for Respondents.

Bartley, J.—This appeal is directed against the decision of the learned Additional District Judge, Jessore. reversing the decision of the Munsif, First Court, Jhenidah. The case in the plaint was that defendants 1 to 4 in the suit held an agricultural jama of Rs. 7-8-0 carved out of an original jama of Rupees 18-8-0. This jama included a plot of homestead land, plot No. 1720, on which the defendants lived. They went to live elsewhere, and in 1434 B. S. erected a hut on the plot, and allowed the Mahomedan public to use it as a mosque. Further, they attempted to collect money by subscription to build a pucca mosque. The suit was brought under S. 25, Ben. Ten. Act. In the first Court, the substantial defences were that no notices under S. 155, Ben. Ten. Act, had been served on the defendants; that the suit was barred by waiver and acquiescence as the landlord knew of, and assented

to the erection of the hut for the specific purpose indicated; that the plot on which it stood was homestead land; that by law, equity and custom, defendants were entitled to erect a mosque, and that there was no user rendering the land unfit for the purposes of the tenancy. The Munsif decreed the suit against defendants 1 to 4. The decree directed the removal of the hut, gave nominal damages of one pice to the plaintiff, and directed khas possession on default. Further defendant 1 to 4 were:

"permanently restrained from allowing the public to acquire any right on and from erecting or allowing anyone else to erect either a kutcha or a pucca jama ghar or mosque on the plaint lands."

On appeal, the learned Additional District Judge held, in agreement with the lower Court, that there had been a proper service of notices on the defendants, that the suit was not barred, that the original tenancy was an agricultural tenancy, that the plot on which the hut stood was a plot used as homestead land and comprised in the tenancy, and that the hut was a public mosque, erected

"with the obvious intent of using it for prayer as well as allowing neighbours of the same community to flock there and say their prayers there."

On these findings, he came to the conclusion that such user did not hamper in any way the purposes of the tenancy and consequently constituted no ground for ejectment under S. 25, Ben. Ten, Act. The short point therefore for decision in this appeal is whether on the facts found, the tenant has used the land in a manner which renders it unfit for the purposes of the tenancy. On full consideration of the question, we are constrained to take the view that the answer must be in the affirmative. We are unable to hold that the erection of a place of public worship on land comprised within a tenancy originally created for the purposes of agriculture is a species of user permissible under S. 23, Ben. Ten. Act. In our view, such permissible user must be user connected, directly or indirectly, with the purposes for which the tenancy was originally created, and attributable to the special needs of the tenant as an agriculturist. We do not think it can be said that the erection of an edifice intended for public worship, whether such edifice is constructed on homestead or on agricultual land, can be held to be such user.

As indicated in *Raj Kishore* v. *Rajani Kanta* (1), one of the tests to be applied in such a case is whether the purpose for which the land is used is or is not one totally unconnected with agriculture, and on the facts here found, there can be no doubt that there is no such connexion. In *Dhirendra Kumar* v. *Radha Charan* (2) it was held that the construction of a cremation ghat on an occupancy holding rendered it unfit for the purposes of agriculture, and even if it be conceded that in the present case the plot was bastu land, used, before it was abandoned, as the dwelling house of the raiyat, it cannot we think be maintained that the erection of a place of public worship on the site does not make it unfit for the purpose for which it was originally intended and used.

Our attention has been drawn on behalf of the respondent, to the case reported in *Hari Mohan Mitter* v. *Surendra Narain Singh* (3). In that case however it was distinctly found that the erection of the buildings in question was in conformity with the purposes for which an agricultural holding was let. We are therefore of opinion that on a correct application of the principles which emerge from a consideration of the law and of the reported cases, the decision arrived at by the learned Additional Judge cannot be supported. It follows that the plaintiff-appellant is entitled to a decree in accordance with the provisions of S. 155, Ben. Ten. Act. The decree passed by the Munsif is not however in strict accordance with the provisions of that section, nor is an injunction by which the defendants are permanently restrained from allowing the public to acquire any right on the plaint lands a valid form of prohibition.

The result of the conclusion arrived at by us therefore is that the appeal is allowed, the decision of the Court of appeal below, dismissing the plaintiff's suit is set aside, and a decree is passed in favour of the plaintiff in accordance with the provisions of S. 155, Ben. Ten. Act. The plaintiff's suit is decreed against defendants 1 to 4. They are to pay to the plaintiff the amount of

1. (1917) 37 I C 249.
2. AIR 1920 Cal 263=57 I C 758.
3. (1907) 34 Cal 718=34 I A 133 (P C).

Rs. 100 as compensation for misuse of the lands appertaining to the agricultural holding in suit. The misuse of it is capable of remedy; and the defendants are liable to be ejected from the holding in execution of this decree in the event of their non-compliance with the direction of this Court in the matter of payment of compensation mentioned above, and of remedying the misuse of the holding. Such misuse consisting in using plot 1720 mentioned in the plaint as a place of public worship, and raising a structure on the same which is used, or is meant to be used, as a public place of worship (a mosque) within two months from this date. As mentioned in the judgment of the trial Court, the plaintiff's suit is dismissed as against defendants 5 to 10. The parties are to bear their own costs in the litigation throughout. The records of the case are to be returned as soon as practicable.

Guha, J.—I agree.

R.K. *Order accordingly.*

A. I. R. 1934 Calcutta 282

MITTER AND GUHA, JJ.

Prokash Chandra Chakravarty and *others*—Appellants.

v.

Barada Kishore Chakraverty and *others*—Respondents.

Appeal No. 29 of 1933, Decided on 21st November 1933, from order of Dist. Judge, Tippera, D/- 24th May 1932.

(a) Civil P. C. (1908), S. 48 — Court has jurisdiction to decide the question of limitation—Decision whether right or wrong stands unless set aside in appeal or revision — Till then it cannot be attacked in another proceeding.

The Court has jurisdiction to decide rightly or wrongly. The executing Court can determine whether the application for execution is barred under S. 48, Civil P. C. It may arrive at a wrong conclusion. The wrong decision is binding on the parties unless it is corrected at the instance of the parties in appeal or revision. But so long as it stands it cannot be attacked collaterally in another proceeding, on the ground of want of jurisdiction in the executing Court.: 25 *Bom* 337 (*P C*); *A I R* 1929 *Mad* 826 and *A I R* 1921 *P C* 23, *Foll.* [P 283 C 2]

(b) Civil P. C. (1908), S. 11—Res judicata —S. 11 does not affect jurisdiction of Court.

Section 11 while it prohibits an inquiry in limine as to a matter already adjudicated upon, does not affect the jurisdiction of the Court: 11 *Bom* 488 and *AIR* 1927 *Cal* 928, *Rel on.* [P 284 C 1]

Bijan Kumar Mukherji and *Sailendra Mohan Das*—for Appellants.

Chandra Sekhar Sen — for Respondents.

Mitter, J.— This appeal is directed against an order of remand made in a suit for contribution. The contention of the defendants, now appellants, is that the entire suit should have been dismissed by the lower appellate Court as the amount in question in the suit was not legally recoverable from them. In order to understand this contention a few relevant facts need be stated. It appears that the Maharaja of Tipperah obtained a decree for Rs. 674 for arrears of rent against the tenants of a certain taluq on 5th May 1908; in execution of the said decree the tenure was sold on 27th May 1912 for Rs. 4,850; out of this sum Rs. 9,84-1-0 was appropriated towards the decretal debt and Rs. 3,865-15-0 remained as surplus sale proceeds. On 22nd December 1911 the Maharaja got a decree for rent for the subsequent period against the said tenants in respect of the same holding and in execution of the said decree the Maharaja attached the surplus sale proceeds, but in the meantime one Kamalakanta Banikya attached the surplus sale proceeds in execution of a decree on the foot of a mortgage.

The Maharaja entered into compromise with Banikya and got Rs. 1,000 as deposit and allowed Kamal Banikya to take the remainder of the sale proceeds in satisfaction of Banikya's mortgage decree. The Maharaja refused to treat his acceptance of the sum of Rs. 1,000 as realization towards his decree of 22nd December 1911 and proceeded to execute the said decree. In intermediate proceedings which were carried up to the High Court it was held that the Maharaja was entitled to execute his decree of 22nd December 1911. See Ex. 14, judgment of the High Court dated 12th June 1925. The Maharaja applied for execution in 1927 and in this execution case the pay of the plaintiff was attached. In the taluq in respect of which the rent decree was obtained the plaintiff and the defendants were jointly interested. The decree was realised from the pay of the plaintiff alone and consequently the plaintiff has brought this suit for contribution. One of the substantial defences to the suit

is that the executing Court had no jurisdiction to execute the decree of 1911 in 1927, the decree being barred by limitation having regard to the provision of S. 48, Civil P. C., and the amount which the plaintiff paid to the Maharaja was consequently not legally recoverable from the defendants. This defence was accepted by the Munsif who dismissed the suit.

An appeal was taken to the District Judge of Tipperah by the plaintiff. The learned District Judge remanded the suit to the lower Court with the direction to the lower Court to come to a finding as regards each of the judgment-debtors in the rent execution case arising out of the decree of 2nd December 1911 whether he had due notice of execution proceedings or had no opportunity of having his objection determined by the executing Court by reason of defective notice or by reason of fraudulent suppression of notice. The learned District Judge further directed that the suit should be dismissed with costs in respect of each such (if any) judgment-debtor in respect of whom the Subordinate Judge might hold that he had no opportunity of having his objection determined by the executing Court by reason of defective notice or by reason of fraudulent suppression of notice and in respect of those judgment-debtors who might be found to have had due notice, the Subordinate Judge will determine certain issues and pass orders according to law. The learned District Judge affirmed the findings of the Subordinate Judge on issues 1 to 4. It has been argued on behalf of the appellant, by Dr. Mukherji that the remand is wholly unnecessary and the suit should have been dismissed, as the executing Court had no jurisdiction to execute the decree of 1911 in the year 1927 having regard to the provisions of S. 48, Civil P. C. Stress is laid on the following sentence of S. 48,

"no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of 12 years from (a) the date of the decree sought to be executed,"

and it is argued that these words make it clear that it would not be competent for the executing Court to entertain any fresh application for execution after the expiration of 12 years and that the question is really one which goes to the root of the jurisdiction of the executing Court to entertain such an application. On the other hand, it is maintained by Mr. Sen who appears for the respondents that the question is one not of want of jurisdiction in the executing Court but of an erroneous decision by a Court which has jurisdiction to entertain the application. The learned District Judge has apparently accepted the latter view and the question in this appeal is as to which of the two contentions is right? It appears to us that the respondents' contention must prevail. It is true that the application for execution is not barred under the Limitatien Act but would be barred under this section (S. 48) as it was made 12 years after the date of the decree. But where the executing Court decides that the execution of the decree is not barred, notwithstanding the provisions of S. 48, it merely decides wrongly; and as has been pointed out by their Lordships of the Judicial Committee of the Privy Council in the case of *Malkarjun* v. *Narahari* (1) the Court has jurisdiction to decide wrongly as well as rightly. This wrong decision will certainly be binding on the parties who were represented in the proceeding in which the decision was given or had notice of that proceeding.

This erroneous order was liable, at the instance of parties who were properly represented in the proceeding or had notice of the same, to be corrected by a Court of appeal or revision, but so long as it stands it cannot be attacked collaterally in another proceeding, by such party on the ground of want of jurisdiction in the executing Court. Dr. Mukerji has argued on the analogy of the provision as to res judicata as embodied in S. 11, Civil P. C., that the use of the expression "no order shall be made" ousts the jurisdiction of the executing Court to entertain the application for execution just as the use of the expression "no Court shall try any suit or issue . . ." in S. 11 has the effect of ousting the jurisdiction of the Court to entertain a fresh suit or try a new issue with reference to matters which had already been decided. The analogy, however, does not assist the appellants for the expression "no Court shall try

1. (1901) 25 Bom 337=27 I A 216=7 Sar 739 (P C).

any suit or issue . . . " while it prohibits an inquiry in limine as to a matter already adjudicated upon, does not affect the jurisdiction of the Court. As was pointed out by West, J., the decision of a question of res judicata as of limitation or the like, raised in a case is not even, though wrong, a failure, or a cause of failure, to exercise jurisdiction, any more than a wrong decision on the whole litigation: see *Amritrav* v. *Balkrishna* (2): see also *Jotindra* v. *Sourindra* (3). The Court which had to execute the decree of 1911 had to determine whether the application for execution made in 1927, offended against the provisions of S. 48, Civil P. C. In determining that S. 48 was not infringed, the executing Court was exercising its jurisdiction although in exercising such jurisdiction it may have arrived at a wrong conclusion. The previous decision of the executing Court arrived under such circumstances would certainly be binding on those who were either represented in the execution proceeding or had notice of the same.

The view we take receives ample support from a decision of the High Court of Madras in a recent case: see *Venkatalingama* v. *Raja Dhanjaraj Girji*, *A I R* (1929) *Mad* 826. Indeed, as has been pointed out by the Judicial Committee in a case based on a somewhat similar state of facts, it was not only competent for the present appellants, if they had notice, to bring forward the plea of 12 years' limitation as provided for by S 48, Civil P. C., when the execution case was determined, but it was incumbent on them to do so: see *Raja of Ramnad* v. *Veluswami* (4). The learned District Judge has rightly sent back the case for determining the issues which properly arise in this case. The result is that the appeal fails and is dismissed with costs. We assess the hearing fee at one gold mohur.

Guha, J.—I agree.

R.K. *Appeal dismissed.*

2. (1887) 11 Bom 488.
3. A I R 1927 Cal 928=103 I C 468.
4. A I R 1921 P C 23=59 I C 880=48 I A 45 (P.C.).

A. I. R. 1934 Calcutta 284

GUHA, J.

Bankim Behary Maiti—Plaintiff—Appellant.

v.

Prabodh Chandra Maity—Defendant—Respondent.

Appeal No. 2994 of 1930, Decided on 14th February 1933, against decree of 3rd Court Sub-Judge, Midnapur, D/- 13th August 1930.

Hindu Law—Widow—Savings out of maintenance allowance is not accretion to property but her absolute property going to her own heirs.

Savings by a widow out of the maintenance given to her by the late absolute owner is not an accretion to the property but her absolute property going to her heirs because what ever may not be consumed may be disposed of by her as she likes: 28 *Mad* I (*F B*), *Rel. on*; 10 *Cal* 324 (*P C*), *held counterbalanced by* 20 *Cal* 433 (*P C*). [P 285 C 1)

Jatish Chandra Guha—for Appellant.

Saroje Kumar Maity—for Respondent.

Judgment.—The only question arising for consideration in this appeal is whether an amount of money, lying in deposit in the Postal Savings Bank, which represents savings out of the income of the property allotted to a Hindu widow for her maintenance, were to be treated as accretion to the estate of her husband. If it were such an accretion, the plaintiff in the suit, out of which this appeal has arisen, is entitled to get the money in suit as executor and legatee. If on the other hand, the savings out of the income of the property which was allotted for her maintenance, was the widow's separate property, the defendant was entitled to get the same. The material clauses in the will by which property was allotted to the widow for her maintenance are Cls. 4, 8 and 12. By the last of these clauses, that is Cl. No. 12, the plaintiff was to get the property on the demise of the widow without any mention of savings, if any, out of the income of the property made by the widow in her life-time, going to the ultimate male owner, the plaintiff in the suit. On a construction of the will, which clearly expressed the intention of the husband in allotting the property for maintenance after his death so far as his surviving widow was concerned, this is a case in which effect should be given to the view expressed by Subrahmania Ayyar, Ag. C. J. in the

case of *Subramanian Chetti* v. *Arunachelam Chetti* (1), that

"where what is given is current income not for mere use and return, but for actual consumption, it would be almost absurd to talk of an intention that there should be any reverter, it being now thoroughly well established that what may not have been consumed, may be disposed of by the female as she likes. In such circumstances, whether as a matter of commonsense or of legal principle, but one view is possible, viz., that money so received, is the absolute property of the woman descendible as such to her own heirs."

Reliance has been placed in support of this appeal, on some observations of their Lordships of the Judicial Committee in the case of *Isri Dut Koer* v. *Mt. Hansbutti Koerain* (2); as has been pointed out by Subrahmania Ayyar, Ag. C. J. in *Subramanian Chetti's* case referred to above, the obiter dictum in the case of *Isri Dut Koer* v. *Mt. Hansbbutti Koerain* (2) regarding a Hindu widow's power of disposition of income of her husband's property, at her disposal, has more than been counter-balanced by the decision of their Lordships of the Judicial Committee iu the case of *Sowdamini Dossee* v. *Administrator-General of Bengal* (3). In the above view of the case, the decision of the Courts below dismissing the plaintiff's suit are affirmed; and this appeal is dismissed with costs.

R.G. *Appeal dismissed.*

1. (1905) 28 Mad 1 (F B).
2. (1884) 10 Cal 324=10 I A 150=4 Sar 459 (P C).
3. (1893) 20 Cal 433=20 I A 12=6 Sar 272 (P C).

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* A. I. R. 1934 Calcutta 285

AMEER ALI, J.

Mahadeoprasad—Plaintiff.

v.

Siemens (India) Ltd.—Defendants.

Original Suit No. 736 of 1929, Decided on 26th June 1933.

*** Contract Act (1872), S. 74 — Breach of guarantee—Damages—Measure of — Figure named in agreement, is evidence of damage —Pre-estimate reasonable—Court can award amount specified as damages.**

Under S. 74, the plaintiff must prove his damage in a general sense. The contract made by the parties estimating their damages is in itself evidence and if there is no other evidence of damage this evidence alone will be considered sufficient. The sum named however is not conclusive evidence and if there is other evidence or circumstances showing that it was excessive, the Court will not consider itself bound by it. If, on the other hand, the other evidence and circumstances indicate that the damage equals or may equal, or is likely to exceed the amount named, the Court will abide by it. Where however the other evidence shows that it is unreasonable, the plaintiff will have to prove his damages irrespective of the figure. [P 287 C 1, 2]

The suppliers of an oil plant entered into stringent guarantees with the purchaser in respect of (a) Capacity. i. e., how many tons of seed can be crushed within a certain time, (b) Economy, i. e., how much petrol or benzine can be recovered after each process, and (c) Efficiency, i. e., how much oil can be extracted from the seed, of the plant and by a subsequent agreement named a figure as damages to be paid in case of non-fulfilment of the guarantees. Tests were held and it was found that the guarantee in respect of efficiency was not fulfilled. In a suit by the purchaser claiming the figure named as damages for breach of the guarantee:

Held: that as it could not be inferred from the evidence of a general nature that the figure named in the agreement was an excessive or unreasonable pre-estimate of damages, the plaintiff was entitled to it for breach of the guarantee: *AIR* 1929 *P C* 179 and 11 *Cal* 545, *Cons.* [P 288 C 1]

Roy and *P. C. Ghose*—for Plaintiff.

Page and *Ormond*—for Defendants.

Facts.—In 1924, the plaintiff purchased a plant of the 'solvent' type for the extraction of oil from Messrs. Gorio & Co., whose business was afterwards taken over by the defendants. With this type of plant certain seeds rich in oil are at first crushed. Petrol or benzine is then used to draw out the essential oils in physical combination with the spirit. Water is introduced in some form or other in the process of extraction. After extraction a large part of the machinery is used in separating the petrol from the oil and in distilling the petrol to retain it for further application. The suppliers entered into very stringent guarantees on the three points: viz., (1) Capacity, i. e., how many tons of seed can be crushed within a certain time, (2) Economy, i. e., how much petrol or benzine can be recovered after each process, and (3) Efficiency, i. e., how much oil can be extracted from the seed. In 1926, the plaintiff filed a suit claiming heavy damages for breach of the guarantees, which was settled on the following, among other, terms: (1) That the defendant company were to put the plant in order and bring it up to certain less stringent guarantees on the three points, (2) that the company should have a test obtained, and (3) that the company would pay Rs. 40,000 as damages for any breach of guarantee. The plant was

erected and, after the final test, held in or about January 1929, samples were submitted to the Government Test House. From the certificate granted by the Test House, it was found that the required guarantee in respect of efficiency was not fulfilled. The plaintiff therefore filed a suit claiming Rs. 40,000 as damages for breach of guarantee in respect of efficiency.

Ameer Ali, J. — (After stating facts and holding that there was a breach of guarantee His Lordship discussed the question of damages.) The question involves a point of law, namely, the effect of S. 74, Contract Act. Speaking for myself, I have never understood S. 74. I am always convinced of the difficulty of a particular point when both sides say it is perfectly simple. I will deal first with the point of law involved and then with the main question of fact which underlies every issue as to damages, including the question of mitigation. What is the effect in Indian law of 'naming a figure?' I should perhaps say now that I have no doubt that these parties at the time of the compromise fully considered their position. The figures named are undoubtedly large, but I have no doubt that they were arrived at after consideration, and I think the harshness of the contract (if you can call it that) is not so much the fixing of these particular figures as the unconditional undertaking to fulfil a very stringent guarantee under what must have been almost unknown circumstances.

However, the point is a point of law and has been argued as such on behalf of the defendant company, and quite rightly and very ably argued. What is the effect of naming a sum, having regard to S. 74? Mr. Page says it has not any effect except as a maximum: In other words, that you have got to read the contract as meaning 'damages not exceeding Rs. 40,000.' That follows from the last clause of the section. The plaintiff has got to prove his damages, irrespective and regardless of the sum fixed. He must have to begin at the bottom, and prove damage item by item. Is that right? Mr. Page relies upon a ruling of the Privy Council in *Panna Singh* v. *Firm Bhai Arjan Singh* (1), at p. 951 *of* 33 *C. W. N.*), and if I took it down correctly the relevant passage is as follows:

> The effect of the Contract Act, S. 74, is to disentitle the plaintiffs to recover simpliciter the sum of Rs. 10,000, whether as penalty or liquidated damages. The plaintiffs must prove the damages they have suffered.

Now, in that case, which was a case of sale of land, the figure mentioned was Rs. 10,000. It was proved that there had been a resale with an actual loss only of Rs. 1,000. The plaintiffs had been granted damages to the extent of Rs. 10,000. The Board reversed that finding and gave expression to the proposition that I have quoted. Mr. Page says that that proposition lays down what he has contended for. The question is, having regard to the facts of that case, what does 'simpliciter' mean? In the first place, does 'simpliciter' refer to 'recover' or to the sum which is to be recovered? Does it mean 'simply to recover, or does it mean 'simply the sum?' I am not clear. Further, having regard to the facts of the case, I think it might well have meant 'notwithstanding that it has been proved that the actual damage was Rs. 1,000 and not Rs. 10,000.' But, taking the word 'simpliciter, in its ordinary meaning (I looked it up in the dictionary), 'absolutely, 'unconditionally,' 'without any condition or 'consideration.' Does it mean that the sum named is to be of no effect at all? The Judicial Committee do not say so. It is true that they say the plaintiff 'must prove his damages.' But is not the figure named some proof? It is not to be conclusive proof, but is it not some proof? Is not the estimate made by the parties with full consideration some evidence? I think it is.

Before I state what I consider to be the law in the form of propositions, I desire to say something about the section itself. In the first place, by reason of the fact that there has been amendment it does not make sense at all. Cl. 2 of the section contains the phrase 'any other stipulation by 'way of penalty' which has been added. In contradistinction to 'other' is 'a sum named in the 'contract as the amount to be paid, etc.' According to English law and phraseology, such a sum would not be a penalty at all. For the purposes of this case I disregard the clause in question referring to a 'penalty.' It is then clear that the Indian law profes-

1. AIR 1929 P C 179=117 I C 485=33 C W 949 (P C).

ses simply to be oblivious to the fact that in England 'sums named in the contract' have been divided into distinct species: (a) liquidated damages, (b) penalties. The Indian law has not heard of them. In all cases, when a sum is named, certain consequences shall follow. What are those consequences? The plaintiff is entitled 'whether or not actual damage or loss is proved to have been caused, to receive reasonable compensation not exceeding the 'amount, etc.. It should be noted here that, by reason of the last clause, we again get away from penalty, because in English law the sum named, if a penalty, ceases to have any effect at all either as a lower or upper limit. In Indian law it remains an upper limit or maximum. The other point to be noticed is 'whether or not 'actual damage or loss is proved.' Now, what is the sense of that, if you have to disregard the figure named entirely? If it is simply a maximum, what is the sense of it? It may have little sense upon any reading, but none at all if one has to disregard the sum named entirely, i. e., for all purposes except as a maximum. Now, there are cases in Calcutta which I have not had time to look into, but there is one, *The Brahmaputra Tea Co., Ltd.* v. *Scarth* (2), at pp. 550 and 551, where this section is discussed:

"It is clear that the Court might have awarded the full sum stipulated without any proof of damages or loss."

That you get from the section itself. Then:

"No doubt the Court has a discretion to fix what it considers reasonable compensation; but when the parties have already agreed among themselves as to what the penalty should be, we think the Court should not, in fixing the compensation, wholly ignore the amount agreed on, unless this is, on its face, wholly unreasonable with reference to the position of the parties and the breach provided against,"

which does not get you very far. To my mind, the following is the intention of the legislature: (1) The plaintiff must prove his damage in a general sense; (2) the contract made by the parties estimating their damages is in itself evidence; (3) if there is no other evidence of damage, I can conceive of certain cases where this evidence alone will be considered sufficient, nor do I think that the Judicial Committee intended by anything said in *Panna Singh* v. *Firm Bhai Arjan Singh* (1) to exclude such a possibility; (4) the sum named however is not conclusive evidence, that is to say, if there is other evidence or circumstances showing that it was excessive, the Court will not consider itself bound by it; (5) if, on the other hand, the other evidence and circumstances indicate that the damage equals or may equal, or is likely to exceed the amount named, the Court will abide by it, and lastly, (6) in case (4), that is to say, where the other evidence shows that it is unreasonable, the plaintiff will have to prove his damages irrespective of the figure.

Now, before I deal with the other evidence in this case, I desire to say that, as far as I am concerned, I find great difficulty in believing that the law will not allow commercial people by contract to fix the amount of their damages. Commercial transactions in these days are not confined to sales of bags of sugar or marketable commodities, and particularly, in the case of the sale of specialized machinery and where the investigation as to damages must be very complex, very expensive and very uncertain, it seems to me to be entirely unreasonable that the parties should not be allowed to make a pre-estimate; subject to this, for which the section provides, that, if it is clearly shown that the amount is unreasonable, then the Court may, in its discretion, depart from it. In England, the difficulty is obviated in a case such as I have described by classing the "figure named" as "liquidated damages:" see *Widnes Foundry* (1925), *Ltd.* v. *Cellulose Acetate Silk Co.* (3), where the matter is explained.

Counsel for the defendants has quite rightly pointed out to me that, if I am to proceed quantitatively, the evidence of damage is not sufficient for me to arrive at a figure. I agree. I should have to send the parties to a reference. There is evidence however of a general nature, an estimate of his damage. There is some evidence of the amount of oil lost and of the market rate. That, although it is not evidence of a kind upon which I could base a finding as to figures, is evidence from which I am entitled on my view of the law to infer

2 (1885) 11 Cal 545.

3. (1931) 2 K B 393=100 L J K B 746=47 T L R 481=145 L T 507..

that the sum named was not excessive or unreasonable and to decide that I should not depart from what was, I think, a genuine pre-estimate of damage. In those circumstances, I think it my duty to award the sum named to the plaintiff.

In some ways I regret it. I think it has been a very unfortunate commercial transaction in which neither party is really to blame, and I regret it more because of the expense of arriving at a finding has been very considerable. There was one question which did occur to me in this connexion, and it was for that reason that I asked certain questions at the end of the case, the purport of which was, I think, the subject of misapprehension by the defendant's counsel. It is this. As far as I remember, the plaintiff ceased working the mill in 1930. I desired to consider whether, when claiming the figure named, on the basis that the plant was totally worthless, the plaintiff should not have minimized the damage by attempting to find a buyer for the plant or put it to some use. That is why I asked these questions. I do not know that it follows logically.

This however was not a point taken by counsel for the defendant, whose contention as regards "mitigation" was that the plaintiff should have taken further steps to bring the plant up to guarantee On the facts of this case I cannot see that the plaintiff was called upon further to tinker with the machinery. The defendant company for some years had been making strenuous efforts to fulfil the guarantee, but, for some reasons (which I shall shortly summarise), had tailed. I think it would have been not reasonable but unreasonable for the plaintiff's people to attempt what the defendants themselves could not do. The reasons referred to were I think as follows: Mr. Page attributed the whole failure of the plant to the fact that it was a plant which could not get the attention that was required, the skilled attention it was so to speak used to. There is no doubt something in this. But it is not all.

The seed was a seed new to the plant. The solvent was a solvent new to the plant; not its appropriate solvent. This required adjustments and alterations in the plant. Once you begin to try and adjust a plant of this nature, you are going to have a very difficult task; you are very likely to put the whole thing out of balance. On the technical evidence as to the plant being a good plant or not or fit for the work, I have no doubt that it was an excellent one, but not for the work it had to do here. I accept the evidence of the experts called by the plaintiff whose evidence was more than normally clear and intelligent. I do not think the rollers were quite the right type of rollers. I do not think the stirring apparatus (that is, on the evidence of the defendants' own documents) could do the work expected of them. These were I think the main factors which in combination prevented the performance of the contract by the defendant company. There will therefore be a decree for the sum of Rs. 40,000 with costs.

R.K. *Suit decreed.*

A. I. R. 1934 Calcutta 288

GUHA AND BARTLEY, JJ.

Manmatha Nath Mitter — Appellant.

v.

Promatha Nath Chatterjee and *others* —Respondents.

Appeal No. 775 of 1931, Decided on 13th July 1933, from appellate decree of Addl. Dist. Judge, 24-Parganas, D/- 1st November 1930.

(a) Civil P. C. (1908), S. 100—Nature of tenancy is legal inference from facts—Landlord and tenant.

The question whether a tenancy is permanent or precarious is a legal inference from facts and is not itself a question of fact. [P 289 C 1]

(b) Landlord and Tenant—Tenancy found to be for dwelling purposes — Existence of permanent structure is not a sine qua non — Landlord cannot insist on the tenant using lands for the purpose of his own habitation.

Where the tenancy is found to be for dwelling purposes, the existence of permanent structure cannot be taken to be determining factor in every case, nor can it be said that the lands appertaining to a tenancy for a dwelling purpose must be used for the purpose of habitation of the tenant himself. Residence cannot be confined to the tenant himself, so as to exclude the idea of a sub-lease by the tenant who had a permanent interest in the lands comprised in the tenancy: *AIR* 1928 *Cal* 315 and 13 *I C* 606, *Ref.* [P 289 C 2]

Rupendra Kumar Mitter Hemanta Kumar Bose—for Appellant.

Atul Chandra Gupta and *Jogeswar Mazumdar*—for Respondents.

Judgment.—This is an appeal by the plaintiff in a suit for declaration in regard to the lands in suit, comprised in a tenancy held by defendant 1, that the defendants have no right to cut down trees, make excavations, to build pucca structures, to establish mills, or to use the lands in suit in any other way than as a garden on the footing that defendant 1 was an ordinary occupancy raiyat. The plaintiff prayed for a permanent injunction and for damages for trees cut and appropriated by the defendants. Defendant 1, the contesting defendant in the suit, set up a permanent mourashi mokarari title to the lands in suit, and resisted the claim of the plaintiff on that basis. An issue was raised on the point whether the defendant had "a permanent mokarari mourashi and transferable right in the land in suit." The question thus raised has been decided by the Courts below in favour of the defendants, and the plaintiff has appealed to this Court.

On the findings arrived at by the Court of appeal below, the tenancy to which the lands in suit appertained, was not created for the purpose of agriculture and horticulture; the lands described as "bagan" have all along been used as busti lands, and various tenants have been settled thereon by defendant 1 and his predecessors for the purpose of dwelling. The learned Judge in the Court below has held that the rent payable in respect of the tenancy has remained unchanged all along since its creation, beyond the memory of living man, although the value of the lands appertaining to the tenancy has increased abnormally; that excavations have been made in the lands before by tenants and sub-tenants without the permission of the landlord; that trees have been cut and appropriated before; that there were bustees almost on all sides of the lands; and that there has been at least one transfer and several successions. On these facts found by him, the learned Judge has come to the conclusion that the defendant had succeeded in showing that the tenancy of defendant 1 was a permanent one.

It is well settled that the question whether a tenancy is permanent or precarious, is a legal inference from facts, and is not itself a question of fact. On the evidence before the Court, the Court below has drawn the inference that the tenancy in the case before us, is permanent, regard being had to the findings of fact arrived at by that Court, to which reference has been made above. On those findings we are unable to hold that the inference that the tenancy in this case is permanent is erroneous or unsupportable. The learned advocate for the plaintiff-appellant contended before us, that an inference of permanency could not be drawn from the facts found by the Court below, unless the tenancy was for residential purpose in the sense that it was for the habitation of the tenant himself. As has been mentioned already, the learned Judge in the Court of appeal below has found as a fact that the lands comprised in the tenancy have all along been used for dwelling purpose. The Court below has observed that so far as permanent structures were concerned the evidence in the case went in favour of the plaintiff; and that the existence of permanent structure was not a sine qua non in the matter of determining whether a tenancy was permanent or precarious. In our judgment the view thus expressed by the Court below is not erroneous: once it is found that a particular tenancy is for dwelling purpose it is immaterial whether permanent structures existed on the same or not.

The existence of permanent structures cannot be taken to be the determining factor in every case, nor can it be said, as it has been contended before us, that the lands appertaining to a tenancy for a dwelling purpose must be used for the purpose of habitation of the tenant himself. The purpose of the tenancy has to be determined; and if that purpose is found to be residential purpose, it cannot be laid down as a proposition of law that the rights of a permanent tenant, in respect of a tenancy created for residential purpose, might be curtailed, the landlord having the power to insist on the tenant using the lands for the purpose of his own habitation.

The decisions of this Court in some cases. to which our attention was drawn in this connexion: *Monmatha Nath* v. *Rajeswar Roy* (1), *Jagabandhu Saha* v. *Magnamoyi Dasi* (2) and *Mohoram Shekh* v. *Tellamuddin Khan* (3), 15 *C.L.J.* 220,

1. AIR 1928 Cal 315=55 Cal 355=107 I C 81.
2. AIR 1918 Cal 961=44 Cal 555=36 I C 884.
3. (1912) 13 I C 606.

do not in any way support the extreme contention advanced in support of this appeal, and we have not been able to find anything contained in these decisions which enable me to give effect to the same. The residential purpose is a very important factor in determining the character of a tenancy whether it was permanent or precarious; but the residence cannot be confined to the case of the tenant himself, so as to exclude the idea of a sub-lease by the tenant, who had a permanent interest in the lands comprised in the tenancy, and of allowing others to use the lands sublet to them for residential purpose, the original purpose of the tenancy. We are in agreement within the Court of appeal below in holding that the inference of permanency could be drawn in the case of the tenancy in suit, in spite of the fact that various tenants had been settled on the lands comprised in the tenancy, which was for dwelling purpose, by defendant 1, and his predecessor-in-title, for dwelling purpose. In our judgment, the decision arrived at by the Court of appeal below, in affirmance of that of the trial Court, is right, and must be confirmed. The appeal is dismissed with costs.

R.G. *Appeal dismissed.*

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* A. I. R. 1934 Calcutta 290

AMEER ALI, J.

Nagendrabala Dasee—Plaintiff.

v.

Panchanan Mourie and *others*—Defendants.

Original Suit No. 1813 of 1930, Decided on 29th June 1933.

*** Transfer of Property Act (1882), S. 51—Compensation under—Person claiming must fulfil all conditions—Such right is neither heritable nor transferable—No general equitable principle apart from S. 51 exists—Person evicted should himself have effected improvement.**

A person who has been evicted can claim compensation under S. 51 provided he is (1) a transferee, (2) he has made the improvement, (3) he has made such improvement believing in good faith that he was absolutely entitled and, (4) he was evicted. The section does not provide for these various capacities or qualifications being filled or fulfilled by different persons. It is intended to provide for a right to compensation to an individual who fulfils all the conditions laid down. The relief given by the section is not any species of property and such a right is neither heritable nor transferable. There is no general equitable principle entitling the person dispossessed to compensation apart from what has been laid down in S. 51. Hence a purchaser of a property at a Court sale who has been dispossessed cannot claim compensation for improvements effected by the vendor. The evictee himself must be the improver: *Case law referred.* [P 291 C 2; P 292 C 1, 2]

H. D. Bose, B. C. Ghose, B. Basu and *N. K. Ghose*—for Plaintiff.

S. N. Banerjee (Sr.), S. N. Banerjee (Jr.), Arun K. Ray and *J. C. Sett*—for Defendants.

Judgment.—In this suit the two matters in issue are: (1) whether the plaintiff is entitled to possession of the premises in question and (2) whether under the provisions of S. 51, T. P. Act, or upon general equitable principles, the defendants, if dispossessed, are entitled to compensation. At the hearing, the attention of counsel and of the Court was mainly directed to the first question, which involved the discussion of a number of authorities on Hindu law. For this reason, although the evidence was given, I adjourned the case for an opportunity for further argument on the second question, namely, the right to compensation, and that question has been discussed before me to-day. Mr. S. N. Banerjee (Jr.) appeared for one of the defendants Charupanna Seal whose position will appear I think from the facts given in the early part ot my judgment [*Negendrabala Dasee* v. *Panchanan Mourie* (1)]. He is a purchaser at a Court sale held in the suit against Saratchandra Mourie, one of the three co-sharers entitled to this property, the sale being in point of fact subsequent to the institution of the present suit. The other co-sharers are Nagendrachandra Mourie and Atulkrishna Mourie, who are represented before me, but who, in point of fact, have not formally claimed by any plea in their written statement or otherwise any right to compensation. The claim therefore has been mainly argued on behalf of Charupanna Seal.

The points taken by Mr. H. D. Bose in answer to the claim are as follows: (1) that Nagendra and Atul not having formally claimed compensation and Charupanna Seal being in any event not entitled to more than part of the compensation, the claim is not sustainable; (2) that that claim is not sustainable under S. 51, T. P. Act, for reasons which I shall state in greater detail; (3) that it cannot be supported on general equit-

1. A I R 1934 Cal 162=60 Cal 1236.1

able principles. With regard to the first point, although there is much to be said in favour of Mr. Bose's contention that Nagen and Atul not being prepared to make or support a claim, and thereby involve themselves in possible liability for costs, should not be entitled to reap the advantage of the decision, should Charupanna Seal be successful. On the other hand, had I been satisfied that a right to compensation existed, I should not have allowed this to interfere with the affording of relief. The other points need more consideration. So far as S. 51 is concerned, it appears to me that the tests to be applied are as follows: I assume that the claimant must be the evictee. (1) Who can claim? The plaintiff contends that only the first transferee can claim. (2) If "transferee" includes "transferees," must all claim? That is the question of parties (already, referred to). (3) Who must have made the improvements? The plaintiff contends that the claimant must be the "improver," which expression I shall retain for the purposes of this judgment. (4) Did the "improver," when making the improvements, believe that he was absolutely entitled to the property? (5) What kind of transferee can claim? The plaintiff contends that the section applies only to the transferees as defined in S. 5, T. P. Act, and therefore does not apply to purchasers at Court sales.

Mr. S. N. Banerjee for Charupanna Seal argued the first point extremely well. He contended that any person in the line of transferees making improvements acquired a right. Taking this case as an example, Dhanamani, who made improvements, could have claimed. In point of fact, the two defendants Nagen and Atul are heirs or representatives in a certain degree from Dhanamani, and in this connexion he cites *Narayanaswami Ayyar* v. *Rama Ayyar* (2). He goes further and contends that a purchaser from Dhanamani on eviction would also be entitled to claim on this basis, that the right obtained by Dhanamani, the improver, is the equivalent of the actual improvement made; that the purchaser when purchasing pays for that improvement, and thereby logically becomes the improver just as if he had made the improvement himself so that whether you look at it in this way or whether you look as it from the point of view of Dhanamani's right being a right annexed to the property of the nature described in S. 8, T. P. Act, that right accrues in turn to each purchaser from the original improver. Each succeeds to the right which is the equivalent of the improvement. With regard to the right of heirs or representatives, it appears to me that the ruling cited by Mr. Banerjee does support his contention to this extent: that, although the matter was not discussed or argued, the Court in India did allow the evicted sons of a transferee improver to obtain compensation, and that such decision was upheld by the Board.

With regard to the argument relating to S. 51, I had best state my construction of that section at once. If it was intended to provide for rights higher and wider than those that I shall now state, in my view, the section should be re-drafted. I will paraphrase it as follows: X has a right to compensation provided that he is (1) a transferee, (2) he has made the improvement, (3) he has made such improvement believing in good faith that he was absolutely entitled and (4) he was evicted. In my view, the section does not provide for these various capacities or qualifications being filled or fulfilled by different persons. It appears to me that it was intended to provide for a right to compensation to an individual who fulfils all the conditions laid down. Mr. S. N. Banerjee did not confine himself to the section. He relied also upon general equitable principles, referring me to S. 188, Mulla's Hindu Law, 7th Edn., at p. 199, and to a case *Kidar Nath* v. *Mathu Mal* (3). But before dealing with this I should mention the difficulty which occurs to me in reading the ruling of the Board in *Narayanaswami Ayyar* v. *Rama Ayyar* (2) as a decision that heirs are entitled to claim compensation, to which their father would have been entitled had he been evicted. I find great difficulty in coming to the conclusion that the relief given by S. 51, T. P. Act, is any species of property: see S. 6, T. P. Act. The section provides for a relief granted upon equitable prin-

2. A I R 1930 P C 297=128 I C 261=57 I A 305=53 Mad 692 (P C).

3. (1913) 40 Cal 555=18 I C 946=77 P R 1913 (P C).

ciples to a person who does something to property and thereby incurs expense, upon that person losing that property. The right does not appear to me to arise or to come into question until the property is lost. Speaking for myself, I do not see that on the law, as it stands, such a right is heritable or transferable.

With regard to equitable principles, I must say that one is first impressed by the injustice of dispossessing people (take this case) forty years after the sale. I consider the possibility of such a thing taking place a matter which calls for the attention of legal reformers. But at the same time there must be an equitable principle for this Court to apply, and I am not satisfied that there is any general equitable principle entitling the person dispossessed to compensation apart from what has been intended to be laid down in S. 51, T. P. Act. At first sight, it does appear to me illogical that if the father has a right to compensation on his eviction his sons should not have such right, but unless the right is property, it is necessary to see whether the sons themselves have any equitable right to assert. In the absence of clear authority it seems to me that I should be wrong in discovering equitable principles in order to remedy the wrong which I do think results to the person dispossessed on my decision at law. Mr. H. D. Bose has given me references to the following cases: *Nanjappa Gounden* v. *Peruma Gounden* (4) and *Abhoy Churn Ghose* v. *Attarmoni Dassee* (5), both as to the nature of tests as to good faith, and also to show that these cases were between the immediate parties to the transfer. For the purposes of argument I have assumed in this case, although it is not entirely clear that Dhanamani was an improver bona fide believing herself to be absolutely entitled.

Mr. Bose has also cited to me the case of *Harilal Ranchhod* v. *Gordhan Keshav* (6) in which it is laid down that for the section to apply it is not necessary that the person suing for possession or evictor should be the original transferor. That must be so. But that is not the question involved. The real question under the section is whether the plaintiff must be the evictee and also the improver. As regards the claim by Charupanna Seal, that stands upon a particular footing. His purchase having been subsequent to the institution of this suit, and with notice of the claim, in my opinion, he, at any rate, on the facts, could not rely upon the section or upon general equitable principles. He cannot say:

"Notwithstanding that I was not the actual improver, nevertheless, by reason of my purchase at a price including that of the improvement, I must be regarded as a bona fide improver."

K.S. *Order accordingly.*

4. (1909) 32 Mad 530=4 I C 18.
5. (1909) 13 C W N 931=1 I C 415.
6. A I R 1927 Bom 611=105 I C 722=51 Bom 1040.

A. I. R. 1934 Calcutta 292

GUHA AND BARTLEY, JJ.

Haris Chandra Choudhury—Plaintiff—Appellant.

v.

Nishi Kanta Nandy and *others*—Respondents.

Appeal No. 744 of 1931, Decided on 5th July 1933, from appellate decree of 3rd Court, Sub-Judge, Dacca, D/- 6th November 1930.

(a) Bengal Tenancy Act (1885), S. 15—Failure of some heirs to notify succession to howla—Decree in suit by landlord against some heirs ignoring others altogether will not operate as effective rent decree so as to pass howla at sale in execution thereof.

It is no doubt the duty of persons succeeding to a howla to notify iheir interests to the owner of the howla under S. 15, but the failure on the part of the heirs to comply with the requirements of S. 15 does not entitle the landlord to treat some of the heirs as representatives of the other tenants in respect of the tenancy, and a rent decree obtained by him against some heirs ignoring others altogether could not be regarded as rent decree effective to pass howla at sale in execution. [P 293 C 2]

(b) Bengal Tenancy Act (1885), S. 15—Omission to notify succession affects only title to recover rent from subordinate tenants.

The omission to notify succession to the teuure as coutemplated by S. 15 has only the result that the person succeeding to the tenure is not entitled to recover by a suit or any other proceeding, any rent payable to him, by the subordinate tenants: but it does not affect his interest in the tenure in any other way. [P 293 C 2]

Jatindra Nath Sanyal, *Probodh Nath Sanyal* and *Phanindra Kumar Sanyal*—for Appellant.

Rajendra Chandra Guha and *Gopaldas Chatterjee*—for Respondents.

Judgment.—The plaintiff in the suit out of which this appeal has arisen, the appellant in this Court, instituted a

suit which has been described by the trial Court as a suit for assessment of rent of the land in suit and for recovery of arrears of rent. The claim in the suit appears to be for rent at the rate to be fixed by the Court and there was a further claim made by the plaintiff for recovery of the rent so assessed by the Court. The plaintiff as the superior landlord, instituted a suit for rent of a tenure mentioned as howla, against two persons Satinath and Kshitinath. A decree was passed against these two persons who are brothers. In execution of the decree so passed, the plaintiff himself purchased the howla; and according to the plaintiff the land in suit in respect of which rent was claimed appertained to a subordinate interest described as mirash, an interest subordinate to the howla, which was said to have been purchased by the plaintiff. If the decree in the suit for rent could be treated as operative as a rent decree under the Bengal Tenancy Act, the plaintiff had undoubtedly a right to ask for assessment of rent and pray for recovery of the rent so assessed by the Court. If however the decree obtained by the plaintiff against the two persons named above was not a rent decree, the suit in the form in which it was brought was not maintainable. There was no right in the plaintiff to have enhancement of rent by way of assessment of the same as prayed for by the plaintiff in the suit. It appears that the howla belonged at one time to one Jotsna Kumari who got it from her mother as yautuk stridhan and as such not only the two persons as Kshitinath and Satinath are heirs of Jotsna Kumari, but also the other two persons, the daughters of the aforesaid Jotsna Kumari, Snehalata and Labangalata are the heirs of their mother.

The question was whether the suit for rent brought against the two brothers only was such a suit in which a decree for rent could be effectively passed, and whether such a decree could enable the plaintiff to bind the land appertaining to the howla. The Courts below have dismissed the suit after coming to the conclusion that the howla was not, and could not be represented by the two persons Satinath and Kshitinath, against whom the suit for rent was brought by the plaintiff. There was no such representation by the brothers of the interest of their sisters in the tenancy which could enable the Court to pass a decree binding the tenancy. In this view of the matter, the decree passed in favour of the plaintiff in the suit brought against the two persons Satinath and Kshitinath, was an ineffective rent decree. It was however contended on behalf of the plaintiff before the Courts below and that contention is urged before us in support of the appeal that the persons other than the defendant in the suit for rent instituted by the plaintiffs, Satinath and Kshitinath, had not notified their succession in the place of their mother Jotsna Kumari, after her demise; and as such it was not necessary for the plaintiff the superior landlord to bring a suit against them for the purpose of realization of rent due in respect of the howla. It is no doubt true that the daughters of Jotsna Kumari, Snehalata and Labangalata had not notified their succession under S. 15, Bengal Tenancy Act.

But the effect of that was not, as has been contended by the plaintiff appellant, that there could be an effective decree for rent in view of the fact that the persons other than the two defendants in the suit had not notified their succession as required by law. The learned Judges in the Courts below have held that it was the duty of the persons who succeeded to the howla to give notice under S. 15, Bengal Tenancy Act, to the plaintiff; but the failure on the part of the heirs to comply with the requirements of this section could not entitle the landlord, to treat some of the heirs as representative of the other tenants in respect of the tenancy, and the decree obtained by him against them could not be regarded as a rent decree. The view thus expressed is in accordance with the decisions of this Court; and we have no hesitation in expressing our concurrence with the same. It may be mentioned that the omission to notify succession to the tenure as contemplated by S. 15, Bengal Tenancy Act, has only the result that the persons succeeding to the tenure is not entitled to recover by a suit, or any other proceeding, any rent payable to him, by the subrdinate tenants: but it does not affect his interest in the tenure in any other way. In the present case

failure on the part of the daughters Snehalata and Labangalata to notify their interest to the owner of the howla, did not entitle the landlord to ignore them altogether, and to bring a suit against the other two persons only, who did not represent the tenancy as a whole. In the above view of the case the tenancy not having been represented in the suit for rent brought by the plaintiff, the howla could not pass at the sale held in execution of the decree obtained by the plaintiff, in the absence of two of the persons who were interested in the tenancy, as tenants thereof.

The contention urged in support of the appeal cannot be accepted, and the decision arrived at by the Courts below must be affirmed and we direct accordingly. The appeal is dismissed with costs.

V.B. *Appeal dismissed.*

A. I. R. 1934 Calcutta 294

GUHA, J.

Nalaki and *others*—Appellants.

v.

Abhayacharan Sil and *others*—Respondents.

Appeal No. 1478 of 1931, Decided on 15th November 1933, from appellate decree of Third Court Sub-Judge, Dacca, D/- 10th November 1930.

(a) Record of Rights—Presumption as to entry in—Dispute about boundary of dags—Other evidence must be considered.

Where a narrow strip of land adjoining and contiguous to two plots of land, is claimed by parties as being included in their respective settlement dags, the decision cannot be based on the entry in the Record of Rights alone. In deciding the question of boundary the other evidence in the case has to be taken into consideration. [P 295 C 2]

(b) Possession—Suit for—"Waste land"——Land incapable of continuous possession is not therefore waste—Limitation Act (1908), Art. 142.

The mere fact that land in dispute was such as was not capable of actual continuous physical possession does not necessarily make it waste land so as to attract the application of the principle that the possession follows title. [P 952 C 2]

(c) Limitation Act (1908), Art. 142—Suit for possession—Plaintiff alleging previous possession and suing for possession alleging subsequent dispossession—Proof of such acts of owner-ship as the purpose for which land is used require is sufficient proof of possession.

Where a plaintiff alleges definite previous acts of possession in respect of a piece of land and sues for possession on the allegation of subsequent dispossession therefrom, the proof by plaintiff of his possession may be such as the land is capable of by exercising acts of ownership thereon. The acts of theownership need not be continuous; nor need they be frequent. A party may be said to be in possession of land when he exercises such acts of ownership in respect of the same as might be expected in the circumstances of the case or having regard to the purpose for which land can be used. [P 295 C 2]

Bejoy Kumar Bhattacharjee and *Nripendra Chandra Das*—for Appellants.

Trailokhya Nath Ghose and *Abinash Chandra Ghose*—for Respondents.

Judgment.—This is an appeal by some of the defendants in a suit brought by the plaintiffs, for recovery of khas possession on declaration of their title to a strip of land. There was also a prayer made by the plaintiffs in the plaint, for a declaration of the plaintiffs' right of easement to use water by making a ghat in the tank of the defendants, which lies to the north of the land in suit.

The defence of the contesting defendants to the suit was that the plaintiffs had no title to the land in suit. The right of easement asserted by the plaintiffs was denied by the defendants. It was asserted on behalf of the defendants that the land in suit appertained to their tank and was recorded as cadastral survey plot No. 544, the plaintiff's case being that the land in suit appertained to the plaintiffs' homestead which was recorded as cadastral survey plot No. 546. On the pleadings of the parties various issues were raised. The principal issues settled related to the question of the plaintiffs' title to the land. The question of limitation was also raised in defence by the defendants, the plaintiffs having been put to the strict proof of their title and to their subsisting title to the land in suit. The Courts below have held that the plaintiffs succeed in making out their title as alleged in the plaint, with reference to the strip of land which is not however the entire quantity of land claimed by the plaintiffs in the suit. So far as the question of possession was concerned the Courts below have concurrently held that the land in suit was "waste land" not in the actual possession of any body before 1331 B. S. and possession should therefore be taken to have been with the rightful owners, i. e., the plaintiffs. In this appeal the first point argued by the learned advocate appearing for the defendants-appellants, was that the plaintiffs' title was not

specifically and definitely found by either of the Courts below. With reference to the point thus raised in support of the appeal, it must be said that the judgment of the learned Subordinate Judge in the Court of appeal below, is not altogether satisfactory on the question of title regard being had to the manner in which the learned Subordinate Judge has dealt with that question.

But the judgment of the learned Judge is a judgment of affirmance; and in affirming the judgment of the trial Court, the learned Judge has expressed himself in this way: that the dispute between the parties was a boundary dispute, and although the report of the commissioner submitted in the case after local investigation was not a satisfactory one, the boundary line dividing the plaintiffs' property and the property of the defendants, i. e., cadastral survey plots Nos. 544 and 546 could be determined with reference to the materials placed on the record; and with reference to those materials it has been found concurrently by the Courts below that the plaintiffs succeeded in making out their title to the strip of land to which reference has been made above, although that strip does not wholly correspond with the entire quantity of the land claimed by the plaintiff in the suit, so far as the area was concerned. So far as the strip of land which has been decreed in plaintiffs' favour, title has been found, and the boundary between the plaintiffs and the defendants' land determined by the Courts below, on the evidence before them; and it cannot be controverted that the findings and the conclusion arrived at by the Courts below did not amount to a finding on the question of the plaintiffs' title as alleged by them in the plaint.

The second point raised in support of the appeal, by the learned advocate is that the entry in Record of Rights is in favour of the defendants, The Record of Rights seems to have mentioned the two C. S. dags Nos. 544 and 546; but the exact boundary of these two plots had to be determined in this litigation; and it has been determined by the Courts below. In my judgment therefore it cannot be argued that the Record of Rights taken by itself lends support to the defendants' claim so as to support their title which could be set up preferentially to the title set up by the plaintiffs in their suit. The decision could not be based on the entry in the Record of Rights only; and with reference to the evidence in the case before the Court, the boundary between the two C. S. dags had to be determined, and has been determined in point of fact by the Courts below.

The next point raised in support of the appeal relates to the question of limitation. It is argued by the learned advocate for the appellants that the suit having been brought on the allegation of possession and subsequent dispossession and the plaintiffs having alleged definite acts of possession, the Court of appeal below has erred in not trying the question of limitation as raised, upon the erroneous misconception that the land is waste land, and that the principle that possession follows title applies to such land. It is no doubt true that the expression 'waste land' has been used in the judgments of the Courts below, but the use of that expression is rather loose. What actually transpired from the materials on the record that have been referred to in the judgments of the Courts below was that the land in dispute was such as was not capable of actual and continuous physical possession.

With reference to the settled principle that the acts of ownership need not be continuous, nor even be they frequent, and regard being had to the character of the land of which we have a complete idea from the judgments of the Courts below, and the purpose for which the owners used it, it has been sufficiently maintained that the plaintiffs were in possession by doing such acts as in the circumstances might be expected. Keeping this point of view before us, it can not be said that the use of the expression 'waste land' does take away anything from the definite finding of fact arrived at by the Court below, viz., that acts of ownership attributable to the persons who had title in the land were present in the case before me; and such acts must be deemed to be acts which supported the plaintiffs' case so far as to enable them to put their case in this manner, namely, that they had a subsisting title at the date when they came to Court to recover possession of the land. In the above view of the matter,

the question of plaintiff's possession and the question of limitation, must be decided in the plaintiffs' favour as has been done by the Courts below. It must be held that the plaintiffs' suit with reference to the strip of land decreed to them cannot be held to be barred by limitation.

Reference has been made in course of argument to the result of a previous litigation regarding the tank in C. S. dag No. 544. The judgments of the Courts below do not give sufficient indication as to what the previous suit related to; and no contention seems to have been advanced in either of the Courts below, with references to the result of the previous litigation between the parties with reference to the tank included in C. S. dag No. 544. In that view of the matter the question now raised before me, for the first time in second appeal, cannot be decided in the absence of proper materials and accordingly the question as to the effect of the decision of the previous litigation between the parties cannot be decided in favour of the defendants-appellants, as I have been invited to do. The appeal fails, and is dismissed with costs.

There is a cross-objection filed on behalf of the plaintiffs in the suit relating to the right of using the water of the tank covered by the C. S. plot 544. Issue 8 raised in the suit related to this question and the issue was to this effect: Have the plaintiffs their alleged right to use the water of the tank in suit as claimed? The trial Court gave its decision in favour of the plaintiffs, but that decision was reversed on appeal by the learned Subordinate Judge, in the Court of appeal below. According to the learned Subordinate Judge, the evidence in the case pointed out clearly that the plaintiffs' use of the water of the tank covered by the C. S. dag 544, was merely permissive and therefore the question of acquisition of the right of easement by the plaintiffs to use the water as claimed by them in the suit and as raised in issue 8 could not be decided in favour of the plaintiff.

In my judgment the question of the acquisition of the right of easement asserted by the plaintiffs in the suit, has been rightly decided against them, by the learned Subordinate Judge on the definite findings arrived at by him. The cross-objection is therefore dismissed. There is no order as to costs so far as the cross-objection is concerned. The appeal and the cross-objection are both dismissed and the decision and decree passed by the Court of appeal below are affirmed.

V.B. *Appeal and Cross-objection dismissed.*

A. I. R. 1934 Calcutta 296

MUKHERJI AND BARTLEY, JJ.

Kanti Chandra Tarafdar and *another* —Appellants.

v.

Radharaman Sirkar and *others*—Respondents.

Appeal No. 82 of 1929, Decided on 17th June 1932, from original decree of Sub-Judge, Burdwan, D/- 5th March 1929.

(a) Executors—Liability to account — Suit for accounts by legatee—Fact that executors are not in possession of the accounts will not absolve them from their liability.

Where a decree directs executors to render accounts to the legatee the executors cannot be absolved from their liability to account on the plea, that the gomastha appointed by the executors who was in the employ of the legatee was withholding the papers, nor can their liability cease on their explaining why they could not produce account. [P 297 C 2]

(b) Executors—Right and liabilities—Executors authorized to appoint agent and servants—They cannot delegate fiduciary character.

Where a will gives the executors liberty to have their work done through agents and servants and authorises them to incur some additional expenditure, if does not thereby relieve them of their duties and liability as executors or empower them to delegate to others the fiduciary character which belonged to them as executors the executors cannot be heard to say that they never kept accounts and that they never called for the same regularly from the gumasthas. [P 293 C 2]

(c) Executors—Joint executors—Liability.

Where the executors obtain a probate jointly, the fact that only some of the executors actually actively worked does not make any difference in their joint liability. [P 293 C 2]

(d) Executors—Liability of executors—Suit for account and compensation—Wilful default alleged—Claim not dismissed but no relief given—Further inquiry and accounts can be directed on proof of wilful default.

Under the usual administration order obtained on a writ or originating summons, an executor or administrator can only be charged for actual receipt by himself, or his agent not for a default of the co-trustee. And if the statement of claim alleges wilful default, but the judgment at the trial gives no relief on that footing, but does not dismiss the claim for the relief, the Court can, at any subsequent stage of the proceedings, upon evidence of wilful default,

direct further inquiries and accounts on that footing. [P 299 C 1]

D. N. Bagchi and *Nilmoni Goswami*—for Appellants.

H. D. Bose, *Prosanna Sanyal* and *Sourindra Narayan Ghose*—for Respondents.

Judgment.—This is an appeal preferred by defendants 1 and 2 from a final decree in a suit which was instituted by the plaintiff against them and some other persons including one Jatindra Nath Bose. The plaintiff is a universal legatee uuder the will of his grandmother. The will was executed in 1909 and the testatrix died soon after. There were five executors named in the will amongst whom were the two defendants and the aforesaid Jatindra Nath Bose. According to the provisions in the will the plaintiff was to get the estate when he attained majority and the executors were to act as such during his minority. In 1911 all the five executors applied for and obtained probate of the will. Defendant 2 was also appointed guardian of the plaintiff. The plaintiff attained majority on 11th Aswin 1325 (=28th September 1918) and instituted this suit on 7th September 1923.

The plaintiff prayed inter alia for setting aside certain transfers which defendants 1 and 2 had made on declaration of his title to the properties transferred, for recovery of possession of the said properties, for production of certain papers and also for recovery of some movables. With these reliefs which were granted to the plaintiff in part in the preliminary decree that was passed in the suit, we are not concerned. His other prayers were for accounts and for compensation. A preliminary decree granting these reliefs also was passed, which was taken to this Court on appeal but the appeal was dismissed, the decree passed by the trial Court being upheld. In pursuance of the directions contained in the preliminary decree, the Commissioner made the usual investigation and submitted a report. On this report and with some modification of the recommendations therein the final decree has been passed.

It is unnecessary to set out in detail the pleadings of the parties or the points in issue that arose on them, because of the preliminary decree which can no longer be challenged. That decree settled the rights and liabilities of the parties to this extent, that it ordered defendants 1 and 2 to render accounts to the plaintiff for the period 1318 to 1326, both inclusive. At the investigation held by the Commissioner the appellants did not render any accounts or produce any account papers because, as they said, they had none in their possession. The Commissioner thereupon proceeded on the basis of probable income and probable expenditure, upon such materials as the plaintiff supplied and on so much of them as he thought fit to accept and he submitted a report on that basis. The Subordinate Judge on the objection of the appellants made some little variations in the Commissioner's figures and then made the decree which is complained of in the appeal.

To resist the decree that has been passed, some general arguments have been advanced. One of them is that all that the preliminary decree had ordered was that the appellants should render accounts, and that when the appelants have been able to show, as they have shown, that the account papers were not with them but with certain gumasthas who are now in service under the plaintiff, their liability for accounts is gone. This argument is based upon a finding which is contained in the preliminary judgment. In the trial before the preliminary decree the appellants had raised the plea that the plaintiff was not entitled to a decree for accounts because he was himself withholding the account appers through his own gumasthas. It was held that the charge in so far as it was levelled against the plaintiff was unfounded, but that it was probable that the defendants as executors neglected to take the accounts and the papers regularly from the gumasthas. The finding may perhaps be carried further, and it may even be conceded that the said gumasthas are withholding the papers in order to be absolved from their own liability. But how that can absolve the appellants from their liability to account, it is not possible to see. It has been argued that the preliminary decree merely calls upon the appellants to produce the account papers and that as soon as they can explain why they cannot produce them, they have no further liability. This argument obviously has no substance.

Another argument is that the thoka which the plaintiff produced should not have been relied upon, but the income of the estate should have been calculated on the basis of the inventory that was filed at the time of obtaining probate. The inventory does not appear to have been a complete one and in any case the figures given in it are no evidence against the plaintiff nor are they sufficiently reliable. The thoka which the plaintiff has relied on, and the oral evidence that he has given, have been, sufficiently scrutinized, and we are not prepared to differ from the Commissioner and the Judge in the figures as regards probable income that they have accepted.

A good deal of criticism has been levelled against the Judge's remark that "every presumption must be made against executors who are not ready with accounts." If the Judge meant by this that because the appellants did not produce the accounts a presumption was to be drawn to the effect that if produced the accounts would have gone against them a presumption which Section 114, Evidence Act, contemplates, the Judges was certainly wrong, because it has not been established that it was the appellants who were witholding the accounts. But we are satisfied that that is not what the Judge meant by the remark. The appellants had never kept any accounts, they had never submitted any accounts to the Court as they were bound te do under the law, and they had never regularly called upon their gumasthas to submit their accounts to them. We think what the Judge meant was that no reliance could be placed upon such executors, and that when they had thus failed in every respect to do their duty it might be presumed, unless there were strong reasons to the contrary, that the account which the plaintiff was putting forward in his evidence was fit to be accepted.

Nextly, it has been argued that the appellants cannot be held liable because under the will they were appointed only to have their work done through agents and servants. If there was any substance in this argument it should have been urged before the preliminary decree was passed. But, in point of fact, the argument is without any substance. The will gave them the liberty to appoint agents and servants and thereby authorized them to incur some additional expenditure. It never did, not could it ever, relieve them of their liabilities as executors or empower them to delegate to others a fiduciary character which belonged to them as executors. So far as this contention is concerned it has also been said that the appellants or at least one of them, namely the appellant 1, had no time to act as executor, that he was a busy medical practitioner and that he had consented to be an executor because he was obliged to yield to the earnest importunities of the testatrix and so he is not liable. It is sufficient to say that by such pleas the appellants or either of them cannot escape their ordinary liabilities as executors. This is a case in which not merely did the executors act as such, but they did so after having jointly applied for and obtained probate of the will along with the other three executors who were also named in the will. It is quite true that there is some evidence to show that the two appellants fell out with each other at one time and it may also be that they were not pulling on well at all times. But there are enough materials noticed in the preliminary judgment of the Court below to support the Judge's finding that it is not true to say that defendant 1 did no work at all as executor, or that he had no connection at all with the estate. The fact that defendant 2 was taking a more active part and defendant 1 came in and interfered only when it suited his purpose—as is clearly found in the said judgment—cannot in our opinion make any difference in their joint liability on the basis of which the preliminary decree was passed in this case.

Another argument, on the face of it of some importance, has been advanced before us. The argument is that the question whether a decree for money should be passed against defendant 1, in view of the fact that no money ever came into his hands, was not decided by the preliminary decree, but on the other hand was expressly left open at that stage, and that therefore the Judge was wrong in not going into that question and in treating it as concluded. In support of this argument our attention has been drawn to issue 7 framed in the suit and the decision of the Judge thereon as contained in the preliminary judgment

and a passage in the judgment of this Court in the appeal from the preliminary decree. In our opinion, this argument is mis-conceived.

What happened was this. The plaintiff's claim so far as accounts are concerned was of a twofold character firstly in respect of moneys which were or with ordinary diligence might have been in the hands of the appellants (prayer kha to the plaint), and secondly, in respect of compensation for loss caused to the plaintiff's estate during the period of their executorship (prayer cha to the plaint). The first prayer gave rise to issue 6 and the general issue 12, the second prayer, to issue 7. The Judge made a decree calling upon the appellants jointly to render accounts for the period, the meaning of which is that if any money was found due as the result of such accounting, the two defendants were to be jointly liable for that amount. As regards issue 7, it was left over for consideration after accounts were taken. This issue was worded thus :

" Did defendants 1 and 2 administer the estate of late Rajabala Dasi justly and properly ? Are the defendants liable for any loss or damage to the estate due to mal-administration of the estate ? If so to what amount ?"

The reason for leaving this issue over for decision till after the accounting was that until accounts were taken it could not be found what loss was due to whose fault. The law, so far as these matters are concerned, is perfectly clear :

" Under the usual administration order obtained on a writ or originating summons, an executor or administrator can only be charged for actual receipt by himself, or his agent, not for a default of the co-trustee." And, " If the statement of claim alleges wilful default, but the judgment at the trial gives no relief on that footing but does not dismiss the claim for that relief, the Court can, at any subsequent stage of the proceedings, upon evidence of wilful default, direct further inquiries and accounts on that footing : Williams on Executors, Edn. 12, Vol. 2, p. 1292."

Here, the preliminary decree was made against the two appellants because both of them were jointly and severally liable for the moneys that they or their agents received, and they were ordered to render account on that footing, and the question whether any of them was liable for any loss done to the estate which could only be on the basis of his own default and not of the default of his co-executor was left over for consideration till after the accounts were taken. The appellants having failed to render accounts, the Commissioner proceeded to find out what were the probable profits which must have come into the hands of the appellants or their agents. It matters not that the appellants themselves or any of them did not get the amount : it was enough to make them both liable therefor, if not they but their agents got it.

It is no defence for one appellant to say that he did not get the amount until he can show affirmatively that it is in the hands of the other appellants, in which case he may have a right to be reimbursed by the latter. So far as the question of liability arising on the ground of loss caused to the estate by misfeasance, malfeasance or mal-administration is concerned no evidence was adduced by the plaintiff and the Commissioner did not go into it, and no decree therefore has been passed by the Judges on that footing. The Judge therefore was right in observing in his judgment that the preliminary decree having made both the defendants jointly and severally liable, and no question of liability on the ground of wilful defanlt having arisen, it is not open to any of the two appellants to say that he is not liable because no money ever came into his hands. The passage in the judgment of this Court on which reliance has been placed on behalf of the appellants only states that if the appellants produced their accounts and showed that in any particular year no money came into their hands it was obvious that they would not have to account for anything so far as that year was concerned.

There remain now a few specific items in the accounts to consider. It has been argued that in calculating the receipts no allowance has been made for arrears that must have remained unrealized. The answer however is that just as arrears for the period 1318 to 1326 have not been taken into consideration, those for the period antecedent thereto were not also taken into account. Complaints have been made as regards Rupees 30 per month allowed on the ground of house-hold expenses, it being said that the positive evidence is that Rupees 40 used to be paid every month. The evidence which the appellants have relied upon in this connexion is, in our opinion, not very convincing.

The next item is that relating to the repair of the house. That the house was repaired in or subsequent to 1318 is itself a matter of doubt. Item 3 relates to the marriage expenses of a girl of the name of Sukritibala. The plaintiff has examined the bridegroom himself with whom the marriage took place. The evidence which that witness has given does not show that the figure taken is an under-estimate.

On the other items objected to, namely, the collection expenses, we are also unable to disagree with the Court below. The result is that, in our judgment, the appeal ought not to succeed. It is accordingly dismissed with costs. There is a cross-objection, which however, is of no substance and has not been seriously pressed. It is also dismissed.

V.B. *Appeal dismissed.*

A. I. R. 1934 Calcutta 300

AMEER ALI, J.

A. B. Miller

v.

F. G. Ferguson

Civil Application in Original Suit No. 276 of 1876, Decided on 27th August 1932.

(a) Administration—Fund set apart for inactive creditors may be applied for benefit of active creditors.

In the adminstration of an estate funds set aside for inactive creditors may be applied for the benefit of active creditors: *Wilson* v. *Church*, (1911) 106 *L T* 31, *Rel on.* [P 304 C 1]

(b) Administration — Persons found by Court to be creditors are entitled to proportionate share—But this does not affect right of creditors of whom Court has no knowledge—If Court is aware of such persons, it may set aside proportionate share pending finding.

If the Court decides that *A*, *B*, *C* are creditors for the amount of *X Y* and *Z*, that is to say it "finds" or "allows or "discovers" them as creditors, then *A*, *B C* are entitled to proportionate shares in the fund and in any subsequent addition to that fund. *A*, *B*, *C* or their representatives on proving title are entitled to receive such share. In deciding who are the creditors, the Court is perfectly entitled to disregard, *D* and *E*, who have not come in in answer to the advertisement, *D* and *E* need not be regarded as creditors, and the Court may divide the fund among those who prove. This is so even if the Court may be aware of a possible claim by *D* and *E*. But such division will not prejudice the right of *D* and *E* or *F* and *G* (of whom the Court has no knowledge at all) to come in and claim before distribution against the fund, and after distribution, subject to certain qualifications, against those who have received their shares. The Court on the other hand (being aware of possible or likely claim) may not disregard *D* and *E*. It may protect them by setting aside the proportionate shares of *D*. and *E* pending a finding, that is, may set them aside not absolutely but contingently upon a finding; failing proof within the time set by the Court, the shares so set aside will revert to the General Fund. In other words, the Court may give *D* and *E* interlocutory protection. The Court can, in special cases, even find *D* and *E* to be creditors i. e. without active proof and treat the claim as allowed leaving merely the right to receive contingent fund on proof of title. It will be a question to be decided in each case on the construction of the decree as to whether there has been a finding or whether there has been merely interlocutory protection: *English cases referred.* [P 304 C 2, P 305 C 1]

(c) Administration—Executor must state to Court not merely claims of creditors who come forward but other claims of which he is aware.

In the adminstration of estates, it is the duty of the executor or to whomever the conduct of the proceedings is entrusted in furnishing the materials for the report to state to the Court not merely the claims of the creditors who come forward but any other claims of which he is aware: *Re land Credit Co. of Ireland*, (1872) 21 *W R* (*Eng*) 135, *Ref.* [P 305 C 2]

S. K. Gupta—for the settlors' representatives as also for some of the *B C* and *D* creditors.

F. S. R. Surita for Casel De Seguirez De Macao—for Creditors *C*.

Moore—for two of the *D* Creditors.

Kamala Bose—for one of the *C* creditors who had received the trustee dividends in full.

Facts.—This matter is in form an application for directions by the Official Trustee of Bengal. It is headed "In Suit No. 232 of 1876," an administration suit, in which the final decree was passed so long ago as 10th December 1878. The history of the matter is prior to 1826; there was a firm of merchants and agents in Calcutta, consisting of the Barrettos and a gentleman called Edward Brightman. The firm failed. The surviving partners, Louis Joseph Barretto and Edward Brightman, desired to make the most complete possible satisfaction to the creditors of the firm and to their individual private creditors. For this purpose, they entered into a deed of trust, dated 10th March 1827. This is Ex. A to the petition. The terms of this document may however be of some assistance in construing the decree, referred to. During the period 1827 to 1874, the trustees, who were prominent merchants in Calcutta, received proof of or admitted debts and

paid three dividends, which are referred to as the "first three dividends" of 37½ per cent, 12 per cent. and 14 per cent. respectively, making altogether 63½ per cent. The said dividends, or some of the said dividends, were paid to about 108 creditors or their representatives.

On 6th February 1874, on a petition of the surviving trustees the Official Trustee of Bengal was appointed trustee of the deed. This suit No. 232 of 1876 was filed by the Official Assignee representing the insolvent estate of one of the creditors, a Mr. Sinaes for administration of the trusts declared by the deed of 10th March 1827. On 30th November 1876, the preliminary decree was passed. On 10th December 1878, the final decree was passed. As to what happened between these two dates is not known. There are no papers in existence which show what orders were made, and, most unfortunate of all, the officer's report upon which the final decree was based is not available. The matter in issue will really turn upon the construction of that decree.

There are four schedules to that decree. Sch. A includes about 124 names, and it gives against those names the amounts of the debts. The individuals referred to in Sch. A are referred to as "the original admitted creditors" of the firm. The decree nowhere refers to private creditors of the individuals. This schedule contains about 30 of the 40 names contained in the schedule to the copy of the deed of trust. The other names are new. Sch. D contains the names of about 56 persons as being the names of those "creditors or their representatives who had come in the suit and proved their claims." All of these save one, No. 19 of Sch. D, have received from the trustee dividends in full. Sch. C contains about 68 names, as being the names of those creditors who had not come in in the suit. (In actual facts Sch. C shows about 98 names, but of these some 30 properly appearing in Sch. D are included in Sch. C. This error may be illustrated by adding together the numbers of the creditors in Schs C and D, which come to 154, whereas Sch. A contains 124). Of the 70 persons' names, whose names appear properly in Sch. C, 27 had received the three first dividends in full; 27 had received the first dividend in full and four of these 27 the second dividend, and 16 had received none of the three dividends. The aggregate of the last two figures, 27 and 16, some 43 (plus Padchu Pandab crediter No. 31) making in all 44 are the creditors whose names are set out in Sch. B, i. e., creditors who had not received the first three dividends in full. The ultimate effect of the decree was:

(i) To set aside a fund for the B creditors which may be called the "B Fund," representing the first three dividends or that part of the first three dividends not received by the 44 B's. The B Fund was to be sub-apportioned. (ii) To provide for a 4th and final dividend out of the entire balance, the words being "apportion the balance:" (a) This dividend to be paid out to the 51 D's, and (b) to be retained for the 70 C's, the words being "to retain the sums apportioned to the individual creditors mentioned in Sch. C." This may be called the "C Fund," which, again, was to be sub-apportioned. In drawing up the schedules two mistake were made, first, 29 D creditors, who had in fact received the three trustee dividends in full, were wrongly included in Sch. C. The result of this mistake is that 29 quotas of the 4th dividend have been included in excess in "C fund." The capital represented by these excess dividends is about Rs. 36,000. With accretions it now amounts to Rs. 1,25,000. This fund may be called the "D/C fund."

The second mistake made was that owing to the particular form of Sch. D (due to the fact that all the D's had received 63½ per cent. of their claim) showing against their names only the balance of their claims, the final dividend for the D's was calculated on the basis of Rs. 11-5-6 per cent. of 36½ per cent. of their claim. On 31st May 1881, the trust was closed. The events subsequent to the closing of the trust may be shortly stated: Four creditors included in Sch. B, not including Panchu Pandab, have received their share of the B fund and their share of the C fund plus accretions, their shares being in point of fact calculated on their original claim plus interest. In addition to these four, three more creditors, who had already received the first three dividends, have received their portions of the C fund

Certain claims have been received by the Official Trustee, including a tentative claim by the Secretary of State, referred to in para. 29 of the petition, a claim by J. A. Barrettc, and J. N. F. Barretto, one the legal representatives of the original settlors, and a claim by a "C" creditor, the Casel De Seguirez De Macao, a company incorporated under the Portuguese law. It appears that no persons other than those mentioned in the schedules or their representatives have put in claims. Petitions by one of the representatives of the settlor and by the company have been filed, but these applications stood over in order to allow the present matter to be decided. This petition was filed on 1st September 1931, when certain directions for advertisements were given and it now comes to be heard on notice by such advertisement. Thus the different funds which are in question are: (1). The D/C fund, capital plus accretions Rs. 95,137-5-8. This is the fund represented by that portion of the dividends set apart for the 29 creditors whose names properly appear in Sch. D and improperly appear also in Sch. C. (2). The B fund with 39 potential participants. Capital Rupees 56,131-1-4. (3). The C fund with 63 potential participants. (4). Accretions of B and C funds, respectively, approximately Rs. 1,96,703-11-4. and Rupees 28,457-3-4. (5). The D fund not drawn with only one potential participant, equal to Rs. 260-3-9 and with accretions Rs. 742-1-10, practically negligible but theoretically of considerable importance. (6). A further fund (E fund) not yet in existence but which it is sought to create by the release of the D/C, B or C funds or any of them for the creditors now active and appearing, whom I will call E's. The E's (consisting as might be expected mostly of D's) claim that the E fund should be distributed among them to the exclusion of all creditors who have not in these proceedings already come in or who do not come in within a time to be fixed by the Court.

In the application the D's were represented by the Administrator-General the administrator of several estates of creditors included in Sch. D. Mr. Isaacs appeared for the Administrator-General, and Mr. Gupta (who appeared in several interests) also represented three of the D creditors. The claim on behalf of the D's is a double one: (i) That the D/C fund should be utilised—(a) to remedy the D's defective fourth dividend, or (b) to provide a fifth dividend for the D's or E's. (ii) That the B and C funds and/or their accumulations should be utilised to provide a fifth dividend for the D's or E's. The C creditors (including the B's who are only a variety of C creditor) are represented by No. 53 C, the Casel Seguirez DeMacao for whom Mr. Surita appears and by Nos. C-31 and 32 and B, 3, 10 and 38 for whom Dr. Gupta appears and No. C 67 for whom Mr. K. B. Bose appears. The C creditors claim that they are entitled to their portions of the B and C funds with all accretions and to have calculated such portions on the basis that their claims carry interest.

The representatives of the settlors are J. A. Barretto and J. N. F. Barretto, for one of whom Dr. Gupta appears. Their claim is that the portions of the D/C, B and C funds with accretions in respect of which no claims have been received should after satisfying all creditors who have appeared in full should revert to the estate of the settlors. Hence the questions to be considered may be summarised as follows: (i) Should the D/C fund be released, and if so, for whom? (ii) Should the B and C funds and/or their accretions be released and if so, for whom? (iii) Should the D fund (not drawn) be released, and, if so, for whom?

Judgment.—(After stating the facts and the questions to be considered His Lordship proceeded to consider the law on the point.)

Law. — In this case, I will deal with the law before dealing with the question of construction. The authorities to be considered are not many: *Williamson* v. *Naylor* (1), *Alderson* v. *Petrie* (2), *Ashley* v. *Ashley* (3), *Ashley* v. *Ashley* (4), and *In re, Macdonald* (5), *Wilson* v. *Church* (6) and the following text-books: Daniel's Chancery Practice, pp. 890-2, 897-8; Seton, Edn. 7, forms 2417 and 2429; and English Rules of Court, O. 55, inter alia,

1. (1838) 3 Y & C (Ex) 208.
2. (1873) 25 W R 361-n.
3. (1875) 1 Ch D 243.
4. (1876) 4 Ch D 757.
5. (1889) 59 L J Ch (n s) 231.
6. (1911) 106 L T 31.

Rr. 56 and 65, and forms in appendix I Nos. 5 and 6, at pp. 1699 and 1701 of the 1931 rules. I will take these authorities in the above order.

In *Williamson* v. *Naylor* (1), there was a trust by will of one-fifth of the estate of the testator to be distributed rateably amongst 52 persons mentioned in the schedule to the will. It was held and this was the crux of the case that these persons were not legatees but creditors whose debts were revived by the will. The one-fifth amounted to a sum of £3,999. At p. 212 this amount is referred to as having been set apart for the creditors. Of the 52 creditors named in the schedule to the will, only 22 had come in and proved before the Master, and in the result these 22 creditors were allowed to receive and appropriate the whole amount towards satisfaction of their debts to the exclusion of the 30 who did not come in. The real point of the case is that, for reasons good or bad, the schedule to the will was not accepted as equivalent to proof of the debts and the Court actually found only 22 to be creditors. The reasons are indicated at p. 215 of the original report (inter alia that there was no knowing whether the debts had or had not been discharged). The principle applied is not different from that so clearly expressed in *David* v. *Frowd* (7), to which I shall again refer, namely, that the Court is perfectly entitled to distribute among those whom it "discovers" to the exclusion of other creditors whom it does not "discover" subject to certain reservations of the right in favour of those others.

The second authority is *Alderson* v. *Petrie* (2) recited in *Ashley* v. *Ashley* (3). This was decided by Lord Selborne, and the principle laid down was that all the creditors, named in the schedule to the master's report, as having established their claims, acquired a vested interest in the original funds and any funds subsequently falling in, and that

"only the proportion of the fund which the debts of those who claimed payment at the subsequent period bore to the entire debts could be paid out, and that the rest must be retained in Court, (p. 773)."

Alderson v. *Petrie* (2) was followed in and applied in *Ashley* v. *Ashley* (3) to which I must refer to in a little detail. This was the administration of an estate of one Charles Pitfield. On 9th August 1792, there was a report by the master, specifying the fund in Court and specifying the creditors "found." Some of the creditors "found" did not withdraw their dividends, which amounted to £ 425-10s. In 1867 a sum of £3,146-16-3 fell in, and an inquiry was directed as to who were entitled to share to the £425-10s and £3,146-16-3. Only two creditors came in in this inquiry and they claimed payment in full to the exclusion of all others (see p. 246). On 5th April 1875, a certificate was given. It was held that the two creditors who came in only received a rateable proportion of the fund that had fallen in. (As I read it they were not entitled to share in the £425-10s at all.) I do not refer in detail to the judgment on appeal (4), although there is much that bears closely on the matters in question in this case.

In *Re, Macdonald* (5) is an authority, which at first sight, appears to be on all fours with the present case. In 1864, the testator died and, in 1866, there were advertisements for creditors. Some came in, but the proceedings were abortive. In 1888, a large sum of money, £1,180, was paid into Court and the administration was again taken up with the result that, on 16th November 1889, there was a certificate, showing (i) Debts "allowed" to the extent of £609; (ii) 20 creditors were ascertained, i. e., either living or by their personal representatives. Their debts amounted to £325. (iii) 15 creditors not traced. Their debts amounted to £282. The fund was divided and £282 was apportioned and retained in Court subject to further orders. It was argued, by way of distinction, that in this case, all the creditors had put in claims, but that does not appear to be so. So far as the 15 creditors are concerned, in this respect there does not appear to be any distinction between them and the C creditors of the decree of 1878. The only question to my mind is whether the order was intended to be a final order. It would be interesting to know what happened to the fund retained. I am inclined to think that it was a final order: see Daniel's Chancery Practice, p. 395 and Seton, p. 1403). I propose however for the purpose of deciding this case, not to make that assumption.

7. (1833) 1 My & K 200 =2 L J Ch 68.

The last case is *Wilson* v. *Church* (6). The history of the matter will be found in another report, 41 *L. T.* 50. As this case has been strongly relied upon by the D creditors, the judgment of the Court of appeal, on 20th June 1879, declared that the trust fund, to which the bond-holders were entitled by way of resulting trust, amounted to X. The trustees were directed to raise £744,300 and apportion this sum rateably to the unredeemed bonds. The trustees were to give notice to the bond-holders to attend and receive the amounts. The trustees were to pay the holders of the bonds, on presentation, the amount apportioned, and they were to give certificates to such persons entitling the holders to a rateable proportion of the balance. Lastly, the trustees were to apportion the balance and then to distribute to the holders of the certificates on presentation. The trustees raised £744,300, and, out of it paid a dividend of 45 per cent "upon issued certificates." (This must refer to some certificates attached to the bond and not to those issued by the trustees.) There remained a balance of £39,987. On 8th July 1881, an order was made giving the trustees leave to pay a further dividend of £2-6s per cent and (this is the important point) to pay into the Court to the credit of an account headed "unpresented bonds," 45 per cent plus £ 2-6s per cent on £9,600 worth of bonds not presented. The sum so set aside apparently amounted to £1,918. There was a direction as to the ultimate residue with which we are not concerned. As to what happened afterwards, I find some difficulty in following. for instance, as to how the names of the holders of the unpresented bonds were ascertained: see p. 33, Col. 1.

However that may be, the ultimate result was that sum of £1,918 being "the unpresented bonds" fund was released and applied in payment of bond-holders who had presented their bonds. The case therefore is an authority for the proposition that funds set aside for inactive creditors may be applied for the benefit of active creditors. From a practical point of view, the case is not dissimilar to the present case. Legally however there is a vital difference, namely, that the Court had not by a decree, as in *Alderson* v. *Petrie* (2) and *Ashley* v. *Ashley* (3), "found" the holders of the bonds to be creditors or entitled to share in the fund in Court. This difference enabled Eve, J. to distinguish the cases mentioned. This therefore being the state of the authorities, the question is whether or not the present case falls within the scope of *Alderson* v. *Petrie* (2) and *Ashley* v. *Ashley* (3). The D creditors, represented by Dr. Gupta and Mr. Isaacs, seek to distinguish these cases on the following grounds:

(i) They contend that, on a proper construction of the final decree, there is no finding that the persons named in the schedules are creditors. (This is the question of construction which I shall deal with next.)

(ii) They contend (and this is a purely legal point) that there can be no finding in the absence of a claim. That there cannot be a debt without a creditor. That the master or the officer cannot "allow" a claim of "find" a debt unless there is some action on the part of the creditor. The expression used by Mr. Isaacs is that the creditor "must manifest his appearance." That there can be no passive proof of the debt with the effect of vesting the fund in the creditor. They point out that in the cases *Alderson* v. *Petrie* (2) and *Ashley* v. *Ashley* (3) there has been such active proof. As regards *Re, Macdonald* (5) I have expressed my view.

I will now summarize as shortly as I can the principles which I consider are to be deduced from the authorities:

(i) If the Court decides that A, B, and C are creditors for the amount of X, Y and Z, that is to say it "finds" or "allows" or "discovers" them as creditors (all these expressions being used in the authorities I have mentioned), then A, B and C are entitled to proportionate shares in the fund and in any subsequent addition to that fund.

(ii) A, B and C or their representatives on proving title are entitled to receive such share.

(iii) In deciding who are the creditors, the Court is perfectly entitled to disregard D and E, who have not come in in answer to the advertisement. D and E need not be regarded as creditors: see *Ashley* v. *Ashley* (3) and *David* v. *Frowd* (7), and the Court may divide the fund among those who prove. This is so even if the Court may be aware of a possible claim by D and E.

(iv) Such division will not prejudice the right of D and E or of F and G (of whom the Court has no knowledge at all) to come in and claim before distribution against the fund, and after distribution, subject to certain qualifica-

tions, against those who have received their shares : see *In re McMurdo* (8), where this aspect of the matter is fully discussed.

(v) The Court on the other hand (being aware of possible or likely claim) may not disregard *D* and *E*. It may protect them by setting aside the proportionate shares of *D* and *E* pending a finding, that is, may set them aside not absolutely but contingently upon a finding. Failing proof within the time set by the Court, the shares so set aside will revert to the General Fund. In other words, the Court may give *D* and *E* interlocutory protection.

(vi) Can the Court do more for *D* and *E* ? Can it make a final allocation, although *D* and *E* have not come in ? Can the Court, inspite of the ordinary rule of practice, "no claim no creditor" [*Ashley* v. *Ashley* (3)] in a special case decided as to *D* and *E's* right just as it decides on *A*, *B* and *C's* right, and find *D* and *E* to be creditors,i.e., without active proof, treat the claim as "allowed," leaving merely the right to receive contingent on proof of title. Personally I can see no insuperable obstacle on principle to that being done, and I can conceive many cases in which it might be desirable or inevitable, cases, for instance, where there has been considerable lapse of time resulting in loss of evidence and death of various creditors, cases where the claim had once been proved or admitted, cases where not only there had been proof, but where there had been part payment and so forth.

In this connexion I would like to refer, by way of parenthesis, to the *D's*. Is the position of the *D's* in 1932, from a practical point of view, materially different from the *A's* in 1878 ? We know that they have not been paid, but also we know from the finding of the Court that the *A's* had not been paid in 1878. Many of them show no active movement. We do not know whether they are alive or dead. It is clear, in law, that the sum of Rs. 260-3-9 retained in the D Fund for creditor D-19 cannot be applied for the benefit of those *D's* who now "manifest, their appearance."

Upon the question whether the Court can "find" without active proof, I think the portion of Daniel's Chancery Practice, to which I have referred, gives the answer, as also the forms in the Annual Practice. In the administration of estates, it is the duty of the executor or to whomever the conduct of the proceedings is entrusted in furnishing the materials for the report to state to the Court not merely the claims of the creditors who come forward, but any other claims of which he is aware : vide *Re Land Credit Company of Ireland* (9) and indeed, the English form provides a special schedule for this purpose. Form 6-B is to set out "List of sums of money due, but in respect of which no claim has been received," and there are two sub-schedules : Part 1, "sums admitted to be due" : Part 2, "sums which may be due, but in respect of which the liability ought to be proved." It contemplates that for the purpose of preparing the certificate, or its equivalent the Report, upon which the finding of the Court will follow, persons, having what may be called the carriage of the proceedings are to state sums admitted to be due, and which should be taken as proved altough no claim has been put in. It therefore appears both in principle and practice that an "active" claim is not essential for a finding.

(vii) Therefore it will be a question to be decided in each case whether there has been a finding or whether there has been merely interlocutory protection. Has the Court established a right ? Has it merely protected the creditor ? That brings me to the final question of construction.

Construction. — The question is whether the decree of 1879 is a finding in favour of the A creditors for the amounts set against their names in the schedules I will call Construction I. Or was it so far as the C creditors are concerned, protection, pending a finding ? I will call this Construction II. (His Lordship found in favour of Construction I after giving reasons for the same and the judgment proceeded). That being my finding on the questions of construction, the whole matter to my mind is covered by *Alderson* v. *Petrie* (2) and *Ashley* v. *Ashley* (3), and I am not free to release the funds in question for the benefit of the active creditors.

8. (1902) 2 Ch 684=71 L J Ch 691 = 50 W R 644=86 L T 814.

9. (1872) 21 W R (Eng) 135.

Result.—The result is as follows : (i) There is no resulting trust in favour of the settlors or their representatives. (ii) The D-C Fund. This fund is a surplus fund and may be released. If there were no higher claim to this fund, it would, in accordance with *Ashley* v. *Ashley* (3), go to provide further dividends to all those whose claims have been allowed ; but, in my view, it is the duty of this Court, first, to correct the error which has resulted in the fourth dividend to the *D's* being inadequate and I will direct that the D-C Fund be applied, first, apart from the question of costs, which I will deal with hereafter, to remedy the defect of the fourth dividend. As to the precise manner in which this should be done, I need not give directions, unless I am asked to do so, but it would appear, at first sight, that the best method of doing this would be to recalculate the dividend debiting the *C's* with the amounts which they had actually received.

At present, I merely declare that the D-C Fund may be applied for this purpose. The balance, if any, of the D-C Fund will be apportioned between all those creditors whose claims have been allowed, according to my finding (and of course any new claimant who comes in before the distribution). Those A creditors or their representatives, who have come in and are entitled to receive, may be paid out. With regard to the others, their portions must be retained in the same way as the other funds with which I now propose to deal.

(iii) The B Fund must be sub-apportioned and separate individual accounts opened. The sums so apportioned will remain subject to proof of title.

(iv) C Fund to be dealt with in precisely similar manner.

(v) B and C accretions, in my view of the law, go with the share of each individual. In other words, the B and C Funds will be treated as if so many individuals were beneficiaries of a particular portion of the fund from the year 1878.

(vi) The B and C Funds will be apportioned as they stand at present irrespective of any amounts paid out to B and C creditors since the final decree, whether in excess of the amounts properly payable to those creditors or not. As regards such amounts the Official Trustee is discharged.

(vii) The D Fund (Rs. 260-3-9 plus accretions, Rs. 481-14-1, total Rupees 742-1-10) will remain subject to proof of title.

(viii) There will be no E Fund.

(ix) On the question of costs I am prepared to direct as follows : Before the D/C Fund is applied in accordance with direction (ii) above, it will bear the following costs : (The remaining portion is not necessary for the purpose of this reporting).

K.S. *Order accordingly.*

A. I. R. 1934 Calcutta 306

JACK AND NAG, JJ.

Bhabadeb Chatterjee—Plaintiff — Appellant.

v.

Gopesh Chandra Nandi—Defendant—Respondent.

Appeal No. 1097 of 1931, Decided on 29th August 1933, from appellate decree of Sub-Judge, Burdwan, D/- 6th November 1930.

Bengal Tenancy Act (8 of 1885), Ss. 105 and 107—Exparte decision under S. 105 is no bar to tenants subsequently claiming niskar title.

An exparte decision under S. 105 does not bar a tenant from subsequently claiming niskar title. [P 307 C 1]

Benoyendra Prosad Bagchi and *Apurbadhone Mukherji*—for Appellant.

Rishindra Nath Sarkar, *Promode Kumar Ghose* and *Indu Prokash Chatterjee*—for Respondent.

Jack, J.— This appeal has arisen out of a suit for recovery of rent for the years 1331 to 1334 B.S. at Rs. 6-9 15gds with cess at two pice per rupee twenty-five per cent damages, the total claim being Rs. 29-6-0. The suit was dismissed in the trial Court and also in the Court of appeal below, on the grouud that the suit was barred under the provisions of S. 105, Ben. Ten. Act, read with S. 107 of the Act. The ground on which this appeel was urged was that the learned Subordinate Judge erred in law in his appreciation of the effect of the proceedings under S. 105, Ben. Ten. Act and that the learned Judge ought to have held that the question whether the holding was rent free was really decided in the previous case under S. 105, Ben. Ten. Act, and therefore res judicata between the parties and cannot be agi-

tated in any subseqnent suit between the same parties. In this case the entry in the khatian was that the land was liable to the payment ot rent, whereas the defendant asserts that he held the land rent free from the time of his predecessors in title, on the assertion of lakherai right since 1237 B. S.

The proceedings under S. 105 were exparte and the Revenue Officer decided what was fair and equitable rent. The question as to lakheraj title of the tenant was not raised or discussed in those proceedings and we agree with the opinion of the learned Subordinate Judge who cited authorities in support of the proposition that an exparte decision under S. 105 of the Act does not bar a tenant from subsequently claiming niskar title. This is the only point which is raised in this appeal and is decided against the appellant. This appeal is accordingly dismissed with costs.

Nag, J.—I agree.

K.S. *Appeal dismissed.*

A. I. R. 1934 Calcutta 307

JACK AND NAG, JJ.

Joy Kumar Deb —Appellant.

v.

Jamiraddin and *another* — Respondents.

Appeal No. 1216 of 1931, Decided on 22nd August 1933, from appellate decree of 3rd Court Sub-Judge, Tippera, D/- 10th September 1930.

Bengal Tenancy Act (8 of 1885 as amended in 1928), Ss. 48 (c) and 49 (b) — Notice of ejectment under S. 49 (b) of old Act—S. 48 (c) of amended Act is not retrospective and landlord's right to eject on service of notice is not affected.

Section 48 (c) of the amended Act of 1928 is not retrospective; hence the right to eject the tenant which vests in the landlord on service of notice of ejectment under S. 49 (b) of the old Act is not affected and the tenant is liable to ejectment on expiry of the period mentioned in the notice : *A I R* 1933 *Cal* 435 (*SB*), *Ref.*

[P 307 C 2]

Nripendra Chandra Das for Birendra Chandra Das—for Appellant.

Upendra Kumar Roy — for Respondent.

Jack, J.—This appeal has arisen out of a suit for ejectment of the defendant under-raiyats after notice to quit under S. 49 (b), Ben. Ten. Act of 1885. Notice was served on them on 10th April 1928 (viz., before the end of Chaitra 1334 B. S.) requiring the defendants to leave the land by the end of Chaitra 1335 B S. Before this period expired from February 1929 the amended Tenancy Act came into force. Admittedly if it applies the under-raiyats are not liable to ejectment whereas if the old Act applies they are liable to ejectment. Both Courts below have held that the new Act applies and that the defendant under-raiyats are therefore not liable to ejectment. This view depends on the fact that the defendants were still under-raiyats after the new Act came into force, and therefore it is claimed that their rights as under-raiyats are determined by the provisions of the amended Act. This view however fails entirely to take account of the fact that immediately on service of notice under S. 49 (b) of the old Act a right to eject the tenants on and after the end of Chaitra 1335 vested in the landlord and unless the provisions of the new Act as to ejectment after notice contained in S. 48 (c) of the Act are retrospective they could not affect the right which had vested in the landlord on service of notice under S. 49 (b) of the old Act.

There is no indication in the Act that the legislature intended this provision to be retrospective and, under S. 6, Cls. (b) and (c), General Clauses Act of 1897, it would not therefore affect the right which had vested in the landlord under the provisions of S. 49 (b) of the Act of 1885 to eject the defendants after the expiry of Chaitra 1335. Nothing in this case appears to turn upon the form of notice since it happens that the notice, which was given, definitely prescribed a time within which the under-raiyats were to leave the land, and in any case, though there is a slight difference in the form, there is no difference in the meaning of a notice under the old and under the new Act, in both cases the notice is one terminating the tenancy at the end of the following agricultural year. The learned advocate for the respondents maintains that the decision of the Special Bench case of *Jiban Krishna Chakrabarty* v. *Abdul Kader Chowdhury* (1) was made to depend on the difference in the form of notice under the two Acts; that may be so, though, at the conclusion

1. A I R 1933 Cal 435=143 I C 164 = 60 Cal 1037 (SB).

of the judgment, His Lordship the Chief Justice states that

"whatever the form of notice which was actually given by the plaintiff to the defendant, the amending Act does not affect the rights of the parties."

In any case I would prefer to base my decision as did Mitter, J., in that case on the fact that the new Act cannot interfere with the vested interest of the landlord. It follows that the defendants are liable to ejectment. This appeal is therefore allowed and the suit is decreed. The plaintiff will get possession of the land in suit from which the defendant will be ejected. The plaintiff will get his costs in this Court with interest at 6 per cent. per annum.

Nag, J.—I agree.

K.S. *Appeal allowed.*

A. I. R. 1934 Calcutta 308

MUKHERJI AND NAG, JJ.

Asutosh Mukherjee and *others*—Defendants—Appellants.

v.

Tarapada Mukherjee and *another*—Respondents.

Appeal No. 235 of 1929, Decided on 12th June 1933, from appellate decree of Third Court Addl. Sub-Judge, 24-Pargannas, D/- 7th June 1929.

(a) Hindu Law—Joint family property—Existence of nucleus—Presumption is that the separate property is joint family property—Burden is on the party who alleges contrary to prove.

Before the property in possession of one member can be presumed to be joint family property, the existence of a nucleus of joint family property must be proved. Where there is ancestral property by means of which the property may have been acquired then it is for the party alleging self-acquisition to prove that it was acquired without any aid from the family estate: 33 *All* 677, *Rel on.* [P 316 C 2]

(b) Hindu Law—Joint family—Partnership—Joint contribution of specific amounts—Rights of parties under Contract Act arise and not under Hindu law.

Where the acquisition is not made out of any nucleus of joint funds but in a partnership started on a joint contribution of specific amounts by each, no acquisition of rights as under Hindu law arises, but the rights are governed by the Contract Act. [P 322 C 2]

(c) Hindu Law—Joint family—Self acquisition—Separate earnings by members unless blended with joint funds remain separate—Sending money for family requirements does not blend separate earnings.

A member of a joint Hindu family can make separate acquisition of property for his own benefit and unless it can be shown that the business grew from joint family property or that the earnings were blended with joint family estate they remain free and separate. The mere fact that money used to be sent regularly and constantly, for meeting the requirments of family does not amount to blending the earnings into the common stock: *A I R* 1929 *P C* 1, *Rel on.* [P 317 C 1]

(d) Hindu Law — Partition — Doctrine of double share—There must be joint funds to start with.

In Hindu law the doctrine of double share is applicable where at the foundation there was an acquisition out of joint funds but the means of acquisition drawn from the joint funds are of little consideration, while the personal exertions are considerable. The doctrine has no application where there has been no common funds which even went to start or implement the business. [P 318 C 1]

(e) Contract Act (1872), S. 253—Scope.

Section 253 has for its foundation a contractual relation of partnership. [P 318 C 1]

(f) Deed—Construction—Word "us" used in letter from one brother to another, does not show partnership.

From use of the word "us" in a letter written by one brother to another in connexion, with a suit, it is not to be inferred that there was partnership between the brothers. [P 319 C 1]

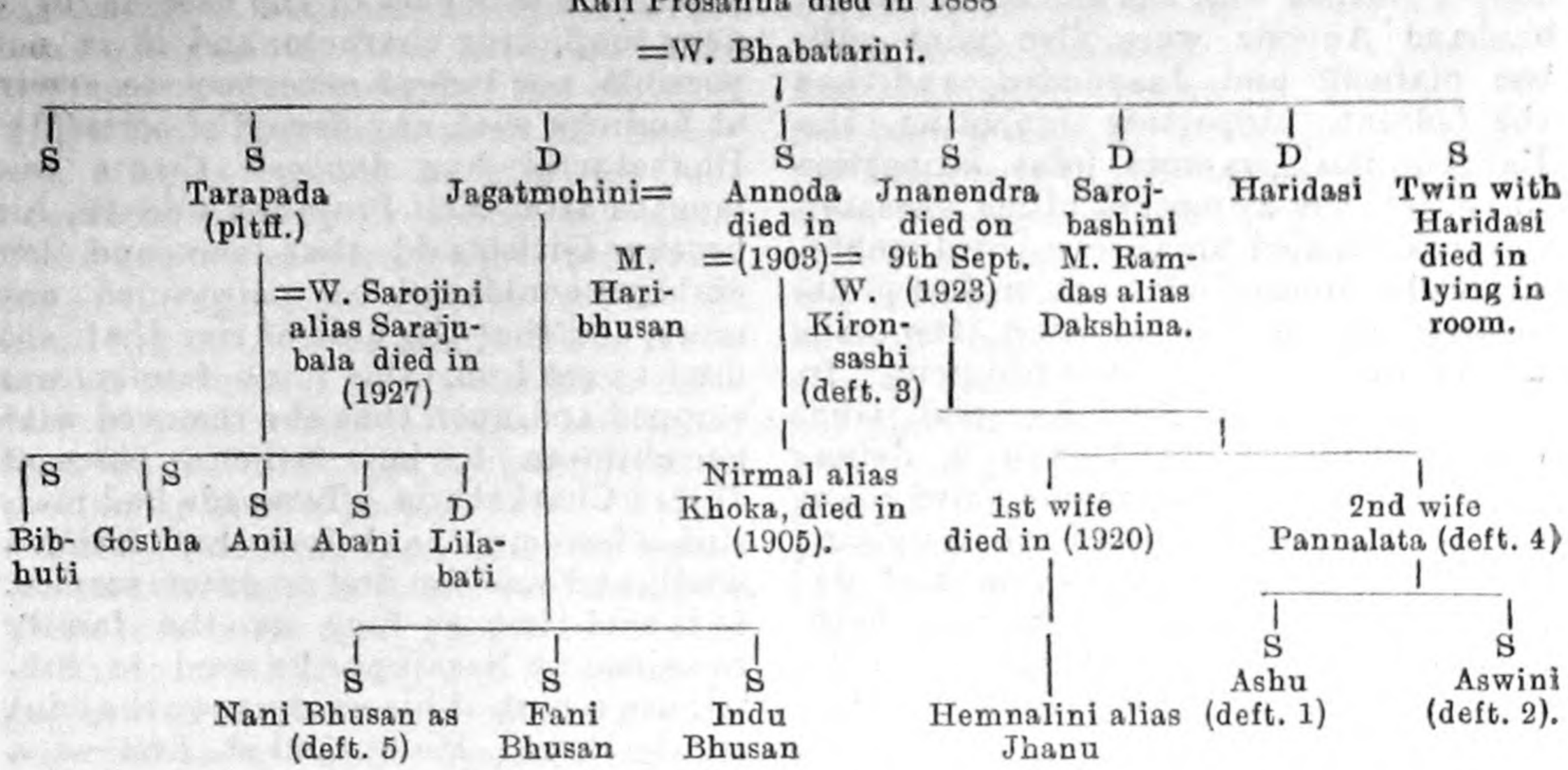
Amarendra Nath Bose and *Shambhu Nath Banerjee* for *Panna Lal Chatterjee*—for Appellants.

Rupendra Kumar Mitter, Kshitindra Nath Bose, Bijan Behari Mitter and *Prandhan De*—for Respondents.

Judgment.—This is an appeal from a preliminary decree in a suit for partition. Defendants 1 and 2 and 4 to 8 are the appellants. There is a cross-objection on behalf of the plaintiff who is one of the respondents in the appeal. The other respondent is defendant 3. To appreciate the relationship amongst the parties a reference to the following pedigree is necessary:

(*For pedigree table, see p.* 309)

Kali Prosanna Mukherjee died in 1888 (=1294). Of his sons, those who figure in this case are three: Tarapada the eldest; Annada, the second; and Jnanendra, the third. Tarapada's four sons are Bibhuti, Gosta, Anil and Abani, and his daughter is Lilabati. His wife Sarojini alias Sarajubala died in 1927, while this suit was pending in the Court below. Annada died in 1903, leaving his widow Kironsashi who gave birth to a posthumous son Nirmal alias Khoka, who died in 1905, Jnanendra's first wife died in 1920, and by her he had a daughter Hemnalini alias Jhanu. Thereafter Jnanendra married his second wife Pannalata, and had, by her two sons, Ashu and Aswini. He executed a will on 21st July 1923 (=5th Sravan 1330)



and died on 9th September 1923. He left three daughters; Jagat Mohini, who was married to Hari Bhusan Banerjee and has three sons Nani Bhusan, Fani Bhusan and Indu Bhusan; Sarojbasini whose husband is one Ramdas Chakravarti alias Dakshina, and Naridasi, Ramdas and Nani Bhusan are two amongst the principal witnesses in this case: the former being P. W. 19, and the latter D. W. 8.

Tarapada is the plaintiff in this suit. Ashu and Aswini, the two infant sons of Jnanendra represented by their mother Pannalata as their guardian are defendants 1 and 2. Defendant 3 is Kironsashi. The five executors in Jnanendra's will are defendants 4 to 8, being, respectively, No. 4 Pannalata; No. 5, Nani Bhusan, who is one of the sons of Jagat Mohini: No. 6, Radhanath, who is son of one Umesh who was a brother of Kali Prosanna; No. 7, Kishori, who is a grandson of one Gobinda who was an uncle of Kali Prosanna; and No. 8, Bhakatabatar, who is the younger brother of the father of defendant 3 Kironsashi. The suit was based upon very simple allegations. It was alleged that the plaintiff Tarapada and his brother Jnanendra lived as members of a Hindu joint family governed by the Dyayabhaga law and jointly carried on an extensive business in medicine in Rangoon and that with the proceeds of that business they jointly acquired moveable and immovable properties and owned and possessed the same in equal shares. It was alleged further that after Jnanendra's death his widow and the two infant sons continued to live as members of the joint family, but that some wicked persons had intervened and were inciting the widow to separate in mess from the plaintiff and were managing the Rangoon business against the plaintiff's wishes and had also taken no heed of repeated demands which the plaintiff had made for partition. A decree for partition was prayed for, with a separate allotment of plaintiff's eight annas share in all joint moveable and immovable properties which were described in four schedules appended to the plaint, namely, Sch. Ka, immovable properties; Sch, Kha, business at Rangoon, Sch. Ga business in money-lending; and Sch. Gha, moveables.

The defence of defendants 1 and 2, shortly put, was that the plaintiff and Jnanendra were not joint in estate; that the Rangoon business belonged exclusively to Jnanendra who acquired it at its inception with his own money and subsequently improved it to a flourishing condition by his own exertions. funds and resources; that all the properties given in the plaint (with the exception of two items of properties of Sch. Ka, which were said to belong to a third party and merely stood in the name of Jnanendra) had been acquired with the profits of that business; that the plaintiff had no share in the properties; and that Jnanendra used, out of generosity to maintain out of his income his relations, including the plaintiff and his family, who were in want. Defen-

dant 3 pleaded that she and her deceased husband Annoda were also joint with the plaintiff and Jnanendra, and that the plaint properties including the Rangoon business were joint properties in which she as mother of her deceased son was entitled to an one-third share. The Subordinate Judge has made a preliminary decree for partition, the main points in which are the following: In the proporties of Sch. Ka, and Gha, plaintiff, defendants 1 and 2, defendant 3 are to have an one-third share each; and in Sch. Kha and Sch. Ga plaintiff to have an one-third share and defendants 1 and 2 a two-thirds share. And it was ordered that there would be a partition of the properties of Sch. Ka, and Gha, but

"the Sch. Kha property will remain joint, and plaintiff will get one-third share in the profits only and not in the assets thereof."

It is the common case of all the parties that the properties, or at any rate the bulk of them, owe their origin to funds which were the proceeds of the Rangoon business. It is necessary therefore to give a concise account of the state of the family, such as the evidence discloses, up to the point of time when that business was started. The family belonged to Narainpur in the Subdivision of Basirhat (District 24 Parganas). Kali Prosanna Mukherjee was the eldest in a family of five brothers, namely, himself, Kali Mohan, Jagabandhu, Girish and Umesh. Of these Jagabandhu died first. Then died Kali Prosanna. Kali Prosanna had been a Naib under some Ghoses. According to Kali Prosanna's widow Bhabatarini, the family at the time of Kali Prosanna's death, which took place in 1888 (=1294), had practically no properties with the exception of Abad, which, according to her, yielded about 3 or 4 bishes of paddy per year. On behalf of the plaintiff, evidence has been given that Kali Prosanna and his brothers had an annual income of Rs. 700 or Rs. 800 which, within a year of Kali Prosanna's death, dwindled down to a half. Be that as it may, subsequent events show that on Kali Prosanna's death, practically speaking, all nucleus from Kali Prosanna's ancestral properties were cut off and his widow and children were left to shift for themselves as best as they could.

The evidence adduced by the parties as regards this part of the case is of a very conflicting character and it is not possible, nor indeed necessary, to arrive at findings with any degree of certainty. Bhabatarini has deposed that a few months after Kali Prosanna's death, his brother Girish said that she and her children could not be maintained any more, and that the dole of rice that she used to get from the joint family was stopped and upon that she removed with her children to her father's place at Jhikra Chatkaberia. Tarapada had married a few months before his father's death and was the first to enter service. It is said that so long as the family remained at Narainpur he used to contribute a part of his earnings to the joint family there. He worked at first as a teacher in the Basirhat School, and then he served one Rai Bahadur Chaudhury and thereafter as a private tutor of boys and thereafter in 1900 or so he came to work in the shop of one Bhuban Dutt, where according to the defendants he used to get a pay of Rs. 25 and according to the plaintiff Rs. 5 or Rs. 10 more. Annada and Jnanendra were, on Kali Prosanna's death, put into a school at Sanpukuria in Bhabatarini's father's village Jhinkra Chatkaberia. Bhabatarini's brother died soon after and on that Jnanendra removed at first to Bhabatarini's sister's house at Baraset and after being there for about a year he went to put up with a relation of the family named Kanti Mookerjee at Bhawanipur. At Bhawanipur Jnanendra stayed for about seven years and read up to the Entrance Standard. In 1900 or so Jnanendra joined Bhuban Dutt's shop on a pay of Rs. 20. On Bhabatarini's brother's death, Annada was given shelter in the house of one Mohim Chatterjee at Khardah and sometime after he joined the Government School at Taki where he read for two years or so.

He thereafter began to work as a Khata writer in a grocer's shop and then he took service under one Moti Babu and later on joined Bhuban Dutta's shop on a pay, which according to one account was Rs. 15 and was Rs. 40 according to another. The evidence is to the effect that Annada was already in service in Bhuban Dutta's shop when Jnanendra came from Bhawanipore and took up service there. The family during this period eked out a somewhat miserable

existence. A number of money-order acknowledgments (Ex. 2 to 2p) have been produced on behalf of the plaintiff which show that small sums of money used often to be paid by him to Jnanendra in the latter's school-boy days. These acknowledgments show remittances to the aggregate amount of Rs. 82 from August 1889 to March 1893. They do not however give any adequate indication of the extent of the assistance that the plaintiff must have rendered to the family at this period.

Notwithstanding the conflict and confusion that there is in the evidence, we think it is fairly clear upon the evidence of Bhabatarini herself, who is certainly not a witness who can in any sense be regarded as favourably disposed towards the plaintiff, that during this period the plaintiff was the only earning member of the family and it was he who had to bear the brunt of its expenses, ordinary as well as extraordinary. He no doubt received some assistance from his good relations, in the matter of the maintenance and education of his brother; but such assistance was apparently all that he received from outside sources. Bhabatarini has said that so long as Jnanendra was at Bhawanipur the plaintiff used to send him Rs. 4 regularly every month. It is also clear upon her evidence that the plaintiff had to meet not only the ordinary expenses of the family consisting of his mother and his own wife and himself, but also the expenses which were incurred for the marriage of his sister Haridasi, who appears to have been married about six years after Kali Prosanna's death. It is not necessary to go into greater details, but it would be sufficient to say that in 1901, the year in which the story of this case really opens, all the three brothers were employed in the shop of Bhuban Dutta, earning altogether Rs. 70 or Rs. 90 a month.

In 1901 the state of the family took a somewhat better turn. In April or May 1901 Jnanendra left for Rangoon on being appointed general manager of Bhuban Dutta's medicine business there. He was to get the same pay, namely, Rs. 20 as before, but also a commission on profits in addition to his pay. What the rate of this commission was is a matter of dispute, some saying it was 4 annas in the rupee and others only 1 anna in the rupee, the latter version being more probable. He got himself married shortly before he started. It has been proved by P. W. No. 19, Ramdas Chakravarti, who is one of the principal witnesses on behalf of the plaintiff and who happens to be doubly connected with the plaintiff—both as the husband of plaintiff's sister Sarojbashini as already stated and also as the brother of the plaintiff's wife, Sarojini alias Sarajubala, now dead, and who has, as will appear later on, sought to support the plaintiff's case on all possible points and in all possible ways, that at the time when he left for Rangoon Jnanendra had no money in his hands. And there is other evidence to show that his passage money was paid by Bhuban Dutt, while a few extra rupees were given to him by his aunt, namely, Bhabatarini's sister: vide evidence of Bhabatarini and of D. W. 4 Manmatha, the son of Bhabatarini's sister. The evidence is that Jnanendra's pay used to be drawn by Tarapada from Calcutta, and there is nothing to suggest that the commission which fell due to him at Bhuban Dutt's business at Rangoon was drawn by Jnanendra at any time or at intervals. Jnanendra therefore must have managed to defray his own expenses from some other source. That this was so is also the case of both the parties, notwithstanding that only so little has been disclosed as regards the character of Jnanendra's earnings about this period as could not possibly be avoided. Speaking of the period antecedent to the purchase of the Pharmacy at Rangoon which took place in July 1906 (=1313) the plaintiff has said:

"The Rangoon business was started in 131 (=July 1906) with funds of Jnanendra and myself and both of us contributed our labours to it. . . . . Before this business, we had a cocaine business in Rangoon. I used to send cocaine from Calcutta. This business fetched immense profits."

The existence of this business in cocaine which was carried on by Jnapendra and Tarapada about this period prior to the purchase of the Pharmacy is also spoken to by P. W. 19, Ramdas Chakravarti who has deposed that he too had to take part in it under Jnanendra's instructions. And the fact that the two brothers did jointly carry on this business at the time is amply

established by a letter of Jnanendra to Tarapada [Ex. 1 (e)] of which the portion containing the date has been torn off but which must have been a letter of a date prior to Annoda's death which took place in 1903, because the letter contains a reference to Annoda as then living.

There is no doubt therefore that during the first few years of Jnanendra's stay at Rangoon and till the Rangoon Pharmacy was purchased Jnanendra was not only in service at Bhuban Datta's as their general manager, but also carried on jointly with Tarapada a very lucrative business in cocaine. So far as Tarapada is concerned, he worked as a sub-broker in the firm of Messrs. Schroder Smidt & Co. He says he worked there from 1901 to 1909, and though about the exact period that he worked the evidence is conflicting yet it is clear that he must have worked as such for several years, and, at all events, till 1906. Bhuban Dutt himself was the Banian of Messrs. Schroder Smidt & Co., and one Narain Dutt was the broker under him; and Tarapada came in there as under-broker. Tarapada's earnings as such under-broker, according to P. W. 12, Narain Chandra Dutt was "Rs. 50 or Rs. 60 at the start and rose up to Rs. 200, Rs. 250 or Rs. 300 at the end." The evidence of P. W. 19, Ramdas Chakravarti is that after leaving this job as under-broker to Messrs. Schroder Smidt & Co., Tarapada commened a business in bones in partnership with certain other persons, namely, a Zamindar of Sathkhira and two "Christians," that Tarapada contributed about Rs. 3,000 to the capital of this business but the business collapsed within a year, landing him in debts and liabilities. He has deposed that the partners gave out that they would make Tarapada liable for Rs. 6,000 or Rupees 7,000, and that leaving aside the liability on account of the bone business Tarapada's financial position about 1315 B. S. (=1908-9) was this: that he had contracted debts to the tune of Rupees 1,200 or Rs. 1,300. As regards Annoda it would be sufficient to say that he carried on some sort of a business in clothes, with no regular shop for the purpose, but with a stock kept in the house itself. Annoda died on 10th October 1903. Jnanendra returned from Rangoon for the first time in 1903 after Annoda's death. Kironsashi in her evidence says:

"He (meaning Jnanendra) was iu Rangoon when my husband died. On hearing about the illness, as he was written to for medical treatment, he came. My husband's elder brother (meaning Tarapada) wrote the letter. My husband died before he came. He came home and heard that my husband had died. My husband died immediately after the telegram was sent. My husband died three or four days before he came. It was necessary to send a telegram to Jnanendra for money was required."

In 1905 Jnanendra again came back from Rangoon and while returning took his wife with him. In 1909 he came a third time and Bibhuti accompanied him to Rangoon on his return journey. Gostho went to Rangoon in 1918, Jnanendra came back from Rangoon for the last time in 1921. A few more facts require mention at this stage. In 1920 Jnanendra's first wife died. He therefore married Pannalata, defendant 4, and had by her two sons Ashu and Aswini, defendants 1 and 2, as already stated. While Jnanendra and his wife and daughter used to put up at Rangoon Tarapada and his wife and children with the exception of Bibhuti and Gostha who went to Rangoon in 1909 and 1918 respectively, as already stated together with Bhabatarini, Kironsashi, Haridasi and others used to stay at Baranagore. The evidence is to the effect that at Baranagore they lived at different houses from time to time on very small rents, and it was only after Jnanendra's final return from Rangoon that a decent house on a rent of Rs. 60 was rented at Baranagore and thereafter Jnanendra removed to another house for which he had to pay a rent of Rs. 100. There is ample evidence, mostly documentary, which proves that Bhabatarini was not pulling on well with Tarapada and his wife, and that this was one of the factors which served to create an unpleasantness between the two brothers (Vide Ex. B (5) of 1912, Ex. B (4) of 1915, Ex. 1Z (32) of 1917, Ex. 1Z (45) of 1919, Ex. B (10) of 1921 and Ex. W series.). Bhabatarini has also deposed that towards the last four years or so before Jnanendra's final return from Rangoon, she had to pay the rent of the house she was living in because Tarapada with his part of the family had removed to their native village at

Narainpur. Whether this evidence is literally true or not, one need not inquire; but this much is clear: that the relations between the mother and the son were not at all pleasant at any time since Tarapada was financially broken down.

On 21st July 1923 (5th Sravan 1330) Jnanendra, while staying at Baranagore, executed a will. In this will he made certain gifts to charitable objects and for the benefit of an educational institution which he had established in memory of his father Kali Prosanna and also certain other bequests for the benefit of some of his relations, including a provision for Rs. 2,000 to be spent for the marriage of Tarapada's daughter Lilabati. As regards his moveable and immovable properties, he provided that his sons would be the proprietors subject to this: that in the business at Rangoon Nani and Gostha and Gostha's two younger brothers, when competent, would work and for that Nani would get a 2 as. share, and Gostha and such of his said brothers who would work in the business would get a 3 as. share in the profits. Jnanendra died, as already stated, on 9th September 1923.

This suit was commenced on 25th February 1924. Written statement on behalf of the defendants 1 and 2 was filed on 26th July 1924. Defendant 3 filed her written statement on 6th April 1925, to the contents of which reference has already been made. In her evidence she stated that this written statement was prepared for her by her sister's husband one Nisha Nath Bhattacharjee who, besides herself, was the only witness (D. W. 1) examined on her behalf. In the trial she herself gave her deposition on commission while putting up at the house of Tarapada. Probate of the will was applied for by some of the executors; and after some contest amongst some of the executors themselves and also some objection on the part of Tarapada with regard to some minor matters eventually on 30th July 1925 a grant was made in favour of all the five executors. During the pendency of the present suit, Gostho instituted a suit on 11th April 1927 for his share of the profits of the Rangoon Pharmacy on the basis of the will (vide plaint Ex. R) and eventually got a decree (Ex. RR) on 25th March 1928. Tarapada was not wholly unconcerned with this suit, as the letter Ex. AAA, dated 19th September 1927, which he wrote to one of the executors, shows. In this letter he advised that executor to take up an attitude which might not appear to militate against his own contentions in the present suit.

We now come straight to the circumstances under which the business in Rangoon, which forms the subject matter of Sch. Kha to the plaint was started. The business consists of two items, one going by the name of Imperial Pharmacy and situate at premises No. 6, Moghul Street, and the other a branch Pharmacy started later on in premises No. 1-97 Dal Yuspi. It is really the acquisition and character of the former of the two items with which we are concerned in this case, because it is these that would govern the other items as well. The definite case which the plaintiff has made as regards this matter would be clear from his own deposition on the point. He says:

"The Rangoon business was started in 1313 (July 1906) with the fund of Jnanendra and myself and both of us contributed our labours to it. Annoda was dead at the date of starting that business. It is not true that the said business was started by Jnanendra with his own funds. The said business was started by us with Rupees 1800 and out of the said sum I contributed Rs. 1000, and Jnanendra Rs. 800."

His case also is that after the Pharmacy was purchased with Rs. 1,800 raised in that way, he used to contribute his labours by purchasing and sending medicines from Calcutta and doing other necessary works in connection with it. His case further is that the business was expanded by Jnanendra by putting money into it now and then, and that the proceeds used to be appropriated partly by himself and partly by Jnanendra. He explains that the Pharmacy was started in the name of Jnanendra and he himself remained only in the background lest Bhuban Dutt, who was Banian to Messrs. Schroder Smidt & Co. and under whom he was under-broker, and who himself had a business in medicine in Rangoon in which Jnanendra worked as General Manager, as previously stated, objected to his being concerned in a rival business there. His case further is that Bibhuti as well as Gostha also took part in looking after the Pharmacy and

managing its affairs. Analyzed, Tarapada's case therefore is that he claims to be a partner to the extent of an 8 as. share in the business because: 1st., he contributed Rs. 1,000 out of the sum of Rs. 1,800 with which the Pharmacy was purchased; second, he used to contribute his labours by purchasing and sending medicine from Calcutta and doing all necessary works in connexion therewith, and in short was the representative of the business on its Calcutta side; and third.. his sons Bibhuti and Gostha used to contribute their labours on the business. Upon the evidence on the record it is plain beyond doubt that the business that gradually grew out of the Pharmacy in Moghul Street so purchased, and in respect of which a branch was subsequently started in Dal Yuspi, became in fulness of time a very flourishing concern and yielded large profits. It is also evident that from time to time large sums of money had to be put into the business in order to meet its ever increasing demands. The Subordinate Judge has observed and the observation seems to us to be correct:

"It is not disputed that the expansion and development of the business was due mainly, if not solely to the exertions resources and credit of Jnanendra. A number of documents have been put in to show that—Jnanendra had to borrow large sums from different quarters from time to time on his personal responsibility to meet the ever increasing demands of the Pharmacy. Tarapoda does not claim that besides personal exertion and the aforesaid sum of Rs. 1,000 he had to make any other contribution in money worth the name for the building up of the business."

Upon this state of facts we have to examine the evidence in order to find out whether the three contentions referred to above which form the basis of the plaintiff's claim as regards the Rangoon business, or any of them, is true. To take first the story of the contribution of Rs. 1,000, P. W. 19 Ramdas Chakravarti says that there was a dispute between Jnanendra's cousin Heru alias Suren, and Bhuban Dutta's people at Rangoon's and so it was decided to start a new shop there which would belong to both the brothers, and that there was a consultation in which Tarapada said that he would advance Rs. 1,000 for the purpose. This consultation according to Tarapada took place when Jnanendra came down to Calcutta for taking his wife to Rangoon and he has given the approximate date thereof as April or May 1906. Tarapada says that he had Rs. 1,000 with him in currency notes and that he sent this amount to Jnanendra at Rangoon through one Kali Prosanna Das, now dead, who was an employee of Messrs. Bhuban Dutt and who was being sent out by them to Rangoon to be the manager of their medicine business there in the place of Jnanendra. He admits that the fact that a rival business in medicine was being started was to be kept back from the knowledge of Bhuban Dutt as such a disclosure might lead to his dismissal from his post as under-broker under Narain Dutt, and that this was the reason why the business was allowed to be started in the sole name of Jnanendra. Yet his story is that he sent Rs. 1,000 through Kali Prosonna, who was none else than an employee of Messrs. Bhuban Dutt. It is also the case that no receipt was taken for the amount so entrusted to Kali Prosanna, but that may perhaps be explained by the fact that Kali Prosanna was an old class-mate of his.

The whole story has been challenged on behalf of the defence as a myth, even to the extent of denying the existence of such a man as Kali Prosanna Das and of his having even been in the employ of Messrs. Bhuban Dutt, and this challenge certainly finds some support from the answers given in cross-examination by two of the witnesses, namely P.W. 11 Bhuban Mohan Das and P. W. 12 Narain Dutt, both of whom were prominently connected with the shop, and the former having been its manager. D. W. 2 Sudhansu Sekhor Roy has deposed that one Haridas Chandra became manager of Messrs. Bhuban Dutt's business at Rangoon when Jnanendra left and that he never saw anyone named Kali Prosanna Das as such manager. He is apparently a respectable witness, though not quite a disinterested one. Another witness D. W. 9 Kunja Behari De has definitely deposed that there was no Kali Prosanna Das in Baranagore, such as might have been utilized for the purpose alleged. A witness. P.W. 16 Saroda Prosad Banerjee, deposed that he saw the handing over of the money by Tarapada to Kali Prosanua Das in the shop of one Kishori Doctor and that Kishori Doctor as well as one Adhar Das were

present at the time but are now dead. In cross-examination however he admitted that he has "no positive recollection," and also that he did not remember the name of the man to whom the money was paid. This witness does not mention that P. W. 19 Ramdas Chakravarti was present on the occasion, and yet the latter gave evidence to the effect that Jnanendra had written to him to see that Tarapada did send the money and that he was present when Tarapada handed over the money to Kali Prosanna. Some other witnesses have also been examined on behalf of the plaintiff to prove what may be regarded as a sort of admission on the part of Jnanendra. One of these P. W. 4 Kali Charan Banerjee, says that it was he who gave information to Jnanendra about the Pharmacy and on that Jnanendra wrote to Tarapada from Rangoon about the money, that Tarapada wrote in reply that he would be sending money soon and that in case there was delay the money might be collected through the help of the witness, and that as Tarapada sent Rs. 1,000 his help became unnecessary. It is somewhat difficult to fit this version in with that given by P. W. 19 Ramdas and of Tarapada himself. Another P. W. 2, Atul Krishna De has deposed that Jnanendra had admitted before him that Tarapada had paid Rupees 1,000 towards the capital, but that no one was present when that admission was made. A third, P. W. 17 Nagendra Nath Chatterjee, says that Jnanendra had to borrow Rs. 2,000 from his (witness's) father-in-law, for making the purchase with Rs. 1,800 and that Jnanendra told him that Tarapada would send him Rs. 1,000 but in case there was need and he be in difficulty, he (witness) would have to request his father-in-law to advance the money and so at his request his father-in-law advanced the loan.

This is a version which finds no corroboration from any other witness, and is against the tenor of the evidence given by the other witnesses on the point. This story, again, is contrary to the plaintiff's case as argued before the Court, namely, that Jnanendra had no means at all to raise any money beyond Rs. 800. In cross-examination the witness said, "I do not know if Tarapoda actually sent the money aforesaid." Then there is the fact that the story of this evidence of Rs. 1,000 was not given in the plaint, and was not disclosed until the plaintiff himself came into the witness-box, while in the cross-objection of the mother Bhabatarini, it was definitely suggested—presumably at the instance of the plaintiff himself, for he was present during her examination on commission and questions were being put to her under his instructions—that Tarapada has paid Rs. 2,000 towards the capital at the time when the business was started. On such state of facts and of the evidence it is not possible to hold that the story of contribution of Rs. 1,000 by Tarapada for purchase of the Pharmacy has been proved. A number of letters purporting to have been written by Jnanendra to Tarapado about this period (April to December 1906) have been produced on behalf of the plaintiff. The more important of them are Exs. 1 (a), 1 (b), 1 (c), 1 (d), 1 (f), 1 (g), 1 (i) and 1 (k). All these with the exception of Ex. 1 (k) are clearly fabricated, written on paper which came into existence in or after 1920 and containing writing which is very dissimilar to that of Jnanendra.

The Subordinate Judge has expressed the view that P. W. 19 Ramdas was the writer of these letters. He has come to this finding upon a comparison of the writing on these letters with a specimen of the writing of that witness taken in Court, and also in view of the fact that as explanation for the inordinate delay that was made for their production in Court it was alleged that the letters remained with him as he was trying to arrange for an amicable settlement between the parties. It is not possible, nor indeed necessary to pronounce such a definite opinion, but it is sufficient for us to find, as we do find most certainly, that they are not Jnanendra's letters. Ex. 1 (k) may be a genuine letter, but even in it two words "I" and "my" seem to us to have been altered into "us" and "our" in order to make out that the business belonged to both the brothers. The letter no doubt contains a request to Tarapada to see if any money can be raised over the joint signature of the two brothers; but such a request does not necessarily indicate that the brothers were partners. An-

other letter (Ex. 20) purporting to have been written by Jnanendra in 1906 and suggesting that he had some other partner, has been produced, but it is obviously fabricated, and not in Jnanendra's handwriting. A careful scrutiny of these letters disclose an anachronism in their contents which itself is sufficient to discredit their genuineness.

The plaintiff's case was that Jnanendra was able to contribute only Rs. 800 and he himself contributed the remainder, namely, Rs. 1,000. The documents which throw any light upon the purchase are Ex. A, Ex. JJ, Ex. LL (1) and Ex. LL (2). The first two documents show that the Pharmacy was purchased on 23rd July 1906 for Rupees 1800 with a stipulation to pay the amount to the vendor by 10th August 1906 and that the amount was in point of fact paid up on 8th August 1906; the last two are extracts from the account-book of the Imperial Pharmacy for that period written by Jnanendra himself and they show payment of the amount by a cheque on the Commercial Bank of Rangoon. A good deal of argument has been addressed to us on behalf of the plaintiff to establish the position that Jnanendra could not possibly have scraped together so much as Rs. 1,800 for the purpose, because his pay in respect of his service under Bhuban Dutt used to be drawn from Calcutta by Tarapada and all that was left to him to avail of was the commission which might due to him and from that too he must have drawn amounts from time to time to meet his own expenses. This argument is more or less in the nature of a speculation, because Jnanendra who is the only person who could have explained how or from where the money came is not alive and none else can say what actually took place. That he could raise Rs. 800 from some source or other is the plaintiff's own case; and nothing that appears upon the record lends colour to the supposition that Rs. 800 and not Rs. 1,800 was available to him. Besides, whatever doubt may arise on the point is finally dispelled by the admission which the plaintiff has made in his own deposition namely that Jnanendra had with him moneys which were the proceeds of the cocaine business. The plaintiff has said :

"The Rangoon business in suit was extended with the money that Jnanendra had with him out of the cocaine business."

The Subordinate Judge has not accepted the story of contribution of Rs. 1,000 by Tarapado and with his finding on this matter we entirely agree. There are some other facts which also tend to point to the business having been started with Jnanendra's own money. The signboard was in the name of Jnanendra alone, the license and registration of the business was in his sole name. and when a power of attorney was executed in the name of Nani Bhusan Banerji it was executed by Jnanendra and not by him jointly with Tarapada.

The Subordinate Judge also has found that the evidence taken as a whole lends support to the conclusion that the business was the self-acquired business of Jnanendra. It is quite true the two brothers formed members of a joint family at the time of the acquisition, and there is also evidence that there was some nucleus of joint family property. But it is not the plaintiff's case that any part of the nucleus went for the acquisition of the business and indeed such could not be his case, because, after all, the yield of the small quantity of land, roughly speaking 40 bighas according to the plaintiff, and 20 Bighas according to the defendants, after meeting the requirements of the family would leave practically nothing from which any such acquisition could be made. The necessity of establishing, the existence of a nucleus of joint family property before the property in possession of one member can be presumed to be joint family property, has been recognized in numerous decision of the highest authority and the reason of the rule is this: that when there is ancestral propery by means of which other property may have been acquired then it is for the party alleging self acquisition to prove that it was acquired without any aid from the family estate : see *Ram Kishen Das* v. *Tunda Mal* (1). In the present case the plaintiff's own case being not that the acquisition was made out of any uncleus of joint funds but on a partnership started on a joint contri bution of specific amounts by each of the two partners no acquisition of rights as under the Hindu law itself arises. In such circumstances, as the

1. (1911) 33 All 677=10 I C 513.

Judicial Committee has pointed out in the case of of *Annamalai Chetty* v. *Subranabian Chetty* (2):

"A member of a joint Hindu family can make separate acquisition of property, for his own benefit, and unless it can be shown that the business grew from joint family property or that the earnings were blended with joint family estate, they remain free and separate."

As regards the blending of the earnings of the business with the joint family estate, the Subordinate Judge originally observed that there is no evidence that the earnings were ever blended into the common stock of the family. It does no doubt appear that money used to be sent, and that regularly and constantly, from Rangoon, for meeting the requirements of the family, but that does not mean that the earnings were blended into the common stock. The other two items which also form the basis of the plaintiffs' claim, namely that he worked for the business on the Calcutta side, and that his sons Bibhuti and Gostho also worked in the business at Rangoon, were put forward by him as evidence of a partnership, under which he claimed an 8 annas share in the business. The defendants' case, on the other hand, was that whatever work Tarapada did in respect of the business was done by him merely on the request of Jnanendra such as a younger brother would not hesitate to make to this elder, and an elder brother would readily comply with, for his younger. If the elder brother had nothing else to do and was depending upon the former for the maintenance of himself and his family; that Bibhuti did nothing for the business and had no connexion with it; and that Gostho worked for a time in it but on a pay. So far as this part of the case is concerned, the Subordinate Judge's findings are somewhat difficult to understand or to reconcile. It is not possible to make a summary of such findings without detriment to their logic. They are accordingly reproduced in their entirety:

"The whole history of the family also goes to prove that Tarapada was not treated as an ordinary dependent of Jnan. It was Tarapada who was the mainstay of the family when it had to pass through bad times and when Jnan had to look upon him for his educational expenses (vide the M. O. acknowledgments, Exs. 2 to 2 p). P W. No. 18, Shiba Prosad, says that Jnan had a high regard for Tarapada. That was nothing but a reflex of his sentiment for a loving and toiling brother. In the same strain Nani Bhusan (manager of the business) wrote to Tarapada in 1911 in a letter where the tribute due to the head of a Hindu family under proper notions had been paid. This is what is said by Nani, "Uncle, if you do not stand against the storm, who will?" (vide Ex. 3-B). Thus it will appear that Tarapada was given a position in the business which was in consonance with the part he played in it and which he could well have expected to get from a brother to whose up-bringing he had to contribute his mite at an earlier period. If this be kept in view, the facts transpiring in the evidence will follow as a natural sequence. I have already referred to the remittances from Rangoon towards defrayal of the household expenditure at Baranagar. At Baranagar Tarapada used to make all disbursements necessary for the joint family, such as paying the doctor's bills, meeting the costs of all ceremonies (Annaprasan, Upanayan and marriage) and paying the dues of grocers, goldsmiths and priests. Tarapada used to get from Rangoon not only the maintenance cost of his family but all the extraordinary expenditure such as the cost of Upanayan (sacred-thread ceremony) and marriage of his sons and the cost of pilgrimage for self, wife and some children. All this could not have been drawn from Rangoon if Tarapada was a mere hanger-on.

No doubt in some ofthe letters written by him to Jnan, Tarapadawas some times found as petitioning Jnan for doles. These cannot be construed as negativing the position of a partner in the business. It is not an uncommon thing in a Hindu joint family that members who earn less are more tolerant and deferential to members who earn more and upon whom the prestige and good name of the family depends. Tarapada was fully conscious of what was due to Jnan as the architect of the family fortune, and if from that consciousness he sometimes took up the role of a persuader it cannot detract from the position he could otherwise claim. It will next be seen that Jnan allowed the earnings of Tarapada's son Bibhuti to be mixed up with his funds (vide Ex. 1 coupled with Exs. 2-q to 2-z 4). An entry in the ledger of the Rangoon business (Ex. 14) shows that Jnan allowed Bibhuti's money to be added to the funds of the business. Gostho (another son of Tarapada) used for a time to work in the Pharmacy. The plaintiff's case is that Gosta did not get any pay from there. The pay-books or acquittance-roll of the Pharmacy which could have furnished the best evidence in the matter has been withheld. There is however, an isolated entry in a ledger (Ex. P) to show that there was a pay fixed for Gostha. No weight can be attached to this entry. It might have been interpolated for the purpose of this case. P. W. 10, Ram Kanta Pal, says that he made the entry nnder the orders of Nani. It is admitted on behalf of the defence that all the account books of the business are in existence, still, excepting some stray books selected at random, they have been held back. When the Jabeda account corresponding to the above entry (Ex. P) is not forthcoming it cannot be said that Gostha was a paid servant. The last will of Jnan also goes to confirm the above supposition, There Jnan made

2. A I R 1929 P C 1=113 I C 897 (P C).

provision of three annas of the profits of the business for the three sons of Tarapada excepting Bibhuti. In need not be mentioned here that the will was prepared shortly before the death of Jnan when he was admittedly under the influence of the relations of his second wife (vide D. W. No. 2 Sudhanshusekhar Roy). Even in that environment Jnan could not altogether overlook the claims of Tarapada's branch. Such a share as the above in a flourishing business could not have been given to the plaintiff's sons if the plaintiff was no better than a dependant. The blending of income belonging to Tarapada's branch with his own income shows that Jnan always treated Tarapada as his partner."

On these findings the learned Judge proceeds to consider what share Tarapada can have in the business and observed:

"I have already said that Tarapada has failed to prove any contribution in money and that he contributed his labour and exertion. Jnanendra not only supplied the capital but contributed his labour. So he should get two shares and Tarapada one share. This is in consonance with justice and equity and is not opposed to the provisions of S. 253, Contract Act. It is rather supported by authorities": vide *Lalchand Shaw* v. *Swarnamoyee* (3) and Mayne's Hindu Law and Usage, S. 288.

The learned Judge therefore has made a decree in plaintiff's favour not upon the basis of a partnership which was the plaintiff's case but upon principles of Hindu law and on general principles of equity, for the application of either of which very different considerations would arise. So far as Hindu law is concerned, as pointed out by Mr. Mayne in the paragraph itself to which the learned Judge has referred, the doctrine of a double share is applicable where at the foundation there was an acquisition out of joint funds, but the means of acquisition drawn from the joint funds was of little consideration while the personal exertions are considerable. The doctrine has no application where there has been no common funds which ever went to start or implement the business. S. 253, Contract Act, has for its foundation a contractual relation of partnership. These principles are entirely inapplicable to the present case unless one can find that the business was started out of common funds. It may be conceded that the learned Judge's finding that Tarapada was the Karta of the family managing its affairs and making the necessary disbursements of its ordinary as well as extraordinary expenditure, and that he was looked upon as its head and respected by Jnanendra and all others, is correct, and it is more than clear from the mass of correspondence that is on the record that notwithstanding that Jnanendra was not pleased with Tarapada for his conduct towards his mother Bhabatarini and protested against it and not withstanding also that Jnanendra from time to time objected to such expenditure as he was not willing to bear, he always showed to Tarapada that degree of respect to which the latter was legitimately entitled by reason of the relationship in which he stood.

On the other hand Tarapada had his love and affection for Jnanendra who was his younger brother and was toiling in a distant country and was the mainstay of the family. These however are matters which are neither here nor there. The real question is: Do the circumstances disclose that Tarapada was treated as a partner in the business, or are not the circumstances equally consistent with or referable to the fact that he was the eldest member of the family, who was doing nothing at the time in the shape of an occupation as a means of earning and it was for that reason that he was asked to help the business by doing such work for it as an elder brother or any other member of the family would readily do in respect of a business really belonging not to him but to another member of the family on whose earning the family entirely depended. The error on the part of the learned Judge in our opinion consists in his not having kept this viewpoint clear in his mind. The large mass of correspondence, to some of which only the learned Judge has referred, shows unmistakeably that Tarapada's help was requisitioned in various matters in connexion with the despatch of goods, settling of disputed claims, finding out ways and means for the promotion of business and various things of that sort. The more important of the letters on which special stress has been laid on behalf of Tarapada are Ex. 1 (o), d/-1907; Ex. 1 (x), d/-1908; Ex. 1z (6), d/-1910; Ex. 1z (7), d/-1911; Ex. B, Ex. B (3), Ex. B (5) and Ex. 1z (15), d/-1912; Ex. 1z (26), d/-1914; Ex. 1z (32), d/-1917; Ex 1z (45), d/-1919; Ex. 1z (50); Ex. 1z (57) and Ex. B (6), d/-1920; Exs. B (1), B (2), B (7), B (10) and Ex. 1z (70), d/-1921, and Ex. B (8), d/-1922.

3. (1909) 3 I C 102.

It is not necessary to deal with each of these letters individually. Most of them, in our opinion, are perfectly inconsequential showing only requests made or advice given such as one brother would do to another, regard being had to their respective positions and the relations in which they stood to each other and to the family as a whole. In Ex. B (3), in which speaking of a suit relating to the Rangoon business Tarapada used the word "us" in the plural in connexion with the suit, but it is obvious that from this an inference does not necessarily arise that there was a partnership between the brothers in connexion with the business against which the claim in the suit was made. People are in the habit in ordinary parlance of identifying themselves in that way in a cause in which they have no pecuniary or proprietary interest. The letter Ex. B-5, of which the true import does not appear in the translation, is really against the plaintiffs' contention. The damaging passages in Ex. lz (26), Ex. lz (50), Ex. lz (57) and Ex. lz (70) are clear fabrications. And amongst the other letters many are either begging letters or are utterly inconsistent with any supposition that there was any claim of Tarapada on the business or in its profits (e. g., Ex. B, B (1), B (2), B (3), B (6), B (7), B (8), B (9) and B (11)). The Subordinate Judge apparently felt pressed by the letters that are on the record which were written by Tarapada to Jnanendra in which to quote his own words: "Tarapada was sometimes found as petitioning Jnanendra for doles." He nevertheless held that these letters could not be construed as negativing his position of a partner in the business, because as he says:

"It is not an uncommon thing in a Hindu joint family that members who earn less are more tolerant and deferential to members who earn more and upon whom the prestige and good name of the family depends. Tarapada was fully conscious of what was due to Jnanendra as the architect of the family fortune, and if from that consciousness he sometimes took up the role of a persuader it cannot detract from the position he could otherwise claim."

In our judgment the learned Judge was wrong in his appreciation of the evidence afforded by the letters and in drawing his conclusion from their contents. In our judgment, Tarapada's letters purport to proceed from a person who could have no pretensions to a claim on the ground of partnership but who certainly had every claim upon the natural love and affection and esteem of his younger brother who would under ordinary circumstances have duty to look to the wants of the elder brother and of the family of which that brother was the head. It is an admitted fact that no account has ever been taken of the business during the long period it has continued since 1906 down to this day. D. W. 13 Gostho, who has had ample opportuities of looking into the accounts of the Rangoon business is unable to say if there is any expenditure entered in the said accounts in the name of Tarapada. It is not alleged that moneys that used to be sent from the business to Calcutta were ever entered in Tarapada's name and P. W. 10 Ramkanta Pal has positively proved the contrary. Consequently, if any accounting is to be ever made it would not be possible to make out what money, if any, Tarapada may have drawn out of it.

The feeble attempt which was made through P. W. 10 Ramkanta Pal to establish that accounts of the business written by the said witness were sent by Noni Gopal to Tarapada (that witness has said that they were so sent once or twice) has failed altogether, Noni himself having repudiated that he ever did such a thing. Tarapada, while he did not allege that he ever paid any money out of his own pocket for the purchases that he had to make in Calcutta for the Rangoon business, deposed that the Rangoon firm used to send him moneys to make the purchases with. This however has been disproved by other evidence notably, the evidence of D. W. 3 Ashutosh Chakravarti, who has been the ledger-keeper of Messrs. Butto Kristo Pal, the largest amongst the dealers in medicine in Calcutta, and who has said that in the books of that firm the accounts stood in the name of J. N. Mukerji and the consignments used to be sent by that firm through the Bank and payments used to be received by them through the Bank. Tarapada also has admitted that all the Calcutta firms had their accounts in the name of the Rangoon firm. Tarapada undoubtedly did a lot of work for the busines at the Calcutta end, but, as has been already observed, there is nothing to indicate

that he did it as a partner or a person having a pecuniary or proprietary interest in the business.

The learned Jadge seems to have felt pressed by the fact that the Rangoon firm used constantly and regularly to send moneys to Tarapada for the purposes of the joint family. But one earning member maintaining a whole family regularly all his life is almost a normal feature of joint families in Indian society. The character and attendant circumstances of such payments as were made in this case destroy all the theories of such payments having been made as on account of a partnership. The remittances were more or less of fixed amounts, e. g. Rs. 50 a month, about the period 1906 to 1909 or 1910, Rs. 100 per month during the period 1915 to 1917, but where extra necessity arose extra amounts were sent (vide D. W. 3 Noni Bhusan and D. W. 5 Radhakanta). The remittances used to be made to Tarapada so long as he had to make disbursements for the family at Baranagore, but only when Jnanendra or his wife were not there. Large sums were drawn by Jnanendra himself from Rangoon between 1920 and 1922 under telegraphic instructions through the Bank, Ex. NN Series) and no objection appears to have been raised thereto. P. W. 19 Ramdas, who has endeavoured his very best to prove every inch of the plaintiff's case, gave a story that Tarapada with a view to give his wholehearted attention to the Rangoon business had to give up his under-brokership with Messrs. Schroder Smidt & Co; and that after Tarapada's bone business collapsed he had to draw money from the Rangoon Pharmacy to keep himself up. As regards the latter assertion, Tarapada himself has not attempted to put it forward in his evidence, and there is no other corroborative evidence, either oral or documentary, and as regards the former statement, Tarapada gave a different version saying that he gave up the appointment at Schroder Smidt & Co, as Jnanendra advised him to do so because he had diabetes. Upon the evidence of Noni (D. W. 8) it has been proved, and there is no evidence the other way, that Bibhuti who was taken by Jnanendra to Rangoon in 1909 and had within a short time become somewhat wayward (vide Ex. 1 of which the date cannot be had but which in all probability was a letter of this period) was put into a school to which he remained attached till 1912 or 1913 but in 1913 he joined the training class of the Telegraph Department and then took to service in which he is now drawing quite a decent pay. The finding that "Jnanendra allowed the earnings of Tarapada's son Bibhuti to be mixed up with his funds" and which is said to be based upon Ex. 1 and Ex. 2-Q to 2-Z (4) is in our opinion entirely unjustified. Ex. 1 only shows that Bibhuti was putting up with Jnanendra and was under his guardianship. Ex. 2-Q to 2-Z (4) are certain telegraphic money order acknowledgments of 1922-1923, when Jnanendra was in Calcutta, of remittances made by Bibhuti of such amounts as Rs. 50, Rs. 60, Rs. 75, Rs. 100, and there is nothing to suggest that the moneys were sent for anything else than for the purposes of the family.

We are unable to see how these documents show that Jnanendra allowed these moneys to be blended into the funds of or utilized for the porposes of Pharmacy. Bhabatarini has said that so long as Jnanendra was alive Bibhuti used to make over his pay to him coupling the statement with the significant words, "to whom else shall he make over". These words imply what is only true, namely that in an ordinary joint family a dutiful young member of it would behave in that way towards one who is practically the only earning member and on whose earnings mainly the family ultimately depends for its existence and support. Such conduct on the part of Bibhuti in making over his pay to Jnanendra or of Jnanendra in receiving it would not necessarily indicate that Bibhuti's moneys were appropriated by Jnanendra for the purposes of the business or spent for any other purpose than what they were meant for, namely for the purpose of the family. In this connection reliance has been placed on behalf of the plaintiff upon certain entries (Ex. 14) in the accounts of 1921 which show that on 2nd July of that year, Rs. 65 was deposited by by Bibhuti and out of that amount Rs. 40 was withdrawn by him on 16th January following. This evidence is too poor to lead to any inference as to

the blending of Bibhuti's earnings into the funds of the Pharmacy. Bibhuti, it should be stated here, has not been examined as a witness on behalf of the plaintiff as he undoubtedly should have been if the plaintiff desired to establish either that he worked in the business or contributed any money towards it. Gostho went to Rangoon in 1918, after the business had already run a course of 12 years. The defendants desired to make out that when Gostho began to work in the Pharmacy he was given a pay. The Subordinate Judge was not prepared to accept this story which was sought to be supported by the evidence of D. W. 2 Sudhansumohan, and also by an entry (Ex. P.) in the accounts, because the said witness Sudhansumohan is a relation of Pannalata and because the entry was a stray entry which could easily be fabricated. The story may or may not be true and probably is an exaggeration just as much as the other story which the defendants put forward namely that Bibhuti's and Gostho's meals at Jnanendra's place were charged for. Gostho has been examined as a witness on behalf of the plaintiff. He was a very unwilling witness, as he must be, because by the suit which he instituted and the decree that he obtained he has already taken the benefit which the will confers on him. He has said that he got no pay as it was "our" business. Very likely it is true that he drew no pay and this is probably why Jnanendra made the provision in the will in his favour. (P. W. 10) Ramkanta Pal has said that Gostho's name is entered on the right side of the ledger. What he exactly means by it is not clear. But whatever it may mean, if it be a fact as it may be, that for 3 or 4 years he worked in the business without any pay but having his food only (vide D. W. 2 Subhansumohan), that would make not the business "our" business, far less would his father get a share in it therefor.

Another incident, a very important one if it was true, has been sought to be proved. It was alleged that at the time of the marriage of Jnanendra's daugher Jhanu, Jnanendra wanted to spend Rs. 8,000 or Rs. 10,000; but Tarapada objected to so much money being drawn out of the joint funds, that is to say, the funds of the Pharmacy and that upon that a serious situation arose because Tarapada threatened that if Jnanendra did not desist, Tarapada in his turn, would draw such excess amount as might be in the till. Tarapada himself has said nothing about it in his evidence. But four of his witnesses namely P. W. 4 Kali Charan Banerji, No. 7 Bhupendra Chatterji, P. W. 8 Upen Mukerji, and P. W. 19 Ramdas Chakravarti, have tried to prove this incident. The account given of the incident by these witnesses is unconvincing in the extreme, and to establish it a postcard Ex. 20 (a) has been produced, in which a few lines inserted by way of a postcript appear. The postcript is not in Jnanendra's writing and is an obvious fabrication. In our opinion, the story is not true. Our finding, for the reasons given above is that Tarapada was not a partner in the Rangoon business and is not entitled to any share in it. It would be convenient at this stage to advert to the case of defendant 3 as regards the Pharmacy. Her case, in her own words, is the following :

"My husband's younger brother (meaning Jnanendra) went to Rangoon after my husband's death. He went to Rangoon and did business there at the time. He used to do business in medicine. He used to do business only when he went to Rangoon first. He was in Rangoon when my husband died. On hearing about the illness as he was written to for medical treatment he came. My husband's elder brother wrote the letter. My husband died before he came. He came home and heard that my husband had died. My husband died immediately after the telegram was sent. My husband died 3 or 4 days before he came. It was necessary to send a telegram to Jnanendra Babu for money was required * * * * * * After my husband's death my husband's younger brother took away the capital of my husband's business and the sale proceeds of the furniture to Rangoon and applied the same to the business (volunteers) whatever little ornaments I had Jnandra Nath sold and took the proceeds thereof to Rangoon."

Now, this story of Jnanendra having taken away the sale proceeds of the cloth, furniture and ornaments for applying the same to the Pharmacy does not find a place in the written statement of defendant 3 in which a simple case was set up that Annada and after him his infant son Khoka were members of a joint family and so the latter had a 1/3rd share in the business being a business of the joint family. It should be noted at the outset that Annada died in 1903 and so the incident if true, must have taken place about the end of that year. The

Pharmacy, it should be remembered, was purchased in August 1906 that is to say, nearly three years later. Tarapada does not support this story. D. W. 1 Nishanath Bhattacharjya is the only witness put forward who endeavoured to make out that there was a nucleus available from the Narainpur properties a fact which we have held was not possible. And the said witness further deposed that on Annada's death, his moveables, gold watch and ring and shawl were sold and the proceeds were invested in the Rangoon business. Bhabatarini has deposed that Annada's cloth business was in debts when Annada died and that Tarapada and Jnanendra sold the cloths to pay off his debts. E. W. 5 Radhakanta, who is a cousin of the plaintiff, and is one of the executors to the will and against whom nothing appears from which any leaning on his part in favour of any of the parties may be inferred, has deposed that Annada's cloths were sold off to pay off his debts. The evidence that has thus been adduced to prove that there was a nucleus available from the Narainpur properties from which the Pharmacy was or could be acquired or that Annada's or Kironsoshi's assets formed a part of the capital of the Rangoon business, has not been believed by the Subordinate Judge and it will suffice for us to say that we are in entire agreement with him in this respect. There remain now the other properties in suit to be considered. (The judgment then proceeded to consider whether the properties mentioned in Sch. Ka—2, 3, 4, 5, 6 and 7 and Sch. Ga and Sch. Gha were joint or not and concluded.) In our judgment therefore the appeal should be allowed, and the decree of the Court below being set aside a preliminary decree for partition should be made in respect of the following properties only, namely, items 3 and 4, Scb. Ka, items 6 and 7, Sch. Ka, and the movable properties of Sch. Gha, with the exception of the first 11 items; on the footing that in items 3 and 4, Sch. Ka—the plaintiff, defendants 1 and 2 and defendant 3 will each have a 1/3rd share, and in items 6 and 7, Sch. Ka and the movables of Sch. Gha, with the exception of the first 11 items --the plaintiff and defendants 1 and 2 will each have a half share.

There will be no order for costs of the Court below, or in other words the order as to costs made by the Court below will stand. As regards this appeal the appellants will get their costs from the plaintiff-respondent, hearing-fee being assessed at 20 gold mohurs. The cross-objection is dismissed.

R.K. *Appeal allowed.*

A. I. R. 1934 Calcutta 322

MALLIK AND JACK, JJ.

Iswar Chandra Pal and *others* — Plaintiffs—Appellants.

v.

Kabiruddin Ahmed and *others* — Respondents.

Appeals Nos. 1333 and 1683 of 1931, Decided on 8th January 1934, from appellate decree of Dist. Judge, Faridpur, D/- 5th January 1931.

Civil P. C. (1908), S. 66—Suit by a person for a declaration that plaintiff is entitled to certain share of property purchased in execution sale on ground that though purchase was made in another's name he contributed to the price in that proportion—Parties held could not contract out of S. 66.

Some persons purchased a property in execution sale in the name of one of them. They had contracted themselves that they shall be the owners of the property in shares proportionate to their contribution. The benamidar sold away more than his share of the property. One of the contributors filed the suit for declaration of his share in the property :

Held : that S. 66 was a bar to such a suit. The operation of S. 66 could not be ousted by the existence of any private agreement or undertaking : 12 *B L R* 317, *Expl. Dist. and Foll.*; *A I R* 1915 *P C* 81 ; 29 *All* 557 and *A I R* 1926 *Bom* 525, *Expl and Dist.* [P 324 C 2]

Rupendra Kumar Mitter, *Bijan Behari Mittra*, *Asita Ranjan Ghose* and *Amrita Lal Mukherjee*—for Appellant.

Gunada Charan Sen and *Profulla Kumar Roy*—for Respondents.

Mallik, J.—The facts which gave rise to the present litigation were briefly these : The plaintiffs who may be described as the Pals and two brothers Mahim Ghatak and Romesh Ghatak and one Radharaman all got decrees against one Izzat Bux and when in an execution proceeding the property in suit which belonged to Izzat was put up to sale it was purchased in the name of Ramesh and Mahim alone in pursuance of an agreement that the property would belong to Mahim and Ramesh in 8 annas and to the Pals and Radharaman in 8 annas Mahim getting a 4 annas share, Ramesh another 4 annas share, the Pals 2/3rds of 8 annas and Radharaman 1/3rd of 8 annas the parties having contributed

in these shares to the fund with which the property was purchased at the sale. This took place in the year 1915 and the parties were put in joint possession of the property in 1918. Thereafter Ramesh sold three-fourths of his share in the property to defendants 1 to 7 in the name of defendant 9 and one-fourth share to defendant 10 stating however in the Kobalas that were executed that his share in the property was 8 annas. On these facts the plaintiffs the Pals instituted the suit that has given rise to the present appeal for declaration of their title to an one-third share in the property (being 2/3rd of $\frac{1}{2}$) and for recovery of possession of the same after partition. Mahim Ghatak who was defendant 11 in the suit supported the plaintiffs' case. The plaintiffs' claim however was resisted by defendant 9 only none of the other defendants having filed any written statement in the case.

The main grounds on which the plaintiffs' claim was resisted were two in number and the two grounds were : (1) that the suit was not maintainable in view of the provisions of S. 66 Civil P. C., the property having been purchased in the name of Mahim and Ramesh and Mahim and Ramesh having been the only certified purchasers and (2) that defendant 9 having purchased a a six anna share in the property from Ramesh who was the ostensible owner of one half of the property for value without notice of the rights of the other people he (defendant 9) was entitled to a six annas share under S. 41, T. P. Act.

Both the Courts below found that the arrangement before the purchase at the auction sale in 1915 has been as stated by the plaintiff, that is, that Mahim should get $\frac{1}{4}$ share, Ramesh $\frac{1}{4}$ share, the plaintiffs 1/3rd share and Radharaman 1/6 share of the property and that they had contributed to the purchase money in these shares. The trial Judge held also that S. 66, Civil P. C., was no bar to the suit and holding in addition that defendant 9 was not a bona fide purchaser without notice found for the plaintiffs and made a preliminary decree for partition. Against that decision of the trial Judge an appeal was taken by defendant 9 to the appellate Court and the learned District Judge set aside the decision of the Court of first instance and holding that S. 66 was a bar to the suit dismissed the suit in its entirety finding also at the same time that defendant 9 was a bona fide purchaser for value without notice. The plaintiffs are the appellants before us. The chief controversy before us had centred round the question as to the applicability or otherwise of S. 66 to the present case.

On behalf of the appellants it was contended that S. 66 would not operate as a bar and in support of this contention reliance was mainly placed on the decisions in *Bodh Singh Doodhuria* v. *Ganesh Chunder* (1), *Ganga Sahai* v. *Kesri* (2) (at p. 182 *of* 42 *I A*), *Achaibar Dube* v. *Tapasi Dube* (3) and *Vishwanath Dhondiraj Gayadhain* v. *Pandharinath Ganesh* (4). Leaving aside from our consideration for the present the case in 50 *Bombay* none of the other three cases cited would, in my opinion, help the plaintiffs-appellants in the present case. In *Bodh Singh's* case (1) where a property was purchased at a Court sale by a member of a joint Hindu family in his name but with the family funds the other members were held to be entitled to sue him for a declaration that the purchase was made on behalf of the whole family though the certificate of sale stood in his name. In that case if their Lordships of the Judicial Committee held that S. 66 was no bar to the suit, they held so on the ground that by the operation of law the members of a joint Hindu family are entitled to treat as part of their common proprety an acquisition, howsoever made, by a member of the family in his sole name, and not because there had been any private agreement or undertaking as was the case in the case before us.

Our attention was drawn to the observations of their Lordships of the Privy Council in *Ganga Sahai* v. *Kesri* (2) (at p. 182 *of* 42 *I A*) to the effect that the provisions of S. 66 are designed to check the practice of making what are known as benami purchases at execution sales for the benefit of the judgment-debtors and in no way affect the title of persons otherwise beneficially interested in the pur-

1. (1873) 12 Ben L R 317=19 W R 356=3 Sar 253 (PC).
2. A I R 1915 P C 81=30 I C 265=42 I A 177 =37 All 545 (PC).
3. (1907) 29 Al 557=(1907) A W N 166.
4. AIR 1926 Bom 525=97 IC 688=50 Bom 600.

chase. But the 42 *I. A.* case was a case of a joint mortgagee decree-holder against the other mortgagee decree-holder who in execution of the joint mortgage-decree purchased the mortgaged property in his own name. If S. 66 was in that case held to be inapplicable it was not because the co-mortgage decree-holders had come to an agreement or undertaking that the property would be purchased in the name of one of them though it would be the property of both but because the application for execution was made by one of the joint decree-holders subject to the rights of the decree-holder. The rights of the other decree-holder accrued not from any agreement or undertaking between the two joint decree-holders but from the operation of law as embodied in S. 231 of the old Civil P. C., corresponding to O. 21, R. 15 of the Code of 1908.

The learned advocate for the appellant next drew our attention to the observations of Richards, J., in the case in *Achaibar Dube* v. *Tapasi Dube* (3) which are quoted with approval in *Viswanath Dhondiraj* v. *Pandhari Nath Ganesh* (4). What was laid down in those observavations was that the provisions of S. 66 do not apply when the parties stand in the relationship of partners and one of the partners purchases the property in his own name with the partnership funds. Mr. Sen for the respondent in a way conceded that S. 66 would be no bar to a case of partnership. But hiscontention was that the present case was not a case of partnership. This contention seems to me to be well founded. The facts of the case are no doubt practically on all fours with the facts of the case in *Viswanath Dondiraj* v. *Pandhari Nath Ganesh* (4) where it was held that S. 66 was inapplicable on the ground that the case was a case of partnership. But if one would look to the definition of the word "partnership" as contained in S. 299, Contract Act with Ill. (b) of the same there can be no manner of doubt that the present case was not a case of partnership. None of the cases on which so much reliance was placed on behalf of the appellant is therefore in my judgment of any avail to him. Indeed there are some observations in the *Bodh Singh Dhuduria* v. *Ganesh Chunder* (1) which in my opinion, go against the appellant's case. In that case their Lordships of the Privy Council observed that the provisions of S. 66 cannot be taken to affect the rights of a members of a joint Hindu family who by the operation of law and not by virtue of any private agreement or undertaking are entitled to treat as part of their common property an acquisition however made, by a member of the family in his sole name, if made by the use of the family funds. This observation containing as it does the expression "not by virtue of any private agreement or undertaking" lays down to my mind, by implication that the operation of S. 66 cannot be ousted by the existence of any private agreement or undertaking as was the case in the case before us. I would therefore hold agreeing with the learned District Judge that S. 66 was applicable to the present case.

The learned District Judge dismissed the plaintiffs' suit in its entirety. With this, in the circumstances of the case, I am unable to agree. The plaintiffs claimed two-third share of 8 annas in the property on the allegation that 8 annas belonged to Ramesh and Mahim jointly and the remaining 8 annas to the plaintiffs (the Pals) and Radharaman in the proportion of 2 to 1. This claim of the plaintiffs was opposed by Rames's successor alone on the allegation that Ramesh had an 8 anna share and Mahim had the remaining 8 annas. Mahim however did not claim anything more than 4 annas. There was therefore no dispute as regards 5 annas and there was no resistance of the plaintiffs' claim to 2/3rds so far as this 4 annas share was concerned.

I would therefore set aside the decree of the learned District Judge whereby the plaintiff's suit was dismissed in its entirety and direct that the plaintiffs' title to the property to the extent of 2/3rds of 4 annas or 1/6th share be declared and that they recover possession of that share of the property after partition or in other words, I would uphold the decree of the trial Court with this modification only that the plaintiff's share in the property will be reduced from 1/3rd to 1/6th. In the circumstances of the case I would make no order as to costs in this Court.

Jack, J.—I agree.

R.G. *Deeree modified.*

A. I. R. 1934 Calcutta 325

McNAIR, J.

Corporation of Calcutta—Plaintiff.

v.

Arunchandra Singha—Defendant.

Original Suit No. 746 of 1931, Decided on 28th July 1933.

(a) Transfer of Property Act (1882 as amended in 1929) S. 67-A—Mortgagee having more than one mortgage by same mortgagor—Mortgagor must consolidate all mortgages and enforce then in single suit—Same principle applies to enforcement of charges under Calcutta Municipal Act (3 of 1923), S. 205.

A mortgagee, who sues on any one mortgage, shall, where he holds two or more mortgages executed by the same mortgagor, include in his suit, his claim to enforce all the mortgages provided he has not contracted out of his obligation. The same principle applies to the enforcement of charges under S. 205 Calcutta Municipal Act even though such a charge is one by operation of law and the charge holder has no power to contract out of the obligation: 42 *Cal* 625; 26 *All* 393, *Ref.* [P 326 C 2]

(b) Interpretation of Statutes—More literal construction is not to prevail if it is opposed to intentions of legislature as apparent from statute.

The more literal construction of a statute ought not to prevail, if it is opposed to the intentions of the legislature, as apparent from the statute and if the words are sufficiently flexible to admit of some other construction by which that intention can be better effectuated: *Caledonian Railway Co*, v. *North British Railway Co* (1881) 6 *A C* 114, *Foll.* [P 326 C 2]

N. C. Chatterji and *Saroj K. Dutt* — for Plaintiff.

Sudhis Roy and *N. Sanyal*—for Defendant.

Judgment.— This is a suit by the plaintiff Corporation for Rs. 134-4-9, on account of consolidated rates payable in respect of premises No. 2, Pyari Das Lane, Calcutta, which is a debattar property, of which defendant 1 is the shebait. Defendant 2 is a lessee of the property under a lease for 70 years granted by the then shebait on 29th November 1917, and defendant 3 is a mortgagee from defendant 2. Defendant 1 alone contests the suit. He contends that the suit is not maintainable, as the plaintiff Corporation is a charge holder under S. 205, Calcutta Municipal Act, over the property in suit, and also has charges over other properties belonging to the same defendant, for the enforcement of which it has brought five other suits, some of which have been decreed. His contention is that S. 67-A, T. P. Act, which was inserted by the amending Act 20 of 1929, makes it compulsory for a mortgagee or chargee, who holds several mortgages or charges over the same or different properties of the same debtor, to enforce all such mortgages or charges in a single suit. The plaintiff Corporation's charge arises under S. 205, Calcutta Municipal Act (Bengal Act 3 of 1923) which provides:

"The consolidated rate due from any person in respect of any land or building shall, subject to the prior payment of the land revenue (if any) due to the Government thereupon, be a first charge upon the said land or building and upon the moveable property (if any) found within or upon such land or building and belonging to the said person."

The language of this section, as was stated by this Court in *Akhoy Kumar Banerjee* v. *Corporation of Calcutta* (1), is perfectly plain, and the intention of the legislature to make the consolidated rate a first charge upon the premises is obvious. The nature and incidents of such a charge are found by reference to S. 100, T. P. Act, which is in the following terms:

"Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge."

Among the provisions applicable to a simple mortgage, and so applicable to a charge, are the provisions of Ss. 67 and 67-A, T. P. Act. S. 67 defines the rights of a mortgagee "in the absence of a contract to the contrary," and among those rights is the right to obtain from the Court a decree for foreclosure or sale. S. 67-A provides:

"A mortgagee who holds two or more mortgages executed by the same mortgagor in respect of each of which he has a right to obtain the same kind of decree under S. 67, and who sues to obtain such decree on any one of the mortgages, shall, in the absence of a contract to the contrary, be bound to sue on all the mortgages in respect of which the mortgage-money has become due."

The defendant's contention, therefore, is that, so soon as there are arrears of rates in respect of any property, the plaintiff Corporation becomes entitled under S. 205, Calcutta Municipal Act, to a charge on that property. If there are several properties belonging to the same ratepayer, each of these properties is charged in favour of the plaintiff Corporation; such a charge is a charge within the meaning of S. 100, T. P. Act,

1. (1915) 42 Cal 625=27 I C 261.

and can only be enforced subject to the limitations imposed by S. 67-A of that Act. For the Corporation various pleas have been urged with force and ingenuity. It is said in the first place that a charge is not a mortgage, inasmuch as it can be, and in the present instance is, created by operation of law, and the provisions of the Transfer of Property Act, which apply to a simple mortgage, are applicable, in the words of the Act, only "so far as may be" to a charge. A mortgage, it is urged, can only be created by "act of parties," and S. 67-A shows clearly from the fact that it refers to "two or more mortgages executed by the same mortgagor," that it is intended only to apply to mortgages or charges created by "act of parties" and is inapplicable to a charge created by operation of law; moreover, by the words "in the absence of a contract to the contrary" in that section the mortgagee is given an opportunity of contracting out of the obligation imposed by the section, whereas the charge holder has no such opportunity. The intention of the legislature in introducing the new S. 67-A in T. P. Act, was undoubtedly to compel a mortgagee, who is entitled to the same kind of decree in respect of several mortgages over the property of the same mortgagor, to consolidated his mortgages and enforce them in a single suit provided he has not contracted out of his obligation.

In my view the same obligation is placed upon a charge holder under S. 100; and the words "so far as may be" in that section are inserted because the legislature realised that some of the provisions of the Act which deal with the rights and liabilities of mortgagors and mortgagees would be inapplicable to charges. The proviso that there may be a contract to the contrary is applicable to a charge by "act of parties," though it is not applicable to a charge by "operation of law." The words "in the absence of a contract to the contrary" are contained in S. 67, T. P. Act, as well as in S. 67-A, yet it could hardly be contended that owing to those words a charge holder would not be entitled to the right of sale which is provided by S. 67. Again it is urged that the insistence on consolidation as claimed by the defendant would be productive of great inconvenience, and might deprive the mortgagee or charge holder of the power of enforcing his charges, if for instance the properties charged were in different presidencies.

It may well be that in such a case a single suit on all the properties charged would not be essential, for the legislature does not compel the institution of an incompetent suit. In the present instance, that consideration does not arise in view of the fact that the plaintiff corporation is only concerned with the collection of rates in a circumscribed area. Finally, it is contended that where there are two distinct mortgages or two distinct charges in respect of the same property in the hands of the same debtor and in favour of the same creditors, the causes of action to enforce the two securities are distinct and the mortgagee or charge holder has, like any other plaintiff, the right to bring a separate suit on each cause of action.

Section 67-A, it is said, purports to limit this elementary right, and any restrictive provision of this nature must be construed with the utmost strictness. Even if the section does provide that a mortgagee, who sues to obtain a decree on any one of the mortgages, shall be bound to sue on all the mortgages; it does not provide in so many words that he must sue on all the mortgages in the same suit. In this connexion, it is pointed out that no reliance can be placed on the marginal note for the purpose of interpreting the section: *Balraj Kunwar* v. *Jagatpal Singh* (2). Although the words of the section do not stress the need for a single suit, they do, in my opinion, clearly indicate that a mortgagee, who sues on any one mortgage, shall, where he holds two or more mortgages executed by the same mortgagor, include in his suit his claim to enforce all the mortgages. The intention of the legislature is undoubtedly to reinstate the doctrine of consolidation, and, as was said by Lord Selborne in *Coledonian Ry. Co.* v. *North British Ry. Co.* (3):

> "The more literal construction (of a statute) ought not to prevail, if it is opposed to the intentions of the legislature, as apparent by the statute; and if the words are sufficiently flexible to admit of some other construction by which that intention can be better effectuated."

One further point remains. S. 67-A, T. P. Act, was inserted by S. 32 of the

2. (1904) 26 All 393=8 Sar 639 (P C).
3. (1881) 6 A C 114=29 W R 685.

amending Act 20 of 1929. S. 63 of the amending Act provides that, so far as is material, nothing in S. 32 of the amending Act shall be deemed in any way to affect

(a) the terms or incidents of any transfer of property made or effected before 1st April 1930, and (c) any right, title, obligation or liability already acquired, accrued or incurred before such date."

A part of the plaintiff corporation's claim amounting to Rs. 74-9-9 refers to rates which became due prior to 1st April 1930, and the defendant admits that he has no defence to that portion of the claim. As regards the remainder of the claim, the suit is incompetent and must be dismissed. There will be: (1) a decree for Rs. 74-9-9 against all the defendants. (2) A declaration that the plaintiff corporation has a first charge on the premises No. 2, Pyari Das Lane, Calcutta, for the said sum with interest at 6 per cent. The defendants will pay to the plaintiff corporation two-thirds of their costs of suit. (3) A decree under O. 34, R. 4, Civil P. C. in form No. 5 A in Appx. D, Sch. 1 thereto as amended by Act 21 of 1929.

K.S. *Suit partly decreed.*

A. I. R. 1934 Calcutta 327

PANCKRIDGE, J.

A. C. Dastoor—Plaintiff.

v.

H. A. Kandawalla—Defendant.

Original Suit No. 725 of 1933, Decided on 25th July 1933.

Civil P. C. (1908), S. 47 and O. 34, R. 14 — Money decree creating charge on property—Separate suit to enforce charge is not maintainable.

Where a money decree creates a charge over property, the charge can be enforced in execution and the property can be sold. A separate suit to enforce the charge is not maintainable under S. 47 and O. 34, R. 14 is not applicable to such cases : *A I R* 1926 *Pat* 31 and *A I R* 1919 *Bom* 56, *Ref.* [P 327 C 2]

J. N. Mujumdar—for Plaintiff.

B. C. Ghose and *S. P. Chowdhury*—for Defendant.

Judgment.—In this case the only question is one with regard to procedure. The plaintiff brought a suit for dissolution of partnership and for accounts and the appointment of a receiver. On 8th June 1932, a consent decree was passed. The relevant paragraphs of the terms of settlement annexed to the decree are term (a), which provides that the defendant shall pay the sum of Rs. 4,000 with interest at 6 per cent. until payment, and term (b), which provides that the principal sum with interest shall form a first charge on the assets including the goodwill, stock-in-trade, and outstandings, present and future, of the business in question. The terms of settlement also include liberty to apply.

The present suit has been brought for the purpose of enforcing the charge created by the second term in the terms of settlement. The defendant maintains that the suit is unnecessary, and that the plaintiff could have obtained all the relief to which he is entitled by executing the consent decree. I am of opinion that the defendant's contention is correct. It is not uncommon for suits to be brought to enforce a charge upon immovable property created by a decree. The reason for this is that, owning to the provisions of O. 34, R. 14, the person, in whose favour the decree creates a charge, is precluded from enforcing it by execution, unless the decree specifically makes provision to the contrary. I do not think that the rule applies to the case before me. It is not accurate to say that, in the former suit, the plaintiff

"obtained a decree for payment of money in satisfaction of a claim arising under a mortgage."

The whole of the order is in fact inapplicable to the circumstances of the present case, since it is explicitly concerned with suits relating to mortgages of immovable property. The former suit is not a suit of that description. Moreover, even where immovable property is concerned, unless the suit can be brought within the four corners of of R. 14, the Court will allow the mortgagee (if I may call him so), to enforce his right by execution. I need only refer to *Hari Sankar Rai* v. *Tapai Kuer* (1) and *Ambalal Bapubhai* v. *Narayan Tatyaba* (2). In my judgment, the suit is one that is not maintainable by reason of the provisions of S. 47, Civil P. C. However, under sub-S. (2) of that section I am at liberty to treat it as an application for execution made in the former suit. I therefore appoint a receiver of the property charged, with power to sell the same, and apply the proceeds in satisfaction pro tanto of the

1. A I R 1926 Pat 31=88 I C 923=4 Pat 693.
2. A I R 1919 Bom 56=51 I C 929=43 Bom 631.

decree obtained by the plaintiff. The plaintiff must however pay the defendant his costs of this suit, but will be entitled to add the costs of an application for execution to his claim.

K.S. *Order accordingly.*

A. I. R. 1934 Calcutta 328

GUHA AND BARTLEY, JJ.

(*Prince*) *Gholam Hossain Shah* and *others*—Plaintiffs—Appellants.

v.

Altaf Hossain and *others*—Defendants—Respondents.

Appeal No. 248 of 1929, Decided on 18th August 1933.

(a) Religious Endowments Act (20 of 1863), S. 7—Death of a member of committee pending suit—Suit does not abate—Surviving members can continue it—Civil P. C. (1908), O. 22, Rr. 1, 2 and 3.

Where a suit is instituted by a committee appointed by the Government under S. 7 of Act 20 of 1863, the death of a member during the pendency of the suit has not the effect of making the suit infructuous. The suit and other proceedings can be continued by the surviving members as the committee is not ipso facto dissolved when one of its members dies : 39 *Cal* 304, *Foll.* [P 333 C 1]

(b) Bengal Regulations (19 of 1810), Sections 7 and 8—Board of Revenue had power in regard to removal of muttawali or local agent.

Under Bengal Regulation 19 of 1810 the Board of Revenue had the sovereign powers of the Government in regard to the management and superintendence of endowments taken charge of by Government and had authority to remove legal agents or muttawalis: 3 *Mad H C R* 324, *Foll.* [P 333 C 2]

(c) Religious Endowments Act (20 of 1863), Ss. 3, 7 and 12—Committee has power to appoint muttawali — Muttawali so appointed is servant of committee—Endowment properties vest in the committee and committee can take over management.

With regard to endowments falling under S. 3 the powers of the committee appointed by the Government under the provisions of the Act are very wide, and they act within their powers in making appointments of muttawali for a term with conditions which are as much binding upon the person appointed as upon the members of the committee. But the position of the muttawali so appointed is that of a servant of the committee and he is not muttawali under Mahomedan law. The properties of the endowment vest in the committee, being transferred to it under S. 12 and the committee can appoint muttawali, or take over management or custody from him provided they act in the interest of the institution : 40 *Cal* 323 and *A I R* 1922 *P C* 123, *Ref.* [P 334 C 1, 2]

(d) Religious Endowments Act (20 of 1863)—Words " Manager, trustee and superintendent " connote same idea, viz., management.

Words " manager ", " trustee " and " superintendent " used indifferently and indiscriminately in the body of the Act are used to denote one and the same idea of management. [P 335 C 1]

(e) Religious Endowments Act (20 of 1863), Ss. 3 and 4—Powers of committee to appoint muttawali are not powers exercised by creator of endowment or under Mahomedan law—Muttawali appointed under the Act has no power to appoint his successor.

The powers of the committe appointed under Act 20 of 1863 are not the powers exercisable under the general Mahomedan law in the matter of appointment of muttawalis, and not the powers exercised by the creator of the endowment himself, but by the power vested in the ruling power, the power exercised by the Board of Revenue under Regulation 20 of 1810, and the power conferred upon the Committee under the Religious Endowments Act (20 of 1863). The muttawalis so appointed under the Act had no power to appoint their successors. [P 335 C 2]

(f) Religious Endowments Act (20 of 1863), S. 3—Muttawali appointed by committee can be dismissed by the committee.

Muttawali appointed by the committee is an officer of the committee and could not under the law exercise any right or have any powers under the law, excepting those delegated to him by the committee as a trustee, or manager or superintendent as mentioned in the Act. His position is that of a servant of the committee and he cannot have what is called a free hold in his office. He can neither claim the same position of a trustee under S. 4 nor could it be claimed by him that the committee had no power in them to dismiss him, but would have too seek intervention of the Courts in that behalf : 21 *Mad* 179, *Foll.* [P 336 C 1]

(g) Evidence Act (1872), S. 115—Person holding office under agreement—Terms and conditions unreservedly accepted — He is bound by terms—Master and servant.

A person who has held office under a registered agreement, for a period of years, on certain terms and conditions, and who has unreservedly accepted a fresh tenure of office on the same terms and conditions, cannot be heard to say that he was not bound by the terms of his service; that the terms were not binding on him, at a time when his employers have acted strictly under the terms of service, in discharging him from service. [P 338 C 1]

(h) Mahomedan Law— Wakf — Muttwali appointed by advertisement and selection and for a term is not one appointed under Mahomedan law.

Under the Mahomedan law, the appointment of a muattwali can be made by the donor and the succession to the appointment must be in accordance with the provision of the deed of endowment, if there is any. The succession to the office of muttawali may be in accordance with the desire of the donor, if he is alive, or if the intention of the founder cannot be ascertained from any established usage, then the appointment may be made by the executors of the founder, and failing all these, the power of appointment is in the Court which represents the power of the Kazi. It can hardly be consistent with the Mahomedan law that the office of muttawali should be advertised and a gentleman who may be qualified in every respect should be

appointed for a period of three years, or for a further period at the option of the members of the committee. A person appointed in such a way cannot invoke under the provisions of the Mahomedan law the powers of muttawali.

[P 337 C 1]

(i) Master and Servant—Power of dismissal.

Ordinarily the authority which has the power to appoint an officer, has also the power of dismissal : *A I R* 1914 *Cal* 325, *Foll.* [P 339 C 1]

(j) Contract Act (1872), S. 23—Doctrine of public policy does not cover a case of appointment of a servant for a term.

By no means can it be said that the case of appointment of a servant for a term, or laying down the terms of service and conditions under which he could be discharged is one to which the doctrine of public policy is applicable. The application of the doctrine of public policy must be within its recognized bonds.

[P 338 C 2; P 339 C 1]

(k) Religious Endowments Act (20 of 1863), Ss. 3, 4, 7 and 12—Powers of committee under—Act and powers of corporation in general considered.

The committee appointed under S. 7, Religious Endowments Act, 1863, are statutory bodies, and though they are not strictly corporation, their procedure in matters relating to management and administration, should be governed by the rules applicable to regular corporations. The difference however, between a statutory corporation and a corporation which is not statutory exists and must be recognized ; the former has such rights and can do such acts only as are authorized directly or indirectly by the statute creating it; the latter, speaking generally, can do everything that an ordinary individual can do, unless restricted directly or indirectly by statute. Acts directly authorized are such things as may fairly be regarded as incidental to or consequential upon those things which are expressly authorized; and contracts entered into by a corporation created for a specific purpose are intravires of the corporation, although not expressly mentioned in the statute under which it takes powers. In determining, therefore whether an act of a corporation is ultra vires or illegal, illegality approaches very near to, and in many cases is the same as ultra vires; and the question is whether a particular act of a corporation is within the competency and power of the corporation. The committee appointed under Religious Endowments Act 1863, were vested with the control of the endowment, and had the power to appoint a trustee, manager or Superintendent for the administration of the same. The power to appoint was expressly conferred by the statute; the power to determine the terms of appointment must, be held to be within the competency of the committee as a statutory corporation, inasmuch as acts beneficial for the purpose of the control of the endowment, the specific purpose for which the corporation was created, are intra vires the corporation. [P 340 C 1]

(l) Specific Relief Act (1877), S. 42—Muttawali entering office under agreement with committee appointed under Religious Endowment Act -Dismissal and appointment of another—Refusal to vacate office—Suit by committee for declaration that dismissal and appointment of another was valid and for permanent injunction is maintainable—Burden of proving that appointment and dismissal was unnecessary is on defendant—Religious Endowments Act (20 of 1863), Ss. 3, 7, 8, 9, 10, 11 and 12.

A entered office of muttawali or manager after having executed a registered agreement, dated 1st March 1926, as between himself and the committee appointed under the Religious Endowments Act. It was mentioned in the agreement that " the appointment of muttawali (or manager) will stand good for three years from the date of appointment " during which time the committee will be at liberty to dispense with the services of *A* without assigning any reason by simply giving him three months' legal notice to terminate his appointment as muttawali or manager. On 16th March 1926 the committee exercised their power by asking him to vacate his office from 1st July 1926. This was followed by the appointment of *S* for a period of five years. *A* refused to vacate the office. The plaintiffs consisting of three members of the committee appointed under the Act for the management of the endowment instituted a suit for a declaration that *A* was validly removed from his office as manager or muttawali and that *S* was validly appointed in his place. In addition to the declaration mentioned, the plaintiffs prayed for a perpetual injunction restraining *A* from asserting his alleged right to the office, and interfering with *S* in the execution of his duties :

Held : (1) that the suit was maintainable and was not barred by S. 42 as the primary relief claimed in the suit was for a permanent injunction against *A*. As *A* was merely in the position of a servant entrusted by the committee appointed under S. 7, Religious Endowments Act 1863, with the management and administration of the Imambara and obtained possession of the same as such, his position was that of a licensee, or a person in possession as a servant and he could not as such, be permitted to deny the title of the plaintiffs at the time when he was appointed and placed in possession of the Imambarah. [P 332 C 1; P 333 C 1]

(2) that the onus was on *A* to show that the committee had not acted on a bona fide belief that the appointment of muttawali for a term and not for life was necessary in the interest of the endowment confided to their care.

[P 335 C 2]

(3) that the onus was on *A* to show that the committee had not, in dismissing him, acted on a bona fide belief that the dismissal was necessary in the interest of the endowment but had been actuated by some other improper motive.

[P 338 C 1]

Nasim Ali and *Hira Lal Chakravarti* —for Appellants.

Nares Chandra Sen Gupta, *A Quasem* and *Diptendra Mohan Ghose*—for Respondents.

Judgment.—This appeal has arisen out of a suit instituted by the plaintiffs, appellants, as the members of the committee for the mangement of the

Hooghly Imambarah, appointed under Act 20 of 1863 (*I. C.*) for a declaration that defendant 1, respondent has been validly removed from his office as manager or muttawali of the Hooghly Imambarah, and that defendant 2 has been validly appointed in his place. In addition to the declaration mentioned, the plaintiffs in the suit prayed for a perpetual injunction restraining defendant 1 from asserting his alleged right to the office, and interfering with defendant 2 in the execution of his duties. The suit was dismissed by the Subordinate Judge, in whose Court it was instituted, on 21st May 1929; and this appeal was preferred by three out of the five original plaintiffs in the suit. One of the plaintiffs, plaintiff 2, died before this appeal was filed; plaintiff 3 died after the filing of the appeal to this Court.

The history of the litigation has to be stated in some detail, in view of the nature of the controversy between the parties. Hajee Mohamed Moshin, a name writ large in the annals of Bengal, executed a deed of appropriation or endowment on 20th April 1806 conveying certain properties, yielding a very large income, to two muttawalis named Rajab Ali Khan and Shakur Ali Khan in trust for certain purposes. For the purpose of the present case, we are concerned with the income out of preperties devoted to what is described as religious or pious purposes. The different purposes of the trust were mentioned by the founder of the endowment under three heads: (1) three-ninths on religious ceremonies and the upkeep of the Imambarah at Hooghly; (2) two-ninths on emolument of the muttawalis, (3) four-ninths in maintaining establishment, and paying certain pensions. The muttawallis appointed by the founder of the endowment were given the power to appoint their successors. The trust so created was carried into effect, and Haji Mohamed Moshin died in the year 1813, when the two muttawalis appointed by him were in possession of the endowed properties. In the same year Shakur Ali Khan, one of the muttawalis was seriously ill, appointed his son Baker Ali Khan muttawali in his place, and died in the next year. Rajab Ali Khan and Baker Ali Khan who acted as joint muttawalis, were dismissed by the Board of Revenue by virtue of powers conferred upon the Board by Regn. 19 of 1810, and one Syed Ali Akbar Khan was appointed sole muttawali, in the year 1818, of the Imambarah and the religious ceremonies connected therewith. The Government thereupon substituted one trustee for two muttawalis appointed by the original deed of endowment, thereby substantially altering the original idea of having two muttawalis.

In the year 1825, Wasiq Ali Khan, claiming muttawaliship under a nomination by his father, Rajab Ali Khan, brought a suit impugning the right of the Board of Revenue to dismiss muttawalis, and claiming the right of his father to nominate him as the successor muttawali. The case of the Government as stated before the Court in Wasik Ali Khan's suit, was that the case was of a public trust of a religious endowment, which properly came within the intent and scope of Regn. 19 of 1810, under S. 13 of which the revenue authorities and local agents had full power, on proof of corruption on the part of the incumbent trustees, to appoint others in their stead. In the case the Board of Revenue with the sanction of the Governor-General in Council, on full proof of corruption, incapacity, and dishonesty, appointed Ali Akbar Khan to the office of muttawali. The Government's case further was that Rajab Ali Khan had no power to appoint a successor. The case came up to the Sadar Dewany Adalat (6 S. D. A. 130). The plaintiffs' suit was dismissed. The final decision was passed by the Sadar Dewani Adalat in September 1836. The learned Judges held that the trust created by Haji Mohamed Moshin was of the nature of a towleeut-mi-ul-waseeut or testamentary trust (per Mr. Barwell and per Mr. Smith); that the Board of Revenue under the authority vested in the Government and delegated to the Board by Regn. 19 of 1810, had the power to remove a muttawali on sufficient grounds, and that power was rightly exercised. On such dismissal. the office of muttawali became vacant (per Mr. Smith). It was further held that under the terms of the original trust deed, the endowment could not have been excluded from the control and superintendence of the Board of Revenue, who possessed the

right of control over such establishment.

Under the provisions of Ss. 8, 11, 12 and 13 Regn. 19 of 1810, Rajab Ali Khan had no power to appoint a successor in his stead without the knowledge and consent of the revenue authorities (per Mr. Money). In the year 1836, the Board of Revenue dismissed Syed Ali Akbar Khan, whom they had appointed in 1818; and one Syed Keramat Ali was appointed to the muttawaliship of the Hooghly Imambara in January 1837. Keramat Ali held the office until the year 1875. Before the appointment of Keramat Ali to the office of muttawalli, one Moulvi Zynuddin was placed in charge of the office after the dismissal of Syed Ali Akbar Khan in 1836. The history of the office shows that after the dismissal of the muttawalis holding office under the deed of endowment, one-ninth of the income of the endowed properties was assigned to "the agent or muttawali appointed by the Government," to administer the affairs of the endowment, the Government in official correspondence of the years 1836 and 1863 using the words muttawali, agent and superintendent in the same sense with reference to the person placed in charge of the Imambara. The Religious Endowment Act, Act 20 of 1863, was passed; and it received the assent of the Governor-General on 10th March 1863. The enactment required, by Ss. 3 and 7, the Local Government to appoint a committee to exercise the powers conferred on the Board of Revenue by Regn. 19 of 1810, in the matter of the power of appointment to a vacancy in the office of a trustee, manager or superintendent, conferred upon the Board by S. 14 of the Regulation.

In 1875, Moulvi Ashrafuddin Ahmed was appointed by the Government in the place of Keramat Ali, as the committee under the new enactment of 1863 had not been appointed till the time of appointment of Keramat Ali's successor came. Keramat Ali wanted to nominate his successor, but his claim was rejected by the Government; and it was pointed out to Keramat Ali that he had no right to appoint his successor. The committee appointed by the Government under Act 20 of 1863 began to function from July 1875; and Ashrafuddin Ahmed was recognized as muttawali by the committee. Ashrafuddin Ahmed claimed the right to nominate his successor and the claim appears to have been accepted by the Government. The Government's action in this behalf was challenged by the committee, and ultimately Ashrafuddin Ahmed continued to be the muttawali till 1916, when he retired. In view of the right claimed by Ashrafuddin Ahmed in the matter of nominating a successor, the committee had for the purpose of settling a dispute, to grant a pension as also a bonus to the retiring muttawali. The committee after this, decided, in 1916, to appoint muttawalis for a term; and in consonance with that decision appointed Syed Mahammad Raziuddin as muttawali in 1916 for the period of three years, with the stipulation contained in a registered agreement, that it would be competent for the committee to dismiss the muttawali, on giving him three months' notice. without assigning any reason for dismissal. On the expiry of the period for which Raziuddin was appointed, he was granted an extension of service for one year. In 1920, Syed Ali Kazimaini was appointed on the same terms and conditions as those under which Raziuddin was appointed in the year 1916. Raziuddin thereupon instituted a suit against the members of the committee for a declaration that he was a muttawali under the Mahomedan law, and as such could not be removed by the committee, that the agreement executed by him was illegal. Raziuddin also prayed for a permanent injunction restraining the members of the committee and their nominee Syed Ali Kazimaini from interfering with him in the discharge of his duties as muttawali.

The trial Court, as also the Court of appeal in its judgment passed on 25th March 1920, refused the prayer for injunction; and it was held by the Court of appeal that the restriction clauses in the agreement under which Raziuddin was appointed muttawali, could not be held to be illegal and void, as contended by the plaintiff Raziuddin. After the expiry of the term of three years for which Syed Ali Kazimaini was appointed muttawali by the committee, defendant 1 Syed Altaf Hossein was selected, and appointed as muttawali, with effect from 1st

March 1923. There was an advertisement for the post of muttawali of the Hooghly Imambara, on 10th December 1922, inviting applications for the post; term of appointment was mentioned as three years, with option to the members of the committee for a further period of three years; the emolument of the post was mentioned as Rs. 300 per mensem, the minimum, under certain terms and conditions. Defendant 1 entered office after having executed an agreement dated 1st March 1923, as between himself and the committee, which agreement was duly registered. Five conditions were specifically and definitely mentioned in the agreement. The salary agreed upon was stated, and it was mentioned that

"the appointment of muttawali (or manager) will stand good for three years from the date of appointment," during which time the committee will be at liberty to dispense with the services of Moulvi Syed Altaf Hossein without assigning any reason, by simply giving him three months legal notice to terminate his appointment as muttawali (or manager)." The said Moulvi Syed Altaf Hossein will be at liberty to resign his appointment without assigning any reason whatsoever, or by simply giving three months' legal notice to vacate his appointment as muttawali (or manager) of the said Imambara."

Before the expiry of the three years' term, there was another agreement drafted, and it was approved by Syed Altaf Hossein, on 17th January 1926; the agreement contained the terms of appointment; and the terms were the same as those contained in the registered agreement of 1st March 1923. It appears from a letter addressed to the committee by Syed Altaf Hossein on 2nd February 1926, that he (Syed Altaf Hossein) thanked heartily the members of the committee for appreciation of his services by re-appointing him of their free will for a second period of three years. He was willing to enter into a fresh agreement embodying the terms and conditions, the draft of which had been signed by the members of the committee and himself. It was pointed out to the committee that the provision relating to the three months' notice for dispensing with service, without assignment of reason, was, to say the least of it, erroneous; it was said however that if the committee did not fall in with that view of the matter, he (Syed Altaf Hossein) did not wish to go against the wishes of the committee for the sake of doing some more service to the cause of the holy shrine and sacred trust. Eventually Syed Altaf Hossein complied with the wishes of the committee that he should make over charge of his office in the evening of 28th February 1925, the day on which the first term of his appointment came to an end, and take charge again early next morning entering upon this office for a second time.

Soon after, on 16th March 1926, the committee appears to have exercised their power to dismiss the muttawali, by asking him to vacate office with effect from 1st July 1926; and that was followed by the appointment of defendant 2, Syed Ajar Hossein Jufri as muttawali for the period of five years. Defendant 1 refused to vacate his office and the position taken up by him gave rise to the suit for declaration and injunction by committee out of which this appeal has arisen. The case of defendant 1 on the merits was, that he was a muttawali under the Mahomedan law, and could not be removed by the committee. The agreement under which he entered office in the year 1923, was characterised as fraudulent, which was not binding on the defendant; and that the defendant pleaded that there was no ground for his dismissal. There was also the plea raised by defendant 1 that the suit was not maintainable in the form in which it was instituted. The appeal to this Court against the decision of the trial Court, dismissing the suit on the merits, has also been characterised as an appeal infructuous and incompetent, as the members of the committee of management are not represented in the same, and for the further reason that one of the plaintiffs died during the pendency of the suit, and another plaintiff died during the pendency of the appeal to this Court.

It is necessary that the plea in bar, raising the question that the suit was not maintainable, has to be taken into consideration first. As has been observed by the trial Court, the plaintiffs' suit was not barred by any of the provisions contained in S. 42, Specific Relief Act, and regard being had to the nature and scope of the suit, we are clearly of opinion that the primary relief claimed in the suit was for a permanent injunction against defendant 1, in the matter of

his continuing in office as the muttawali of the Hooghly Imambara. The relief claimed by the plaintiffs in the suit were such, as made the defendants' plea that the suit was not maintainable in the present form, in our judgment wholly untenable, and the decision of this Court in the case of *Deo Kali Koer* v. *Kedar Nath* (1), on which very great reliance was placed on behalf of defendant 1-respondent, has no application to the case before us. That effect of the death of one of the plaintiffs in the suit during the pendency of the suit in the trial Court, and of the death of another, when the appeal to this Court was pending, did not make the suit and appeal infructuous arises for consideration next. In view of the provisions contained in the Religious Endowments Act (20 of 1863) which govern the rights of the parties in the case, a suit by the surviving members of a committee appointed by the Government under S. 7 of the Act is maintainable, and we are in agreement with the view taken by the learned Judges in the decision of this Court in the case of *Raghu Nandan* v. *Bibhuti Bhusan* (2). That a committee is not ipso facto dissolved when one of its members dies. In the above view of the case, there is no such defect in the appeal as preferred to this Court, which could sustain the plea raised by the defendant-respondent that it had become infructuous on the death of two of the members of the committee.

The substantial question in controversy in the case related to the position of the defendant 1-respondent, under the law; whether the defendant was a muttawali under the Mahomedan law. Subsidiary to this general question were the questions whether the appointment of a muttawali for a limited period was legal and valid; whether the agreement under which defendant 1 came into office was a valid and binding agreement between the parties; could the committee appointed under S. 7, Religious Endowments Act (20 of 1863), legally dismiss a muttawali without assigning any reason, as provided by the agreement. The determination of the main question in the case depends on the scope and operation of the two enactments relating to public religious endowments: (Regn. 19 of 1810 and Act 20 1863, by which the aforesaid Regulation was in course of time, superseded). The superintending authority over religious endowments exercised by the old rulers of the country passed to the British Government; and the Bengal Regn. 19 of 1810, defined the manner in which the power of the Government was to be exercised. The preamble to the Regulation declared the duty of the Government to provide that all such endowments be applied according to the real intent and will of the grantor. The Government by promulgating the Regulation of 1810 framed a general scheme for the better management of the institution. The general superintendence of the endowments was vested in the Board of Revenue, and the Regulation authorised the Board of Revenue to appoint local agents (Ss. 7 and 8 of Regn. 19 of 1810).

The authority to remove for just cause was recognised and the authority to remove was considered to be impliedly given as a proper incident to the principal duties and responsibilities of the Board of Revenue (see *Chinna Rangaiyangar* v. *Subbraya Mudali* (3). The powers of the Board of Revenue were, in fact, the sovereign powers of the Government, in regard to the management and superintendence of endowments taken charge of by the Government. The Government, after assuming control of the endowment created by Haji Mahomed Moshin, dismissed the muttawalis in possession, owing to misappropriation of funds; Akbar Ali was appointed an agent of the Government, thus substituting one agent for two muttawalis, to administer the affairs of the endowment; a litigation ensued which was concluded by the decision of the Sadar Dewani Adalat, Bengal, the position taken by the Government in regard to the endowment having been accepted by the final Court of appeal in the year 1836. The plea advanced by the plaintiff in the suit, claiming to have derived title through one of the original muttawalis mentioned in the deed of endowment, having having been negatived. The decision of the question of the right to appoint a successor mutwalli was against the plaintiff in the suit, and in favour of

1. (1912) 39 Cal 704=15 I C 427.
2. (1912) 39 Cal 304=12 I C 147.
3. (1866) 3 Mad H C R 334.

the Government. The powers vested in the Government were being exercised by the Board of Revenue under Ss. 13 and 14, Regn. 19 of 1810 in the matter of appointment of mutawallis described in various correspondence as agent or mutawalli; the appointment of a second mutawalli as provided by the deed of endowment was effectively done away with. In the year 1863, the regulation was replaced by Act 20 of 1863. The property in the possession of the Board of Revenue was transferred to a committee. Under the enactment, the committee appointed under S. 4 was to have the same powers that the Board of Revenue had under Regn. 19 of 1810, the powers being of supervision and control. The object of Act 20 of 1863 was, as clearly indicated in the preamble, to relieve the Board of Revenue and the local agents from all duties imposed by Regn. 19 of 1810, in respect of superintendence of religious establishments, the appropriation of their endowments, the preservation of buildings connected therewith, and the appointment of trustees and managers; or connected in any way with the management of such establishments; and by the provisions contained in Ss. 7 and 12, all those duties in the case of religious endowments to which S. 3 applied, were fully transferred to the committee appointed by the Local Government, "to take the place and to exercise the powers of the Board of Revenue and the local agents." The effect of the enactment was to confide to the committee the same duties and responsibilities, and enable them to exercise the same powers of the Board of Revenue, and under Act 20 of 1863, the power to suspend or remove a mutawalli for just cause, which was properly incident to the principal duties and responsibilities of the Board of Revenue under Regn. 19 of 1810, was impliedly given. It is to be noticed that by the provisions of the Act, as contained in S. 12 applicable to cases coming within S. 3 of the Act, the committee was to be appointed for the superintendence of the religious establishment and for the management of its affairs; the powers of the committee were not merely powers of supervision and control.

It is further to be noticed in this connexion that the trustee, manager or superintendent of the religious establishment appointed by the committee could have no possession strictly so called. The property was vested in the committee; the trustee, manager or superintendent could have no legal property vested in him, he being only an agent or servant of the committee. His was only the custody or management of the property acting under the supervision and control of the committee. The committee could always under the law take over such custody or management from the trustee, manager or superintendent appointed by it, 'provided they act in the interest of the institution; in the exercise of the powers vested in them by law, as contained in the Religious Endowments Act (20 of 1863). As provided by S. 12 of the Act, the property is transferred to the committee, and all powers previously exercised by the Board of Revenue or local agent for the recovery of land or other property transferred, were exercisable by the committee from the date of transfer. The position thus indicated was considered by this Court in the case of *Bhima Rout* v. *Dasarathi Das* (4), and we are in agreement with the observation made in the judgment to the following effect:

Section 3 deals with cases in which at the time of the commencement of the Act the religious establishment was an institution in which the nomination of the trustee, manager or superintendent thereof was vested in or might be exercised by the Government, and the nomination of such trustee, manager or superintendent was subject to the confirmation of the Government. In cases covered by S. 3 the course to be followed is outlined in Ss. 7, 8, 9, 10, 11 and 12. The trustee, manager or superintendent was put under the control of the Board of Revenue, and subsequently under the control of the committee under the statute. Reference may usefully be made in this connexion to the observations of their Lordships of the Judicial Committee of the Privy Council in *Vidya Varuthi Thirtha* v. *Balaswami Ayyer* (5):

"In 1810 the British Government had assumed control of all public endowments, Hindu and Mahomedan, and placed them under the charge of the Board of Revenue. In 1863 the Government considered it expedient to divest

4. (1913) 40 Cal 323=16 I C 908.
5. AIR 1922 P C 123=65 I C 161=48 I A 302=44 Mad 831 (P C).

itself of the charge and control of these institutions, and to place them under the management of their own respective creeds. With this object Act 20 of 1863 was enacted, a system of committees was devised to which were transferred the powers vested in Government for the appointment of managers, trustees and superintendents; rules were enacted to ensure proper management. The Act contains no definition of the word "trustee;" it uses indifferently and indiscriminately the terms, 'manager, trustee or superintendent,' clearly showing that the expressions were used to connote one and the same idea of management. After the enactment of 1863, the committee to whom the endowments were transferred, were vested, generally speaking, with the same powers as the Government had possessed before in respect of the appointment of 'managers, trustees and superintendents."

To the above observation may be added the opinion expressed by Sir John Wallis, C. J., in the decision of the Madras High Court in the case of *Gobindaraja Madaliar* v. *Sabapathi Mudaliar* (6), that

"the powers which had been given to the Board of Revenue by the regulation and which were conferred upon the committee by Act 20 of 1863 were exceedingly wide, and enabled them to appoint or to make such other provision of the trust, management and superintendence, as might to them seem fit, with reference to the nature and condition of the endowments".

In the present case, as it would appear from the narration of the history of appointment of mutawallis, the committee, in view of the past history, and regard being had to the fact that the mutawallis, successively appointed to the office, never ceased to assert their right to continue in their office, and the right to nominate their successor, considered it necessary to fix a definite period for which the mutawalli of the Hooghly Imambara was to hold office. It is difficult to hold that regard being had to the past history, the decision of the committee was one which was not to the interest of the endowment concerned. Successive holders of the office, in assertion of their rights, forced the committee to face litigation, or settle the matters in controversy, on terms which meant expenditure of funds of the endowment; and in the case of Ashrafuddin Ahmed, the settlement of dispute entailed a recurring charge on the endowment in the shape of a monthly pension for a number of years. On the materials before us, we have come to the conclusion that the decision arrived at by the committee that the office of the mutawalli of the Hooghly Imambara could be held only for a fixed period of time was a proper decision on the facts and in the circumstances of the case. The committee had the power in them, vested under the law, to decide that the tenure of office of a mutawalli was to continue so long as its continuance was not inconsistent with the interest of the endowment.

The question was whether the committee had acted on a bona fide belief that the appointment of a mutawalli for a term, and not for a life, was necessary in the interest of the endowment confided to their care, or had it been actuated by some improper motive. The onus was on defendant 1 in the suit to show that the committee had not acted on a bona fide belief; and there is nothing before us with reference to which it could be held that the action of the committee in this behalf, decided upon in the year 1916, was not bona fide, and in the interest of the endowment. Appointment was to be made subject to good behaviour, and to competence to carry out the duties of the office. This has been the policy of the committee from 1916; some of the mutawallis had to be dismissed and others had to be pensioned. It requires to be mentioned in this connexion, that the powers of the committee appointed under Act 20 of 1863 are not the powers exercisable under the general Mahomedan law in the matter of appointment of mutawallis, and not the powers exercised by the creator of the endowment himself, but by the power vested in the Ruling Power, the power exercised by the Board of Revenue under Regn. 19 of 1810, and the power conferred upon the committee under the Religious Endowments Act (Act 20 of 1863). The mutawallis appointed under the Regulation have no power to appoint their successors.

This was ths scheme followed by the Board of Revenue, in supersession of the general rule of Mahomedan law, and of the scheme outlined in the deed of endowment executed by Haji Mahomed Moshin in 1806. After the endowment vested in the committee, under Act 20 of 1863, the scheme of appointing muttawalis without terms and conditions attached to the appointment, proved to be detrimental to the interest of the en-

• 6 AIR 1921 Mad 114=61 I C 783.

dowment, and it was therefore decided in the year 1916 that the tenure of office of the person entrusted with the internal management of the Hooghly Imambarah, was to be for a fixed period. In our judgment, it appears to be clear that the position is that the muttawali in the case before us did not hold office as a muttawali under the general Mahomedan law, or in accordance with the terms of the original endowment. As a person placed in charge of the internal administration of the Imambara, he was an officer of committee appointed by the Government, in the case of an endowment to which S. 3, Religious Endowments Act (20 of 1863), was applicable; and could not under the law exercise any right, or have any power under the law, excepting those delegated to him by the committee, as a trustee or manager or superintendent, as mentioned in the Act.

The position of a mutawali appointed by the committee is that of a servant of the committee and he cannot have what is called a freehold in his office. In the case before us, as in all cases falling under S. 3, Religious Endowments Act, the mutawali cannot claim the same position of a trustee under S. 4 of the Act; and it could not be claimed by the muttawali that the committee could have no power in them to dismiss him, but would have to seek the intervention of the Courts in that behalf. In our judgment, the correct position was indicated by Davies, J., in *Seshadri Ayyangar* v. *Nataraja Ayyar* (7) at p. 202 that the control of the committee was the control over a subordinate, the case being parallel to the case of a master and servant. The powers of the committee are derived from the supreme or sovereign power of Government, and they were free to deal with a servant appointed by them, according to the terms of employment, and were also free to remove the recalcitrant trustees appointed for a fixed period, without assigning reasons for such removal, in consonance with the terms of service. It would not, in our judgment, be right to hold that the committee must go to the Government, or come to the Judge with their case for orders, as has been held by the trial Court in this case. The muttawali in the present case was not a muttawali holding office under the terms of the original deed of endowment, executed by Haji Mahomed Moshin, and was not a muttawali under the general Mahomedan law, with the power to nominate or appoint his successor. The question for consideration next, is whether the agreement executed by defendant 1 in favour of the members of the committee of management was valid and binding. Was the defendant estopped from raising the question?

The question of estoppel, as a question of law, as raised in the case on behalf of the plaintiffs-appellants in this Court, does not, in our judgment, require any elaborate discussion. If defendant 1 in the suit was a person who could claim to be in possession of the Hooghly Imambara as a muttawali in accordance with the terms of the original endowment, and if his position under the law was that of a muttawali under the Mahomedan law, he was not, and could not be held to be estopped from asserting his position as such. If on the other hand the defendant was merely in the position of a servant entrusted by the committee appointed under S. 7, Religious Endowments Act, 1863, with the management and administration of the Imambara, and obtained possession of the same as such, his position was that of a licensee, a person in possession as a servant, and could not, as such, be permitted to deny the title of the plaintiffs in the suit at the time when he was appointed and placed in possession of the Imambara. As we have indicated above, defendant 1 could not under the law claim the position of a muttawali under the terms of the original endowment, and he could not further claim to be muttawali under the Mahomedan law. The question then arises if defendant 1 in the suit was a mere servant or licensee of the committee. Although indication has already been given of our view of the matter, it is necessary to deal with the agreement and the terms of the employment under which the defendant came to be in the possession of the Hooghly Imambara.

The facts bearing upon this part of the case, have been referred to already. The defendant answered to an advertisement for the post of a muttawali under certain terms and conditions, by an application to the committee for his em-

7. (1898) 21 Mad 179.

ployment. The committee appointed the defendant, regard being had to his qualifications for holding the office. The defendant assumed charge of the office, after having executed a document called an agreement which was duly registered; in this document, the office to which the defendant was appointed was specifically mentioned as "muttawali (or manager)," and there were the five terms and conditions contained in the document to which reference has already been made. The agreement has been characterised by the trial Court as "a fraudulent thing." It was, according to that Court, a fraud upon the gentleman appointed, and it was not therefore valid and binding. The reason assigned for such a conclusion appears to be that the committee had no power to appoint and to dismiss a muttawali; that "the tenure of a muttawali is a life tenure;" that it was a fraud upon the holy institution, if not on the founder. The position of a muttawali whom the committee had the power to appoint has been dealt with above, and we are unable to see how the appointment of muttawali for a term, and with conditions of service, was a fraud upon the endowment of which the muttawali was appointed manager, subordinate to the committee; the position of the muttawali so appointed by the committee could not be held to be that of a muttawali under the terms of the original endowment, and he was not a muttawali in the ordinary sense of the word under the Mahomedan law.

A muttawali could under the Mahomedan law be appointed by the creator of an endowment; a muttawali could be appointed or nominated by an outgoing muttawali, under the Mahomedan law, as his successor-in-office; but appointment of a muttawali by a committee, brought into existence by the statutory provisions contained in the Religious Endowments Act, 1863, was unknown to the Mahomedan law, and the line of reasoning adopted by the trial Court, for holding that defendant 1 was a muttawali under the terms of the original endowment, and further that he was a muttawali under the general Mahomedan law, does not commend itself to us. On the question of fraud said to have been practised on the defendant, reference may usefully be made to certain facts deposed to by the defendant himself; he joined the post of the muttawali of the Hooghly Imambarah in 1923; there was an advertisement for the vacancy and he got it; the last post he held was that of first Talukdar under the Nizam of Hyderabad, popularly called District Magistrate there; he retired on pension from that service. Reference may also be made in this connection to a letter already noticed, written by the defendant dated 2nd February 1925, to the Members of the Committee of Management of the Hooghly Imambara, in which he heartily thanked the members of the committee for appreciation of his services by re-appointing him for a second period of three years; he was willing to enter into a fresh agreement with the members of the committee embodying the terms and conditions, the draft of which had been signed by himself.

In the letter which is Ex. K (5) in the case, mention was made of the ceremony to be performed on the eve of the 28th February, and again on the next morning, and to the provision contained in the draft agreement, relating to three months' notice to dispense with the muttawali's service, without any reason for doing so; and it was stated that the writer of the letter did not want to go against the wishes of the committee if they did not agree with his view that such provision was, "to say the least erroneous." On the above materials, apart from anything else, it was not, in our judgment, open to plead fraud on the part of the members of the committee in regard to the matter of the defendant's entering into the duties of his office as the muttawali of the Hooghly Imambarah, under terms and conditions which were not challenged by the defendant at any time whatsoever, before the committee considered it necessary, in the interest of the endowment, to remove the defendant from the office. A person in the position of defendant 1 who had a held responsible office in the Nizam's State, did not at any time before filing his written statement in this case, take up the definite position that he executed an agreement under a misapprehension, in the bona fide belief that the committee had the authority to appoint a muttawali for a term, and that he was in complete ignorance of the term of the wakfnama of

Haji Mahomed Moshin; that the agreement was absolutely illegal and void; it was not at all binding upon him. The position so taken up by the defendant is not maintainable under the law, regard being had to the provisions of Reg. 19 of 1810 and Act 20 of 1863; and the position is wholly unsustainable upon the facts and circumstances of the case. A person who has held office under a registered agreement, for a period of three years, on certain terms and conditions, and who had unreservedly accepted a fresh tenure of office on the same terms and conditions, could not be heard to say that he was not bound by the terms of his service; that the terms were not binding on him, at a time when his employers had acted strictly under the terms of service in discharging him from service. The reason for the action taken by the Committee was specifically mentioned by the plaintiffs in the suit in the following manner:

"Thereafter it having come to the notice of the committee that defendant 1 was trying to assume powers which did not fully belong to him, and to act to the detriment of the Imambara, and in disregard of the control of the Committee, in such a way as to impair the ultimate responsibility of the committee for the welfare of the institution, gave him notice on 16th March 1926, asking him to vacate the office, with effect from the first of July 1926. That the committee came to know also of many acts of misfeasance, malfeasance of duty on the part of defendant 1, and of misappropriation and malversation of the funds and moneys of the Imambara."

It is apparent that the appointment of defendant 1 for a term was, as has been pointed out already, in the interest of the endowment, whereof the committee were the trustees. The dismissal was also, on the face of it, necessary in the interest of the endowment. It was for the committee to exercise their own judgment as to whether these interests were impaired by the defendant's continuance in office. The onus was on the defendant to show that the committee had not, in dismissing him, acted in the bona fide belief that the dismissal was necessary in the interest of the endowment, but had been actuated by some other and improper motive: see in this connexion the judgment of Sir Lawrence Jenkins, C.J., in *Bhavani Shankar* v. *Timmanna* (8).

The onus was not discharged by the defendant in any way; and the inspection report, Ex. M in the case, dated 3rd May 1925, signed by two members of the Committee, contains nothing which goes against the action taken by the Committee, the following year, for the discharge, of defendant 1 from the office held by him. The dismissal of defendant 1 was followed by the appointment of defendant 2 by the Committee to succeed him. Defendant 1 however would not vacate possession of the Imambarah, and would not on any account make over charge to the person appointed to be his successor; although in the judgment of this Court, passed on 18th June 1928, in a case in which the question of appointment of defendant 2 as the Mutwalli, was directly in controversy, as between defendant 2 and defendant 1, in this suit, the opinion was definitely expressed that it could not be understood why the gentleman (defendant 1)

"who obtained office according to his own agreement for a limited period, in answer to an advertisement in the newspapers, should so desire to retain his office when his employers have discharged him in terms of his agreement."

In the judgment which was passed on an application for substitution of the name of defendant 2 in the place of defendant 1 as the Mutwalli of the Hooghly Imambarah, it was held by this Court that

"the Mutwalli, or by whatever name this Manager may be called, is not a Mutwalli appointed under the Mahomedan law. Under the Mahomedan law, the appointment of a Mutwalli can be made by the donor and the succession to the appointment must be in accordance with the provisions of the deed of endowment, if there is any."

The succession to the office of Mutwalli may be in accordance with the desire of the donor, if he is alive; or if the intention of the founder cannot be ascertained from any established usage, then the appointment may be made by the executor of the founder; and failing all these, the power of appointment is in the Court which represents the power of the Kazi. In no circumstances can the Mutwalli, properly so called under the Mahomedan law, be appointed in the manner in which Altaf Hossein was appointed Mutwalli. It can hardly be consistent with the Mahomedan law that the office of Mutwalli should be advertised and a gentleman who may be qualified in every respect should be ap-

8. (1906) 30 Bom 508=8 Bom L R 407.

pointed for a period of three years, or for a further period at the option of the members of the Committee. A person appointed in such a way cannot invoke under the provisions of the Mahomedan law the powers of a Mutwalli.

The respondent Altaf Hossein entered into an agreement dated 1st March 1923, which embodied the terms by which he was to hold office. It is unnecessary to recite all these terms, but under them he was liable to be dismissed by the members of the Committee. As the learned Judge has himself said that ordinarily the authority which has the power to appoint an officer, has also the power of dismissal, I do not see why the ordinary power should be held in the present case as not capable of being exercised. In support of the proposition of the learned Judge that the authority which appoints has the power to dismiss, the case of *Ram Charan* v. *Rakhal Das Mukerji* (9) may be cited. That was a case of appointment in a Hindu trust, but the principle is the same. I do not therefore agree with the observation of the learned District Judge that the general principles of the Mahomedan law apply to the office of the respondent Altaf Hossein and I am of opinion that he is liable to be dismissed under the terms of the agreement he entered into with the members of the Committee: see Ex. 1, judgment of Bepin Behari, Ghose, J., in Appeal from Original Order No. 32 of 1927. As already indicated, we are in entire agreement with the view expressed in the judgment of this Court, quoted above; and in our judgment defendant 1 was validly removed from his office as Mutwalli (or Manager) of the Hooghly Imambarah and he ceased to be so, with effect from 1st July 1926, and that the appointment of defendant 2 in the place of defendant 1 was valid. Defendant 1 could not, from 1st July 1926, under the law, assert the right to hold the office, and interfere in the matter of execution of the duties of Mutwalli (or Manager) by defendant 2, appointed by the Committee.

In view of the arguments advanced on behalf of defendant 1-respondent some points which in our opinion do not, and cannot, arise for consideration, regard being had to the above conclusion, arrived at by us, may be briefly noticed. It was argued that the agreement dated 1st March 1923, on which the Committee relied, was against public policy; that it was ultra vires of the powers of the Committee to impose limitations in the matter of appointment of a Mutwalli. The decision on these points must depend upon the powers of the Committee under the law, and the status of the Mutwalli (or Manager) appointed by the Committee. If the members of the Committee had, as they undoubtedly had under the law, the power to appoint their officer for the management and administration of the endowment committed to its control, it is difficult to appreciate how the appointment of an officer, Mutwalli or Manager, who could not be called a Mutwalli under the general Mahomedan law, for a term, or an agreement with conditions for his discharge from the office, could be held to be against public policy. As it has been said, the doctrine of public policy will not be extended beyond the class of cases already covered by it, and by no means could it be said that the case of appointment of a servant for a term, or laying down the term of service and conditions under which he could be discharged, fell within the cases to which the doctrine of public policy was applicable.

The Courts cannot invent new heads of public policy, as we have been invited to do in the case before us, seeing that no such terms and conditions of service were imposed by the Committee by the agreement, which were not in consonance with the powers of the Committee under the law. The terms and conditions contained in the agreement in the present case were not in violation of the statutory rights of the Committee to appoint an officer, mentioned in the Religious Endowments Act, as a Trustee, Manager or Superintendent, and who was not a Mutwalli under the Mahomedan law. The application of the doctrine of public policy must be within its recognized bounds, and, in our judgment, the doctrine could not in any way be applied to the case of the contract as between the members of the Committee and defendant 1. On the point that the action of the Committee in the matter of the contract implied by the agreement referred to above, was

9. A I R 1914 Cal 325=20 I C 157=41 Cal 19.

ultra vires, and beyond their powers, consideration similar to that already mentioned, arises in regard to the statutory powers and duties of the Committee.

The Committee appointed under S. 7, Religious Endowments Act, 1863, exercise control over the endowment, to which Regn. 19 of 1810 applied before the Act of 1863 came into operation. The Committees are statutory bodies, and though they are not strictly corporations, their procedure in matters relating to management and administration should be governed by the rules applicable to regular corporations. The difference however between a statutory corporation and a corporation which is not statutory exists and must be recognized. The former has such rights and can do such acts only as are authorized directly or indirectly by the statute creating it; the latter, speaking generally, can do everything that an ordinary individual can do, unless restricted directly or indirectly by statute. It may be noticed in this connexion, that acts directly authorized are such things as may fairly be regarded as incidental to or consequential upon those things which are expressly authorized; and contracts entered into by a corporation created for a specific purpose are intra vires the corporation, although not expressly mentioned in the statute under which it takes powers. In determining therefore whether an act of a corporation is ultra vires or illegal, illegality approaches very near to, and in many cases is the same as ultra vires; and the question is whether a particular act of a corporation is within the competency and power of the corporation. Keeping the above proposition in view, could it be said that the contract entered into by the Committee with defendant 1 was outside the limits of the corporate constitution, that it was ultra vires, illegal and wholly void. The Committee appointed under the Religious Endowments Act, 1863, were vested with the control of the endowment, and had the power to appoint a Trustee, Manager or Superintendent for the administration of the same. The power to appoint was expressly conferred by the statute; the power to determine the terms of appointment must, in our judgment, be held to be within the competency of the Committee as a statutory corporation, inasmuch as acts beneficial for the purpose of the control of the endowment—the specific purpose for which the corporation was created—are intra vires the corporation. Regard being had to the scope of the statute under which the Committee was appointed, and regard being also had to the facts referred to above, that the fixing of a period, so far as the appointment of Mutwalli of the Hoogly Imambarah was concerned, it could not be held that the contract evidenced by the agreement between the members of the Committee and defendant 1, was in any way ultra vires, illegal or void. The appointment of defendant 1 for a term, and under certain conditions specified in the agreement, was within the power of the Committee vested in them under the law as a Committee entrusted with the control of the endowment—the properties, belongings to which had vested in the Committee, and for the administration of which they were to appoint a Trustee, Manager or a Superintendent; and no part of the contract which consisted of inseparable stipulations by way of one and the same agreement, was in excess of the powers of the Committee under the law.

The result of our conclusions mentioned above is that the plaintiffs-appellants in this Court are entitled to the declaration prayed for by them in the suit. Defendant 1 was validly removed from the office of the Mutwalli or Manager of the Hooghly Imambarah, and ceased to be the Mutwalli or Manager with effect from 1st July 1926. Defendant 2 was validly appointed in the place of defendant 1 on and from 1st July 1926. In view of the above decision, a perpetual injunction is issued restraining defendant 1 from asserting any right as Mutwalli or Manager of the Hooghly Imambarah. The appeal to this Court by the plaintiffs is accordingly allowed the decree of the trial Court is set aside and the plaintiffs' suit is decreed in the manner indicated above, with costs. The costs of this Court, as also the costs in the trial Court will be recovered from defendant 1, respondent, Syed Altaf Hossain, personally.

V.B. *Appeal allowed.*

A. I. R. 1934 Calcutta 341

PANCKRIDGE, J.

Damodar Das—Plaintiff.

v.

Morgan & Co.—Defendants.

Small Cause Court Suit No. 12 of 1930, Decided on 20th July 1933, from decision of Small Cause Court Judge, Calcutta.

(a) Legal Practitioner—Attorney in India is entitled to retaining lien and common law lien—Latter is a particular lien and is not available for general balance of account between attorney and client.

The rights of an attorney in India are the same as the rights of a solicitor in England, except in so far as the latter have been diminished or increased by statute. An attorney in India is entitled to two kinds of lien: to protect his right to recover his costs from his client, namely (1) a passive or retaining lien; (2) a common law lien on property recovered or preserved by his efforts. The latter lien is a particular lien and not a general lien, and it is therefore not available for the general balance of account between the attorney and his client, but extends only to the costs of recovering or preserving the property in suit. [P 343 C 2]

(b) Contract Act (1872), S 171—S. 171does not deprive attorney of retaining lien—Legal Practitioner, Attorney.

Section 171 has not the effect of depriving attorney of the passive or retaining lien. [P 344 C 1]

(c) Legal Practitioner—Attorney—Client's money in attorney's possession by his exertion—He has no general lien over it as he has over deeds and papers.

An attorney has no greater rights over money which is the fruit of his exertions when he obtains possession of it, than he has when it is still in the stage of being on deposit in Court. He has a general lien upon deeds and papers in his hands for all costs however arising. But he has no such general right of lien against moneys which he recovers for his client. Whether he gets them or does not, his lien or right to be paid out of those funds is to be confined to the costs incurred in respect of those funds, subject of course, only to this: that he has the ordinary rights of set-off which one creditor has as against another. [P 344 C 1 ; P 345 C 2]

N. C. Chatterjee and *S. B. Sinha*—for Plaintiff.

S. N. Banerjee, B. N. Ghose and *S. C. Mitter*—for Defendants.

Judgment.—This is a suit transferred from the Small Cause Court, on the application of the defendants, under the provisions of S. 39, Presidency Small Cause Courts Act, 1882. The circumstances which have occasioned the suit are as follows: On 9th January 1923, one John Marchmont Gregory obtained a decree for Rs. 16,307 with interest and costs against three persons, of whom one was the plaintiff, and another a gentleman named Lala Raghumal. As security for his claim in that suit, Gregory held the title-deeds of a property, belonging to Lala Raghumal, known as 132, Harrison Road, Calcutta. After the decree, Gregory gave a warrant of attorney to the defendants, authorising them to act as his attorneys in the execution proceedings. On 14th May 1924, Lala Raghumal filed a suit, namely suit No. 1302 of 1924, to set aside the decree obtained by Gregory and to obtain the return of the title deeds.

In June 1924, the defendants filed a warrant of attorney on behalf of Gregory. Writing to the plaintiff on 29th August 1928, the defendants state that they entered appearance in the suit on the plaintiff's instructions and on the plaintiff's undertaking to pay the costs. In subsequent correspondence, the plaintiff states that he does not agree with the defendants' version of the circumstances, in which they entered appearance on Gregory's behalf. On 6th February 1925 the parties to Suit No. 1302 arrived at a compromise, and, in a letter of that date, Gregory informed the defendants of its terms. The letter is as follows:

6th February 1925.

Messrs. Morgan & Co.,
Solicitors, Calcutta.

Dear Sirs,

Suit No. 1302 of 1925 O. O. C. Jn. Calcutta H. C.

Lala Raghumal Khandelwall

v.

Myself and Ray Bahadur Damodar Das

A settlement has been made between me and Lala Raghumal in this case on the following terms:

Lala Raghumal will pay my costs and any amount still due on account of interest and obtain a discharge from Ray Bahadur Damodar Das on my behalf in Suit No. 3629 of 1921 : *Myself* v. *Lala Raghumal and another.*

On Ray Bahadur Damodar Das certifying the payment of costs to me, etc., by Lala Raghumal, as mentioned above, on my behalf, the title-deeds of 132, Harrison Road, which I have sent to you, will be made over to Lala Raghumal, who will withdraw this case, each party bearing his own costs.

Ray Bahadur Damodar Das will pay you the cost incurred by you on my acconnt in this case, and I request you to give effect to this settlement.

Yours faithfully,
(Sd.) John M. Gregory.

On 18th February 1925 Gregory was adjudicated an insolvent When he was subsequently asked by the Official Assignee as to the settlement, Gregory stated that he had no interest whatever

in either of the suits between himself and Raghumal, and that they had been settled long ago and certainly prior to his insolvency. At the end of March 1925 the position with regard to the decree obtained by Gregory in January 1923 was as follows: the balance of the taxed costs payable by the defendants in that suit had been deposited in Court, and there was still due a sum of Rupees 1,741 in respect of interest payable on the decretal amount. On 31st August 1928 a settlement was arrived at between the defendants and Messrs Khaitan & Co., who were acting for the legal representatives of Lala Raghumal, who had died in the meantime. Under the settlement the defendants received a sum of Rs.1,300 in full satisfaction of Gregory's claim for costs and otherwise under the decree of 1923, and made over the title deeds of No. 132, Harrison Road, free from any claim by way of lien. It was also agreed that the suit filed by Lala Raghumal in 1924 should be struck off, each party bearing his own costs. It is not clear what instructions, if any, the defendants had when they agreed to settle the outstanding claims under Gregory's decree on the terms I have stated. It is however admitted that the settlement was made without reference to the present plaintiff.

This suit was instituted in the Small Cause Court on 1st August 1930. In his plaint, the plaintiff states that, in settling the suit for Rs. 1,300 without his consent or authority, the defendants acted wrongfully and illegally, and thereby caused him loss to the extent of Rs. 400, being the difference between the amount due under the decree and Rupees 1 300. He also states that the defendants admit their liability to account for this difference, and that he is willing to set off his claim for this sum against a similar sum due from him in respect of costs payable to the defendants in terms of the letter of 6th February 1925. On the basis of this set-off, he claims the sum of Rs. 1,300 paid to the defendants on 31st August 1928. The case for the defendants is set out in para. 3 of their written statement. Therein they admit having received the sum of Rupees 1,300, but deny that they are liable to pay it to the plaintiff. They go on to say that the sum was appropriated by them towards their general balance of account, and that they made the appropriation as the plaintiff's solicitors having a lien on the money and/or as creditors of the plaintiff. They further allege that the plaintiff accepted the appropriation. They admit having offered to give credit to the plaintiff for the sum of Rs. 400, but they state that they did so purely with a view to arrive at an amicable settlement and deny their liability to account for it. They say that, on the balance of account, there is now Rs. 775 owing, for which they ask for a decree.

The first point that has been raised by the defendants is that the plaint discloses no cause of action. The defendant's counsel points out that there had been no assignment of the proceeds of Gregory's decree in favour of the plaintiff, and also that the warrant of attorney held by the defendants was throughout a warrant of attorney to act on behalf of Gregory and not of the plaintiff. It is said that although Gregory may have intended, or even instructed, the defendants, to make over the fruits of the decree to the plaintiff, that is a matter purely between themselves and Gregory, and gives rise to no claim on the plaintiff's part. I am of opinion that the defendants, in view of their conduct throughout, cannot take up this position. In the words of the plaintiff's counsel, they have always recognised the Rs. 1,300 as being the plaintiff's money. From time to time, statements of general account have been submitted to the plaintiff, in which, as in the correspondence, the claim of the plaintiff subject to the cross claims of the defendants, to the sum of Rs. 1,300 has been conceded. Indeed, their substantive defence, namely that they are entitled to apply this Rs. 1,300 in liquidation of the plaintiff's general liability to them, to my mind, clearly involves recognition of the fact that the money paid in August 1928, was money to which prima facie the plaintiff was entitled.

It will be convenient here to consider the question of the sum of Rs. 400, which stands in a different position to the other part of the plaintiff's claim. The plaintiff claims this sum on the ground of a breach of duty on the part of the defendants to him as his attorneys. Although, as I have said, it is clear that

both parties recognised the plaintiff's title to the sums recovered under Gregory's decree, I do not think that it has been established that, with regard to the litigation, the plaintiff had stepped into the shoes of Gregory. In other words, I do not think that, as regards the actual steps in the litigation, it has been shown that the defendants were acting as the plaintiff's attorneys, and owed a duty to him to do nothing without his instructions. The warrant of attorney still stood in the name of Gregory, and I do not find that the plaint alleges any agreement between the parties concerned, whereby the duty, which the defendants owed to Gregory as his attorneys, had become a duty which they owed to the plaintiff. On the correspondence, I accept the case of the defendants as regards the admission. It appears quite clear that the offer to give the plaintiff credit for Rs. 400 was merely made in order to arrive at an amicable settlement, and was, in fact, without prejudice to the defendants' right to dispute their liability to the plaintiff in respect of this sum.

I now have to consider the claim of the defendants to be entitled to retain this sum of Rs. 1,300 as against the general balance of the plaintiff's account. Although, in the plaint the defendants claim to retain that sum as the plaintiff's attorneys or alternatively as his creditors, the latter aspect of their relationship has not been pressed. Learned counsel for the plaintiff states that the defendant's claim had become barred by limitation when the written statement was filed. Looking into the statement of account, that prima facie appers to be so, and the defendants have not sought to argue that their claims as creditors were not then barred by limitation. It must therefore be kept in mind that the defendants' claim to the money is based purely on their rights as attorneys, and I need not consider their position as creditors either under O. 8, R. 6, Civil P. C., or from the point of view of equitable set-off. Now, the position of attorneys in this country with regard to lien has recently been exhaustively dealt with by Marten, C. J., in *Tyabji Dayabhai & Co.* v. *Jetha Devji & Co.* (1) (at 865 of 51 *Bom.*). The learned Chief Justice observes as follows :

> "In the first place it must be clearly understood that the rights and duties of attorneys are in no way part of the indigenous law or practice in India. Their profession originates from England; it grew up under the English common law; and it is clear that it was the common law which governed their rights and duties in the King's Courts established by the Supreme Court Charter of 1823, to which Courts our present High Court is the successor."

Mutatis mutandis those words appear to me to apply to the Calcutta High Court. I take the learned Chief Justice's words as amounting to a statement that the rights of an attorney in India are the same as the rights of a solicitor in England, except in so far as the latter have been diminished or increased by statute. As to the solicitor's right of lien, the learned Chief Justice adopts the statement of the law to be found in Halsbury's Laws of England, Vol. 26, Title : "Solicitors," para. 1334. It is there stated as follows :

> "A solicitor is entitled to three kinds of lien to protect his right to recover his costs from his client, namely (1) a passive or retaining lien; (2) a common law lien on property recovered or preserved by his efforts; (3) a statutory lien enforceable by a charging order."

With regard to the last mentioned, or statutory, lien it need only be said that it is a creation of the Solicitors Act, 1860, (23 & 24 Vic. c. 127). Indian statute law contains no similar provision, nor would such a statutory lien have any application to the facts of this case. I must now consider what, in the passage I have quoted, is called the common law lien on property recovered or preserved by the solicitor's efforts. This lien, is admittedly a particular lien and not a general lien. and it is therefore not available for the general balance of account between the attorney and his client, but extends only to the costs of recovering or preserving the property in suit. The difficulties with regard to this type of lien usually arise when the interests of parties other than the solicitor and his client are involved. Most of the reported cases are concerned with the solicitor's right to his lien, either over a fund paid into Court, or property in the hands of a Sheriff. It is clear that this particular lien is of no assistance to the defendants in the present case, because, as regards sums which were due in respect of the two suits, to which Gregory was a party when the Rs. 1,300 was paid to the defendants, the plaintiff admits that

1 .AIR 1927 Bom 542=105 IC 383=51 Bom 855.

he must give them credit by reason of the terms of the letter of 6th February 1925. It is immaterial whether the solicitors acquired their rights under their particular lien or under the terms of the letter.

There remains to be considered the third lien, namely, the passive or retaining lien. Mr. Sinha first argued that this lien has never existed in India. I do not agree with this submission, because I consider that the judgment of Marten, C. J., to which I have referred, lays down that an attorney in India has all the rights as regards lien which a solicitor has in England except those rights which depend on statute. It seems to me that the attorneys, who practised before the Supreme Court, had this right of passive or retaining lien, as much as solicitors practising in England. I do not think that the fact, that the particular lien on property recovered is referred to as a Common law lien, means that the passive or retaining lien is not a right recognized at Common law.

Mr. Sinha then submitted that if the passive or retaining lien had originally existed it had been taken away by S. 171, Contract Act. If this view were correct, a solicitor's general lien would only extend to property held under a contract of bailment, and would therefore not apply, in my judgment, to a fund paid to him as the result of the settlement of a suit. Whatever be the meaning of S. 171, Contract Act, I am convinced that it has not the effect of depriving attorneys of the passive or retaining lien which they possessed prior to the passing of the Contract Act. I hold therefore that attorneys are entitled to a passive or retaining lien. It only remains to consider what property is subject to that lien. Mr. Sinha points out that in Halsbury's Laws of England, it is said:

"The retaining lien enures in the solicitor's favour in respect of all deeds, papers, or other personal chattels which come into his possession in the course of his professional employment including bills of exchange, letters patent, policies of assurance, letters of administration, documents contained in a drawer of which the solicitor is given the key, and applications for shares."

Nothing is said with regard to the money of the client which comes into the hands of the solicitor. I have been referred to a textbook entitled The Law and Practice Relating to Solicitors' Liens and Charging Orders by Mr. Atkinson, a solicitor of the Supreme Court in England, published in 1905. At pp. 43 and 44 the author uses these words :

"In addition to this particular or special lien, which extends to his costs in the particular action or proceeding only, a solicitor has a general lien available for his costs in all matters on any moneys of his clients coming into his possession, unless paid to him by the client for a specific purpose; and this lien may be asserted even against the client's trustee in bankruptcy. This general lien however is merely passive, and practically amounts to a mere right of set-off by the solicitor of the amount of his general costs against his client's monyes in his hands."

I was inclined at one time to take the view that, whereas with regard to funds in Court and the like, a solicitor has only a particular lien, the position is different when the solicitor has obtained possession of the fund, and that once possession has been obtained, the solicitor is entitled to treat the money in his possession in the same way as documents belonging to his client, and can refuse to pay it over to his client as long as any amount is owing to him. This would of course in fact amount to applying the money in liquidation of the general account. However a reference to one of the cases referred to by the author of the text-book, to which reference has just been made, has convinced me that this view is erroneous, and that a solicitor has no greater rights over money which is the fruit of his exertions when he obtains possession of it, than he has when it is still in the stage of being on deposit in Court. The case in *Mackenzie* v. *Mackintosh* (2) and the proceedings in the Court of the first instance are reported in 64 *L. T.* (*Ch.*) 318. In that case the plaintiff had a charge over the proceeds of three policies of marine insurance. The assured, who had created a charge in the plaintiff's favour, instructed a firm of solicitors to take steps to realize the amounts claimed on all three policies. There was some correspondence between the parties in connexion with the charge, which included a letter addressed to the plaintiff by the solicitors. A sum of money in respect of one of the policies was under the terms of a compromise paid by the insurance society concerned to the solicitors. The plaintiff called

2. (1891) 64 L T (ch) 318 on appeal 706.

upon the solicitors to pay this sum to him less their charges incurred in respect of the particular claim, but the solicitors maintained that they were entitled to a lien on the money, not only for their charges in respect of that claim, but in respect of costs incurred in respect of claims against other insurance societies under the other policies. The case came before Kekewich, J., and in the course of his judgment, dealing with the general question of lien, he observed as follows:

"There are really no modern cases (not one has been cited) going to show that there is a charge on the fund in the way of a general lien for all of the costs due from the client to the solicitor; whereas it has been settled—beyond the time of legal memory I might almost say—that a solicitor has a lien on the deeds, documents, and papers in his hands. The distinction between the two liens (they are both called "liens") is that one is passive and the other an active lien. In one case he can only retain his papers, and in the other he can enforce his lien as a charge and recover it, and he can do so independently of the statute which enabled the solicitor to proceed in the Court of Chancery by petition and obtain a charging order. That certainly seems to me to have been long established—at any rate to be laid down—I will not say established, in the case of *Bozon* v. *Bolland* (3), where the subject is elaborately treated. The doctrine is also recognized in the case cited by Mr Renshaw, in reply, cf. *Lucas* v. *Peacock* (4), where Lord Langdale says: "The solicitor's lien on a fund is not a general lien; it extends only to costs in the cause or costs immediately connected with the costs of the cause." And *Bozon* v. *Bolland* (3) is referred to. It is true that in that case, as in many others, the fund was a fund in Court. But there are cases which applied the direction to funds not in Court and on principle it seems to me that the rule must be the same."

It is clear therefore that Kekewich, J., thought that there was no difference between a fund in Court and a fund of which the solicitors had obtained possession. However he then proceeded to consider the correspondence in the case, and came to the conclusion that, on the correspondence, the solicitors were entitled to a general lien. It is clear that, apart from the correspondence, he would have held that the solicitors were only entitled to retain the costs arising out of the particular claim in respect of which the money had been paid to them.

Against the decision in favour of the solicitors the plaintiff appealed. The judgment of the Court of appeal does not suggest that the statement of law in the Court below is incorrect, but the Lord Justices, taking a different view of the correspondence, reversed the order of Kekewich, J., holding that the Solicitors were entitled to a particular lien on the funds in their hands. I do not think it necessary to cite passages from their judgments, which are to be found in the same volume of the Law Times at p. 706, except in so far as to refer to the following observations of Lindley, L. J.:

"He (the solicitor) has a general lien upon deeds and papers in his hands for all costs however arising. But he has no such general right of lien against moneys which he recovers for his client. Whether he gets them or does not, his lien or right to be paid out of those funds is to be confined to the costs incurred in respect of those funds, subject, of course, only to this: that he has the ordinary rights of set-off which one creditor has as against another, and which I need not further refer to."

For the reasons I have given, I do not consider that the defendants here can claim in the capacity of creditors. It follows, from what I have said, that, in my judgment, their claim to retain the sum of Rs. 1,300 against the balance of their account is not tenable. I have held that the plaintiff has no claim in respect of the sum of Rs. 400. His claim must, therefore, be reduced by the amount of the two bills outstanding against him in respect of the two suits to which the present suit has reference. Those bills amount to Rs. 328-8-0. There will, therefore, be a decree in favour of the plaintiff for Rs. 971-8-0 with interest on judgment at 6 per cent., and costs as in an ordinary defended suit in the High Court.

K.S. *Order accordingly.*

3. (1846) 9 Beav 177=50 E R 311.
4. (1839) 4 My & C 354.

A. I. R. 1934 Calcutta 345

JACK AND NAG, JJ.

Sudhansudhar Roy and *others*—Defendants—Appellants.

v.

Sasadhar Roy — Plaintiff — Respondent.

Appeal No. 216 of 1932, Decided on 20th July 1933.

(a) Civil P. C. (1908), O. 41, R. 22—Cross-objection against co-respondent cannot be entertained unless grounds are common to co-respondent and appellant.

A cross-objection by a respondent as against his co-respondent should not be entertained under O. 41, R. 22, where the question raised thereby is entirely distinct from and in no way related to the question in controversy in the appeal. The test is whether the question raised is so connected that one of the parties ought not to be allowed to re-open matters so far as he

is concerned without opportunity allowed, in the interest of justice, to another to protect himself by urging his objections even though they be directed, not against the appellant but against a co-respondent: *AIR* 1918 *Cal* 13 (*SB*) and 13 *I C* 653, *Foll.*; 26 *Cal* 114 and 43 *Cal* 790, *Ref.* [P 347 C 1]

A suit for opening of pathway on the establishment of plaintiff's right was decreed against defendants 1 to 4 and was dismissed as against defendant 5 who was tenant of defendants 1 to 4 on the ground that there was no cause of action against him. On first appeal by defendants 1 to 4 the plaintiff filed a cross-objection against defendant 5 who was a respondent in the appeal. The appeal was dismissed and cross-objection was allowed and suit was decreed on contest against defendant 5 also. The finding of the lower Court was that he played a role in the obstruction of the passage and was interested in obliterating the passage, that he was rightly made a party to the suit and the suit should have been decreed against him as well. The cross-objection urged was that the suit should have been decreed against defendant 5 who was tenant of other defendants and was privy to their design in obstructing the pathway.

Held: that there was common ground against defendant 5 along with the other defendants and the cross-objection ought to have been allowed: 43 *Cal* 790, *Ref.* [P 347 C 1]

(b) Civil P. C. (1908), O. 41, R. 22—Failure to file written acknowledgment—Cross-objection should not be disallowed if party affected appears and contests appeal.

Although under O. 41, R. 22 (3) the respondent has to file with the cross-objection a written acknowledgment of the notice from the party who may be affected by such an objection, mere failure to file the written acknowledgment is no ground to disallow the cross-objection if the party affected thereby had appeared and contested the appeal. [P 347 C 1, 2]

(c) Civil P. C. (1908), O. 1, R. 8—Plaintiff having no special interest — Permission of Court is necessary.

Where the suit is brought merely on behalf of the public and the plaintiff has no special interest in the suit as distinct from the public, the suit would not be maintainable, without permission of the Court under O. 1, R. 8 which can be given even after the suit is filed: *AIR* 1933 *P C* 183, *Foll.*; 21 *Cal* 485, *Ref.* [P 347 C 2; P 348 C 2]

Rupendra Kumar Mitter and *Sudhansu Mauli Chowdhury*—for Appellants.

Jatindra Nath Sanyal—for Respondent.

Jack, J.—This appeal has arisen out of a suit for the opening up of a pathway on the establishment of the right of the plaintiff and his men as well as the public to pass along the disputed way. There was a compromise decree in Title Suit No. 617 of 1914 between the same parties and in execution of that decree a civil Court commissioner was appointed who gave delivery of possession of the pathway according to that decree. The present dispute is with regard to the same pathway. The plaintiff's case is that since then he used the pathway but towards the end of Agrahayan 1334, the defendants obstructed and stopped the pathway to the public as well as to the plaintiff by putting several bamboos across this pathway at the north-western corner of the defendants' tank as well as by extracting the bamboo pegs inserted by the side of the pathway by the civil Court commissioner. Hence this suit. The suit was decreed by the trial Court against defendants 1 to 4 but dismissed against defendant 5 on the ground that there was no cause of action against him. On appeal by defendants 1 to 4, the plaintiff filed a cross-objection as against defendant 5 who was made a co-defendant and who was also a respondent in the appeal. The appeal was dismissed in the lower appellate Court but the cross-objection was allowed and the suit was decreed on contest against defendant 5 also. The present appeal is by the defendants.

In this appeal the points raised are in the first place that the cross-objection was incompetent as the circumstances did not justify the plaintiff in filing a cross-objection against a co-respondent against whom his suit was originally dismissed: it is also urged that the cross-objection was incompetent because no notice of the cross-objection was served on defendant 5 as required under O. 41, R. 22, Cl. 3 and that the cross-objection was incompetent because the decree was passed in the absence of defendant 5. As regards the last point it is not correct, because we find that the suit was dismissed on contest against defendant 5 and also the appeal was decreed on contest against him.

As regards the question whether the Court was justified in admitting the cross-objection against defendant 5, on behalf of the appellants we have been referred to the cases of *Bishun Churn Roy* v. *Jogendra Nath Roy* (1); *Jadunandan Prosad* v. *Kallyan Singh* (2) and *Shib Chandra Kar* v. *A. C. Dulcken* (3). The first case was decided before the alteration of O. 41, R. 22 by

1. (1899) 26 Cal 114.
2. (1912) 13 I C 653.
3. AIR 1918 Cal 13=48 I C 78 (S B).

which the word "appellant" in the old section was changed to "party who may be affected by such objection" in para. 3, R. 22. In the third case, viz., the case of *Shib Chandra Kar* v. *A. C. Dulcken* (3), it has been laid down that

"a cross-objection by a respondent as against his co-respondent should not be entertained under O. 41, R. 22, Civil P. C., where the question raised thereby is entirely distinct from and in no way related to the question in controversy in the appeal:"

and that case was decided against the cross-objector on the ground, as the learned Sanderson, C. J., stated, that in his judgment the matters which were sought to be raised by the cross-objection had no relation to or connexion with the question which was raised by the appeal, and could not be said to be within the test which was laid down in the case of *Jadunandan Prosad* v. *Kallyan Singh* (2) viz.,

"so connected that one of the parties ought not to be allowed to re-open matters so far as he is concerned without opportunity allowed, in the interest of justice to another to protect himself by urging his objections, even though they be directed, not against the appellant, but against a co-respondent."

In the present case the finding of the lower appellate Court is:

"It is evident from the deposition of defendant 5 that he played a role in the obstruction of the passage and was interested in obliterating the passage. He was rightly made a party to the suit and the suit should have been decreed against him as well."

In the cross-objection it was stated that the suit should have been decreed against the added defendant 5 who is a tenant of the other defendants and was privy to their designs in obstructing the pathway. On this finding it appears that defendant 5 was equally interested with the other defendants in obstructing and that there was a common ground against him along with the other defendants and therefore this is a case in which it is clear that the cross-objection ought to be allowed. On behalf of the respondent we have been referred in this connexion, to the case of *Mathura Mohan* v. *Ram Kumar* (4), and it is clear that on the findings of fact and in the interest of justice the cross-objection was rightly allowed. As regards notice it is true that under Cl. (3), O. 41, R. 22, the respondent should file with the cross-objection, a written acnowledgment of notice from the party who may be affected by such an objection. The record does not show that any written acknowledgment was filed by the plaintiff in this case. But since the appeal was contested by defendant 5 it does not appear that there is any force in this objection. It was an irregularity and we should not disallow the cross-objection merely because this rule had not been observed. The next point raised on behalf of the appellants is that the suit was not brought under O. 1, R. 8, although it was on behalf of the public. This point has been dealt with by both the Courts below. From the plaint it is clear that the suit was brought in the first place on behalf of the plaintiff and his own men who are particularly affected inasmuch as by the original compromise the plaintiff gave up a portion of his land and it was he who secured this passage in the first place, for his own people through the land and incidentally for the public also. The latest authority in this connexion is a decision of the Privy Council in the case of *Kumaravelu Chettiar* v. *T. P. Ramaswami Ayyar* (5). In this case their Lordships of the Privy Council laid down that,

"Section 30 of the old Code corresponding to O. 1, R. 8, is an enabling enactment. It in no way debars a member of a community from maintaing a suit in his own right, although the act complained of may also be injurious to the whole community."

That case is authority for holding that where the rights of the plaintiff are particularly affected it is not necessary to come under O. 1, R. 8, merely because he also claims the right on behalf of the public. Such is the case here. The plaintiff had taken the trouble to have this way opened over a portion of his land as well as over the land of the defendants mainly for his own benefit, but it was agreed that the way could be used by the public. It is true that in some cases it has been laid down that a suit of this nature is not maintainable if brought outside the provisions of O. 1, R. 8; but it depends on on the circumstances of the case. Where the case is brought merely on behalf of the public, and the plaintiff has no special interest in the suit as distinct from the public, no doubt the suit would not be maintainable without the permission

4. (1916) 43 Cal 790=35 I C 305.

5. A I R 1933 P C 183=143 I C 665=60 I A 278=56 Mad 657 (P C).

of the Court, under O. 1, R. 8. In the present case had either of the Courts below thought that such remission was necessary it could easily have been given during the course of the litigation. For the respondent in this connexion, the case of of *Baiju Lal* v. *Bulak Lal* (6), has been referred to, in which it has been laid down by Ameer Ali, J., that, "Section 30 (corresponding to O. 1, R. 8) in fact embodies a rule of convenience based on reason and good policy, but in my opinion it was not intended to take away, nor does it take away, any right."

The section does not forbid the plaintiff from suing for enforcement of his own right but merely says that if the plaintiff desires to sue on behalf of others he must obtain permission of the Court. We think therefore that the suit is not barred by the provisions of O. 1, R. 8. The only other point raised was that there was ambiguity as to the exact location of the pathway described by the plaintiff. The suit was however decreed in accordance with the original solenama. This objection was also made in the trial Court and there it was found that in title Suit No. 617 of 1914 this pathway was demarcated and a commissioner measured the passage and the adjoining lands and the case map and the field-book which were prepared were made parts of the compromise decree. As the present suit relates to the same pathway all we need say in this connexion is that the commissioner's map report and the book which were made parts of the compromise decree in Suit No. 617 of 1914 be also treated as parts of the decree of the trial Court in the present suit as modified by the lower appellate Court. This appeal is accordingly dismissed with costs.

Nag, J.—I agree.

V.B. *Appeal dismissed.*

6. (1897) 24 Cal 385.

A. I. R. 1934 Calcutta 348

GUHA AND BARTLEY, JJ.

Gholam Hossain Shah and *others*—Defendants—Appellants.

v.

Sayed Muslim Hossain and *others*—Respondents.

Appeal No. 23 of 1931, Decided on 18th August 1933, from original decree of Dist. Judge, Hooghly, D/- 1st September 1930.

(a) Religious Endowments Act (1863), Ss. 3, 4 and 7—Mutawalli appointed by committee—Property vests in committee—Committee can sign cheques.

Where a mutawalli has been appointed by the committee under the Act the trust or the wakf properties vest in the committee and not the mutawalli and it is quite competent for the committee to sign the cheques or countersign them. It is not right to say that the mutawalli alone and not the committee is competent to sign the cheque. [P 351 C 2]

(b) Religious Endowments Act (1863), Ss. 3 and 4—Committee has full power to incur necessary expenditure.

The committee entrusted with the administration of the endowment has the full power to incur expenditure necessary for the purpose of management. [P 353 C 2]

(c) Religious Endowments Act (1863), Ss. 3, 4 and 14—Administration of endowment—Mismanagement—Bona fides of committee not questioned—Acts not shown to be detrimental to endowment—No relief can be had against committee under S. 14.

With reference to the administration of the endowment, if in the course of management there has been any error of judgment or any act done which bears the interpretation that there was mismanagement but the bona fides of which cannot be questioned, and it cannot be established by clear and cogent evidence that acts detrimental to the interest of the endowment were done by the committee, no relief can be granted against committee as contemplated by S. 14, Religious Endowments Act, 1863. [P 356 C 2]

(d) Religious Endowments Act (1863), Ss. 14 and 18 — Diversion of funds — Payments to persons as charity—Committee can incur expenditure for management.

Under a deed of endowment one *H* dedicated his properties to the service of God. The document was variously described as a towaliatnama, a deed of appropriation or deed of trust. The net income of the endowed properties was divided into nine different shares. Three of these shares were devoted to the religious purposes, two shares were to be applied to the remuneration of two mutawallis and the remaining four shares were to be spent for secular purposes, specifically mentioned in the deed of endowment. The properties known as the kharij towlit properties, which escheated to the Government after demise of *M*, had by virtue of arrangement made by Government all along been treated as appanage to three-ninths share mentioned above.

Held: on interpretation of the endowment deed that (1) regard being had to the different allocation of funds of the endowment mentioned in the original deed of endowment providing for expenditure for purposes not specifically mentioned in the deed of endowment or not provided for by the Government in the matter of distribution of funds, the payments out of the kharij towliat fund (an appanage to the three-ninths share devoted to religious purposes) cannot be said to be an act of diversion of funds by the committee, where the payments are being made on account of a settlement of dispute with a person who was asserting his right to be mutawalli of the Imambarah with the power to nominate or appoint his successor to

the mutawalliship. The income of the kharij towliat properties was not in the same category as the three-ninths share of the net income mentioned in the original deed of endowment. [P 352 C 1, 2]

In the absence of proof that payments made to persons as charity out of the three-ninths share of the income devoted to religious purposes out of the income of the kharij towliat properties had the effect of curtailing the expenditure for religious and pious purposes as enjoind by the deed of endowment and as directed by the Government at the time when the endowment was p'aced in charge of the committee, there was no diversion of funds by the members of the committee which made them liable to an answer a charge of malfeasance, misfeasance or breach of trust. Such a diversion of fund did not entail the removal of the members of the committee under whose direction the funds were diverted. The object of the endowment included religious as well as charitable purposes, the founder of the endowment as well as the ruling power have considered the endowment as one made for promoting the welfare of mankind, including both religious and charitable purposes. Religious purposes do not exclude charitable purposes. [P 353 C 1, 2]

Hira Lal Chakravarti, *Shyama Das Bhattacharya* and *Dipendra Mohan Ghose*—for Appellants.

Amarendra Nath Bose and *Bhut Nath Chatterji*—for Respondents.

Judgment.—This appeal was, at the instance of the learned advocates for the parties concerned, heard before the appeal from Original Decree No. 248 of 1929, but as the said appeal arose out of a previously instituted suit, and inasmuch as the decision of the trial Court was given before the decision of the trial Court in the suit out of which this appeal has arisen, we have dealt with the appeal No. 248 first. One of the main points argued before us in this appeal, arising out of the specific prayer in the plaint, is the same as the one decided by us in the other appeal, and our judgment in Appeal No. 248 is therefore to be treated as a part of this judgment.

The previous history of the litigation is the same as that in the other case. The plaintiffs-respondents in this appeal, as members of the Mahomedan public, instituted the suit out of which this appeal has arisen, with the sanction of the District Judge of Hooghly, under S. 14 read with S. 18, Religious Endowments Act (Act 20 of 1863), for the removal of the defendant in the suit from membership of the committee appointed under the Act for a decree for damages caused to the wakf estate for misfeasance, breach of trust and neglect of duty. The plaintiffs prayed for a direction upon the committee to observe strictly the directions contained in the trust deed, as regards the appointment of mutawalli, and to abolish the illegal innovation of appointment for the period of three years, with all its objectionable features. There were other ancillary and consequential prayers made by the plaintiffs in the suit, bearing upon the details of the administration of the endowment. In view of the nature of the allegations made in the plaint, a brief reference to the main features of the case is necessary. Haji Mahammad Moshin dedicated his properties to the service of God, by a document, variously described as a towliatnama, a deed of appropriation or a deed of trust, creating an endowment, popularly known as the Hooghly Imambarah. Two Mutawallis were appointed by the creator of the endowment by the deed executed by him in the year 1806.

The net income of the endowed properties was divided into nine different shares: three of these shares were devoted to religious purposes, two shares were to be applied to the remuneration of two mutawallis, and the remaining four shares were to be spent for secular purposes, specifically mentioned in the deed of endowment. The properties which came to be known as the kharij towliat properties, which escheated to the Government after demise of Haji Mahammad Moshin, have by virtue of an arrangement made by the Government, all alcng been treated as appanage to the three-ninths share mentioned above. It is not necessary to refer in detail to the narration of events relating to the appointment and dismissal of mutawallis by the Government, acting through the Board of Revenue under Regn. 19 of 1810, and the appointment of mutawallis by the committee after the Religious Endowments Act came into operation in 1863 nor would the repetition of the narration of facts leading up to the appointment of mutawallis for a term serve any useful purpose, as they have been referred to in detail in our judgment in Appeal No. 248. The fact that Syed Ashrafuddin was made to retire in 1916, on a monthly pension of Rs. 250, and on payment of a bonus of Rs. 3,000, requires special notice in this

case; it has also to be mentioned, for the purposes of this case, that Moulvi Syed Raziuddin had to be given a bonus of Rs. 500 at the time when he was made to relinquish the office of mutawalli. The appointment of Syed Kazi Maini as mutawalli for three years, the appointment of Syed Altaf Hossein in the year 1923 by the committee, and his dismissal by the committee in 1926, are facts to which detailed reference has been made in our judgment in the other case (Appeal No. 248). The committee appointed one Ajaz Hossein Jaffri in the place of Syed Altaf Hossein, who however refused to vacate the office of mutawalli.

The plaintiffs in the suit out of which this appeal has arisen, alleged that the procedure adopted by the members of the committee after the dismissal of Syed Altaf Hossein was unjustified; and it led to a dead-lock, and the Mohurrum ceremony which was the principal function for which the Imambara was founded, could not have been performed in the year 1926, had not Syed Altaf Hossein exerted himself to the utmost. In the plaint specific reference was made to the acts of mismanagement; cases of improper application of funds by the committee, and of diversion of funds specially set apart for a particular purpose, were mentioned. It was stated that the members of the committee, the defendants in the suit had, by their illegal orders upon the mutawalli, diverted the three-ninths share money from its legal purposes, which was to be devoted to religious purposes to other non-religious purposes; a list was appended to the plaint. A portion of the plaint in the suit was devoted towards making out the position that the founder of the endowment directed that every mutawalli should hold office for life or until he was disabled by infirmity or illness, and that the mutawalli should also be able to nominate his successor. The appointment of Syed Altaf Hossein for a term was described as an innovation and illegal and detrimental to the interest of the endowment. Special reference was made in the plaint to the system of drawing cheques by the mutawalli jointly with the members of the committee, in respect of the funds belonging to the endowment, of which the mutawalli was the Chief Executive Officer. On the pleadings of the parties a number of issues was raised for determination in the suit. Two of the issues (3 and 8) were in these terms: "Are the agreements referred to in para 10 of the written statement legal and valid in the case of the present endowment? Whether the provisions of the Towliatnama are to be followed or if the provisions contained are unworkable, the directions of the Court is to be obtained for appointment of mutawalli?" and "What suitable directions ought to be given by this Hon'ble Court in the matter of the management of the endowment?"

(The agreements referred to in issue 8 quoted above are the agreements between the mutawallis and the members of the committee, containing the terms and conditions of their appointment as such, which has been dealt with in detail in our judgment in Appeal No. 248).

In view of our decision in the other case, we do not think any useful purpese will be served by our dealing with this part of the case, which was, it may be mentioned, given the greatest possible prominence during the course of the argument of this appeal before us, in any detail. As has been held by us, the agreement between Syed Altaf Hossein and members of the committee, dated 1st March 1923, which was in line with the agreement between the parties when Raziuddin and Kazimaini were appointed mutawallis of the Hooghly Imambara by the Committee, was a valid agreement, operative under the law. The committee appointed by the Government under the provisions contained in Act 20 of 1863, acted within their power in making appointments of mutawallis for a term, with conditions which were as much binding upon the persons appointed, as upon the members of the committee. The committee was appointed by the Government to take the place of the Board of Revenue, which exercised control over the endowment created by Haji Mohammad Moshin, in 1806; and during the period of the exercise of control by the Board of Revenue, the scheme of appointment of mutawallis as it appears from the deed of endowment, had already been departed from; and the case sought to be established before the Courts of law, in the matter of a mutawalli appointing or nominating

his successor, was finally negatived by the Sadar Dewani Adalat, in 1836. A detailed reference to these matters has been made in our judgment in Appeal No. 248. After the Religious Endowments Act (20 of 1863) came into operation, the endowment being one to which S. 3 of the Act was applicable, the Government, entirely ceasing to have control, appointed a committee under S. 7 of the Act, to whom the properties of the endowment were transferred.

The trust properties vested in the committee, in the sense that the control of the same was completely transferred to the members of the committee, under law. The administration of the endowment was also vested, by operation of law, in the committee; and the committee had to appoint a trustee, manager or superintendent for the proper management of the endowment. The trustee, manager or superintendent, was an officer or servant of the committee, and was not a mutawalli under the ordinary Mahomedan law. There was no innovation, and it could not be called an innovation if the committee thought it fit, as they had reasons for thinking, that the appointment of a muttawali (or manager) for a term was beneficial to the endowment entrusted to their charge.

We have in the other case (appeal No. 248) come to the definite conclusion that there was nothing contained in the agreement between Syed Altaf Hossein and the members of the committee which could be held to be against the public or invalid, and inoperative as such. In our judgment, the members of the committee acted under the law, in the matter of appointing an officer designated muttawali or manager for the internal administration of the Hooghly Imambara. It was not necessary under the law, upon the procedure laid down by law, upon the decision of the Sadar Dewani Adalat, in 1836, and upon the events which happened, to give effect to the provisions of the original deed of endowment, in the matter of appointment or succession to mutwalliship of the Hooghly Imambara; and it was not therefore necessary for any civil Court, acting as the Kazi or otherwise, to give direction in the matter of the appointment of a muttawali, and to interfere with the statutory function of the committee, in this behalf. In the above view of the case, which has been set out in detail in our judgment in Appeal No. 248, our conclusion is that the learned District Judge by whom the case was decided in the trial Court, is not right in holding that the imposition of the term of three years, the period for which Syed Altaf Hossein could hold office; was illegal, the learned Judge moreover, is not right in holding that in future, the muttawali could only be legally appointed by the committee recommending him, and the Court of the District Judge of Hooghly as the Kazi, affirming the recommendation and appointing him for life. In our judgment, as indicated already, it would not be right to hold, as has been held by the learned Judge in the trial Court, that the trust or wakf properties vested in the muttawali, and that he alone was competent to sign cheques and that the committee was not competent to sign them.

We are further unable to agree with the learned Judge in his conclusion that the agreements referred to in the written statement in the suit were illegal and invalid. The above conclusions dispose of one of the main grounds, if not the principal ground, on which the charge of mismanagement against the members of the committee is based. The plaintiffs have not established their case that the members of the committee had not acted bona fide and in the interest of the endowment committed to their charge, in the matter of appointing a muttawali or manager, on terms and conditions set forth in an agreement evidencing a contract of service, which is valid and binding between the parties concerned. The plaintiffs in the suit cannot have the relief prayed by them, that the committee should be removed on the ground that they had appointed a muttawali for a term with conditions attaching to the appointment. On the question of the members of the committee being guilty of malfeasance, misfeasance of duty, and their liability to be dismissed from office, as mentioned in Issue 7 raised in the suit, out of which this appeal has arisen, specific mention was made in the plaint of instances of maladministration, of mis-deeds, of spending funds of

the endowment on objectionable items, and of diversion of funds to non-religious purposes, regard being had to the definite allocation of the same under different heads; charge was made that the committee had tampered with the voters' list, and of their negligence in the matter of regular revision of the same.

It was also asserted by the plaintiffs that the members of the committee had made their position supreme in the matter of internal administration of the Hooghly imambarah, vested in the muttawali, by a change in R. 17 of the Rules for the managemeut of the imambara. These several heads have to be dealt with separately; but it has to be kept in view, and the position cannot be disputed that each defendant was sued individually as a member of the committee appcinted under the Religious Endowments Act, 1863, and the relief claimed in the suit is purely personal, namely the removal of each individual member on grounds stated in the plaint. It has therefore to be noticed, when each of the members of the committee, defendants 1, 4 and 5 in the suit, the appellants in this Court, was elected member of the committee. Defendant 1 was so elected in the year 1919; defendants 4 and 5 were elected members of the committee in the year 1925, but their election was contested before the civil Court, and were held to be valid in 1928. Taking into consideration now the charge of payments to Syed Ashrafuddin, as pension and bonus, it appears that these payments were being made in accordance with the terms of a registered indenture made between the members of the committee and Syed Ashrafuddin, on 25th August 1916, by which a serious dispute between the parties concerned was settled. (The judgment then discussed the point and proceeded.) We are, therefore, unable to hold that there was any improper diversion of funds by any of the defendants concerned, by payments made to Syed Ashrafuddin. The payments were made in the bona fide belief that they were payments which could be legally enforced. Relating to the question of diversion of funds, it may be mentioned that regard being had to the different allocations of funds of the endowment, we are not prepared to hold that providing for expenditure for purposes not specifically mentioned in the deed of endowment, or not provided for by the Government in the matter of distribution of funds, the payments out of the Kharij Towliat Fund could be said to be an act of diversion of funds by the committee, seeing that payments were being made on account of a settlement of dispute with a person who was asserting his right to be a mutawalli of the Imambara with the power to nominate or appoint his successor to the mutawallishiip. In the above view of this part of the case, the members of the committee could not be removed for payments made by them to Syed Ashrafuddin.

The payment of Rs. 500 made to Raziuddin, who refused to vacate the office of mutawalli, comes up for consideration next. The money was paid at a time when defendant 1 was a member of the committee; the other two defendants were not members of the committee at the time. The committee made the payment in settlement of a dispute, and for a purpose beneficial to the endowment, seeing that the attempt to assert the right to be in office for life, and the further claim to appoint or nominate his successor, had to be resisted by the adoption of the best possible means; and we do not see how the interest of the endowment could be better served than by a payment of an amount of Rs. 500 in the place of having to incur the expenditure of a protracted litigation, not to speak of the determined attempt to thwart the committee in their administration of the endowment. The committee's action in this behalf was perfectly bona fide; and by making the payment, they gave effect to a compromise. It may further be noticed in this connexion that the claim to appoint or nominate a successor by a mutawalli of the Hooghly Imambara was negatived by the Sadar Dewani Adalat so long as 1836.

The allegation of tampering with the voters' list was not seriously pressed before us; and it does not appear to have been a matter which was pressed for decision by the trial Court. The materials before us do not enable us to hold that there was any tampering with the voters' list by the committee. What has been characterised as "a glaring

example of the committee's disregard of the interest of the endowment," is that the voters' list sent to the committee was not returned to the mutawalli at a time when the present litigation was pending before the trial Court.

The voters' list was unexceptionable at the time when defendants 4 and 5 were elected members of the committee in 1925; it has not been revised after that, although the rules relating to the revision of the list required revision every six moths. It appears that mutawalli Syed Altaf Hossein was asked by the committee to submit the voters' list of the Imambara, and the mutawalli hoped to submit the same by the end of the month of November 1925. This is what appears from the letter written by the mutawalli to the committee on 14th November 1925 (Ex. Z-(24) in this case); this submission however did not take place; and the voters' list was not before the committee till the progress of this litigation. All this has to be attributed to the position taken up by the mutawalli in the matter of his relation with the committee, seeing that the voters' list had to be revised by the committee, in consultation with the mutawalli, who was immediately responsible for the preparation of the list. That the committee did not return the voters' list in the year 1928, during the course of this litigation, is not a matter for which the Mahomedan public represented by the plaintiffs in the suit could hold the committee responsible, and was not a thing which amounted to "a glaring instance of the committee's disregard of the interest of the endowment." On the materials before us, the mutawalli was responsible for the non-revision of the voters' list in proper time, and the defendants, as members of the committee, could not be charged with dereliction or non-performance of their duty in that behalf.

The diversion of funds was a charge levelled against the members of the committee. (After stating the facts, the judgment proceeded). In the absence of proof that the payments made out of the three-ninths share of the income, and out of the income of the Kharij Towliat properties had the effect of curtailing the expenditure for religious and pious purpose as enjoined by the deed of endowment, and as directed by the Government at the time when the endowment was placed in charge of the committee, we are unable to hold that there was any diversion of funds by the members of the committee, which made them liable to answer a charge of malfeasance, misfeasance or breach of trust as made by the plaintiffs in the suit. Nor are we in a position to hold that such a diversion of funds entailed the removal of the members of the committee, under whose direction the funds were diverted. In our judgment the objects of the endowment included religious as well as charitable purposes; the founder of the endowment as well as the ruling power have considered the endowment as one made for promoting the welfare of mankind, including both religious and charitable purposes. Religious purposes do not exclude charitable purposes; and we dc not find anything in the Indian Statutes or in the rule of the Mahomedan law, which draws a clear cut distinction between the religious or pious purposes on the one hand, and charitable purposes on the other. If there was a surplus remaining after defrayal of the expenditure for the purposes specifically mentioned in the deed of endowment, a surplus out of the three-ninths share allocated to religious and pious purposes and a surplus out of the income of the secular properties known as the Kharij Towliat properties made by the orders of the Government, an appanage of the three-ninths share, there could not, in our judgment, be any bar to the diversion of funds of the nature arising for consideration in the case before us. In addition to the items recommended by the mutawalli, there was expenditure out of the funds of the endowment for the purposes of litigation. There is nothing to indicate that the committee incurred unnecessary expenditure on account of litigation. There were the election cases; there could be no question that the committee had to incur expenditure for the purpose of maintaining their position; the result of the litigation justified the expenditure in this behalf.

It appears that some money was paid from time to time to the servants of the estate. The committee entrusted with the administration of the endowment had the full power to incur expenditure necessary for the purpose of manage-

ment; and it has not been proved by the plaintiffs how the expenditure itself or the decision of the committee to incur the same was not justified and was not in the interest of the endowment. The nature of the expenditure generally brought under the head of diversion, related to payments by way of charity; and in some cases rewards to servants; no case has been brought to our notice which could come under the category of improper diversion of funds by the committee. The unsubstantial nature of the objection to the committee's right to incur just expenditure for the purposes of management of the endowment may be referred to in this connexion: The costs incurred by the committee for advertising the post of the mutawalli was characterised by the plaintiffs, representing the Mahomedan public, as improperly incurred. The point altogether unworthy of notice, shows in what spirit the litigation was started.

The fact that one Mirza Aktar Hossain, Head Clerk of the Committee's office was given Rs. 400, and was allowed to have a conveyance allowance of Rs. 12, was referred to in connexion with the charge of making payments to their favourites, so far as the members of the committes were concerned. The evidence in the case goes to show that the amount of Rs. 400 was paid as charitable gift to a servant who had served for a long time, and the conveyance allowance was allowed when the office of the committee was removed to a place far away from the locality in which the man resided. We are unable to hold that the action of the committee was unjustifiable, or was such as called for the removal of the defendants from the office as members of the committee. It is somewhat interesting to note in this connexion the fact that Mirza Aktar Hossein's laches in the matter of making some delay in paying a sum of money to Kazimaini, the predecessor-in-office of Syed Altaf Hossein, was specially mentioned by the plaintiffs in support of their case for the removal of the members of the committee.

The members of the committee, the defendants in the suits were charged with mismanagement, for the reason that they had not taken speedy action in the matter of paying off a mortgage debt. The proposal for paying off the debt was made by the mutawalli; that proposal appears to have been accepted by the committee at one time; but on inquiry the committee countermanded their approval of the mutawalli's proposal. The mortgage debt was eventually paid off during the course of this litigation, by the receiver appointed by the learned District Judge in 1928. In our judgment the payment of the debt was deferred owing to the friction between the mutawalli and the committee, the mutawalli showing unwillingness to act up to the direction of the committee; and we do not find anything on the materials before us, which establishes any laches or default on the part of the committee, to which the non-payment of the debt at an early stage could be attributed. The evidence given by Syed Altaf Hossein on the side of the plaintiffs, does not bear out the case sought to be made out by the plaintiffs, and we are of opinion that but for the attitude taken up by Syed Altaf Hossein after his appointment as mutawalli or manager for a second period in 1926, the mortgage debt would have been cleared off very much earlier than the time when it was done in 1928.

It is not necessary to advert to the steps taken by the mutawalli in the matter of detection of an error in the accounts so far as the income realised from the Government by the committee, on account of the three-ninths share was concerned. The plaintiff's case appears to be that the non-performance of his duty by the mutawalli in this behalf in proper time, was gross neglect of duty and lack of supervision on the part of the members of the committee.

The reference to this fact only indicates the real nature of the litigation started in the name of the Mahomedan public. A question of some substance was raised with reference to the matter of repairs of the Hooghly Imambara. It was sought to be established on behalf of the plaintiffs in the suit that the committee did not take steps for procuring necessary funds for effecting the necessary repairs. A grant of Rs. 30,000 from the Government was secured by the committee in the first instance, while according to the plaintiffs the amount of Rs. 37,000 was necessary for the repairs of the building. We have it on evidence that the mutawalli

prepared two estimates for necessary repairs, one for Rs. 30,000 and another for Rs. 7,000; and there was a further grant of Rs. 7,000 by the Government. We are unable on the materials before us, to come to the conclusion that there was anything done by the committee in the matter of repairs of the Imambara, which amounted to neglect of duty on their part, justifying the removal of the defendants from the committee.

The negligence on the part of the committee in the matter of performance of ceremonies in connexion with the Mohurram in the year 1926, and the refusal to sign cheques, and put the mutawalii in funds for the purpose, were mentioned in the plaint. (After stating the evidence the judgment proceeded.) On the facts and in the circumstances disclosed in evidence, it is difficult to hold that the attitude of the committee in the matter of the performance of the Mohurrum ceremony was unjustifiable, regard being had to the position created by Syed Altaf Hossein; and we are unable to hold that the plaintiffs representing the Mahomedan public could make any grievance on account of the attitude of the committee brought about by the action of Syed Altaf Hossein. The Mohurram was duly performed, although the committee was effectively prevented from taking any part in the performance of the same, on account of the fact that the person placed in charge of the administration of the endowment by them, was not allowed to perform his duties as mutawalli or manager appointed by the Committee in the place of Syed Altaf Hossein, who was discharged from service before the time for the performance of the ceremonies in connexion with the Mohurrum came. The failure on the part of the Committee to perform their duty on a particular occasion, on account of serious obstacle placed in their way, by a servant dismissed by them, who was bent upon disregarding the decision of the Committee, was not, in our judgment, a thing for which the public interested in the endowment, could ask for the removal of the members of the Committee under S. 14, Religious Endowments Act, 1863.

The facts relating to what is described as the Bag Balurt case were referred to for the purpose of establishing the charge of wilful mismanagement brought against the members of the Committee. It appears that Ajaz Hossein Jaffri, the person appointed Mutwalli or Manager in the place of Syed Altaf Hossein by the Committee wanted to be substituted in Syed Altaf Hossein's place in the case above mentioned; the application for substitution was refused by the District Judge; on appeal to this Court, Ajaz Hossein Jaffri was directed to be substituted as Mutwalli in the place of Syed Altaf Hossein. The District Judge of Hooghly, the same learned Judge whose decision is in appeal before us, directed the Receiver appointed by him in the present case to pay Rs. 500 to Ajaz Hossein Jaffri for conducting the case in which he was directed to be substituted as Mutwalli by this Court, on his furnishing security to the extent of that amount. It is in evidence that the security was not furnished; and the endowment suffered from the non-prosecution of the case by the Mutwalli appointed by the Committee. There was in the circumstances no laches on the part of the Committee; the person appointed by them as the Mutwalli was unable to prosecute the case owing to the fact that he failed to obtain possession of the endowment on account of the position taken up by Altaf Hossein, and failed to secure the necessary funds from the Receiver appointed in this litigation. All this took place in 1928-1929, when the Committee were powerless and were practically functus officio on account of the prceedings before the Court, in connexion with the present litigation which was started on 27th July 1926. In our judgment there was no wilful mismanagement on the part of the members of the Committee, so far as the Bag Belurt case was concerned. The responsibility in the matter of the management of the case, and the consequent loss to the endowment, if any, did not in any view of the matter rest with the Committee.

The plaintiffs in the suit alleged and sought to establish by evidence, that the members of the Committee were bent upon the deprivation of the power of the Mutwalli, so far as the internal administration of the Imambarah was concerned. It was said that R. 17 of the Rules relating to the management of the Hooghly Imambarah, was amended by the Committee with an end in view,

and that there was interference with the management of the Mutwalli. So far as the amendment of R. 17 was concerned, it related to the power of dismissal of servants of the Imambarah, drawing a salary of less than Rs. 8 per month, by the Mutwalli. The original R. 17 empowered the Mutwalli when he found it necessary to impose any fine upon any servant of the Imambarah for delinquency, or suspend or dismiss any of them; but cases of suspension and dismissal had to be reported to the Committee. The amendment mentioned above, limiting the Mutwalli's power of dismissal, was made on 6th February 1918, before any of the members of the Committee, defendants in the suit was elected as a member. It appears further that Moulvi Sayed Mahammad Raziuddin was present at the meeting of the Committee on 6th February 1918, when R. 17 was amended. It is not possible to make out how the defendants in the suit could be held responsible for the amendment of R. 17. It is also difficult to understand how it could be said that the exercise of the statutory authority vested in the Committee was exceeded in the absence of any evidence in that behalf. The amendment of R. 17, in 1918, by itself does not establish that the defendants had exercised any power not vested in them under the law. It is worthy of notice that there is nothing before us indicating that the defendants as members of the Committee had acted beyond their power in the matter of the internal administration of the Imambarah, placed in the charge of the Mutwalli or Manager appointed by them.

The position of the Mutwalli in relation to the Committee of management of the Hooghly Imambarah has been discussed in detail; the appointment of a Mutwalli for a term and on conditions specified was within the competency of the Committee. The Mutwalli so appointed is a servant of the Committee, and not a Mutwalli under the Mahomedan law. It is the Committee in whom the endowment and the properties of the endowment have vested in law, and the Mutwalli appointed by the Committee has no function to discharge in the matter of administration of the endowment, excepting that delegated to him by the Committee appointing him. There can be no decree passed for the removal of the members of the Committee, if they have appointed a Mutwalli for a term with conditions attached to the appointment, and if under those conditions there has been a discharge of the Mutwalli from his office. With reference to the administration of the endowment, if in the course of management there has been any error of judgment or any act done which bears the interpretation that there was mismanagement, but the bona fides of which could not be questioned, and it could not be established by clear and cogent evidence that acts detrimental to the interst of the endowment were done by the Committee, no relief could be granted as contemplated by S. 14, Religious Endowments Act, 1863. In the case before us the plaintiffs have not established their case before the Court, so far as the charge of mismanagement was concerned; the so-called diversion of funds, the misapplication of the same, attributable, at the most, to error of judgment, could not be characterised as malfeasance, misfeasance or breach of trust, as sought to be done in the case. On the whole, as indicated above in detail, we are not at all satisfied that the materials placed before the Court, by the plaintiffs, entitle them to any of the reliefs claimed by them in the suit, out of which this appeal has arisen.

The result of the conclusions arrived at by us, as mentioned above is that the appeal to this Court by defendants 1, 4 and 5 in the suit, is allowed. The judgment and the decree passed by the learned District Judge are set aside; and the suit instituted by the plaintiffs-respondents is dismissed. The defendants-appellants are entitled to their costs in this Court, as also their costs in the trial Court, from the plaintiffs-respondents. The hearing-fee in this Court is assessed at 5 gold mohurs.

V.B. *Appeal allowed.*

A. I. R. 1934 Calcutta 356

MITTER AND HENDERSON, JJ.

Subodhchandra Niyogi—Appellant.

v.

Bhubalika Dasee—Respondent.

Appeal No. 264 of 1929, Decided on 22nd June 1933, from decree of Second Sub-Judge, 24-Parganas, D/- 17th August 1929.

(a) Will—Person taking under will if with full knowledge of circumstances cannot set up adverse title.

The proposition that any one taking possession under a will cannot set up an adverse title, is subject to the qualification that the election must be made with full knowledge of the circumstances: 34 *Mad* 211; *Board* v. *Board*, (1873) 9 *Q B* 48, *Dalton* v. *Fitzgerald*, (1897) 2 *Ch* 86, *Disting*. [P 359 C 2]

(b) Will—Person in possession of property before execution of will—By merely taking probate of will he or his heirs are not estopped from questioning validity of will.

Where a person has been in possession of property before the execution of will disposing such property, merely because he takes probate of the will, he or his heirs are not estopped from questioning the validity of the will: *Board* v. *Board* (1873), 9 *Q B* 48, *Disting*. [P 360 C 1]

(c) Will—Residuary estate includes portions of enumerated estates not specifically given—But it does not apply to property unknown to testator.

The residuary estate should be construed to include such portions of the enumerated estates as were not specifically given; but it does not apply to property unknown to the testator: 38 *Mad* 1096, *Ref*. [P 361 C 2]

(d) Civil P. C. (1908), S. 11—Claim proceedings taken against plaintiffs, in their capacity as stridhan heirs to their mother—Order passed becoming conclusive—Subsequent suit for partition by plaintiffs as heirs to their father's estate is not barred.

Where claim proceedings are started against plaintiffs in their capacity as stridhan heirs to their mother and the order passed has become conclusive by a suit not being filed under O. 21, R. 63, a subsequent suit by plaintiffs for partition under a different title viz. as heirs to their father's estate is not barred. [P 362 C 2]

(e) Adverse possession—Stranger coming into possession of joint property and acquiring title by adverse possession—Purchase of such property by cosharer — Possession is not possession of cosharer.

Where a stranger to a joint family rightly or wrongly takes possession of property and by having possession for more than 12 years acquires an indefeasible right to such property by adverse possession and subsequently a cosharer purchases back the property with his own money, his possession cannot be said to be the possession of the cosharer. [P 363 C 2]

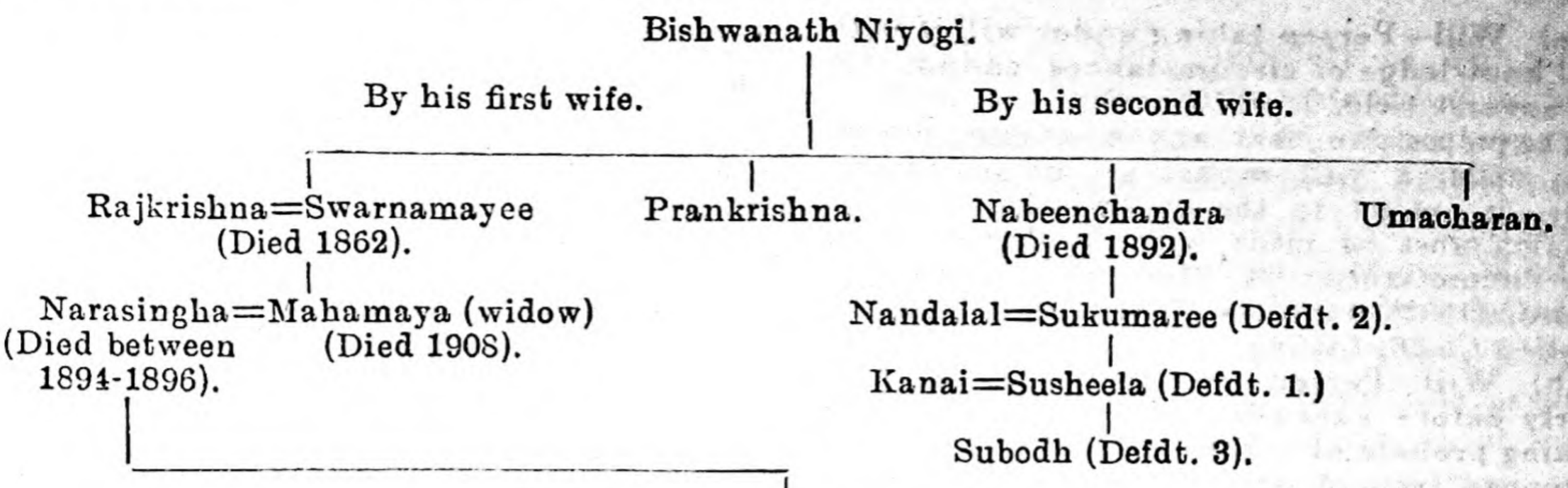
Rupendrakumar Mitra and *Pramathanath Mitra for Dharmadas Set*—for Appellant.

U. N. Sen Gupta and *Apoorbacharan Mukherji*—for Respondents.

Mitter J—This is an appeal by defendant 3 from a preliminary decree made by the Subordinate Judge of 24-Parganas on 17th August 1929, and arises in a suit for partition of five items of immovable properties mentioned in Sch. A of the plaint and of movable properties mentioned in Sch. B of the plaint. The plaintiffs claim eight annas share of the said properties under one title and two annas under another title. The Subordinate Judge has dismissed plaintiffs' claim in respect of the Sch. B properties (movables). He has however, granted a decree declaring plaintiffs' title to eight annas share of the immovable properties described in Sch. A and has appointed a commissioner to effect the partition of the same. Hence the present appeal by defendant 3, who contends that the entire suit should have been dismissed. The relationship between the parties to the suit is shown in the following genealogical tree:

(*For pedigree table, see p.* 358).

It appears from the said tree that Bishwanath died leaving him surviving four sons and it is common ground that he left three cottas of land in Dakshineshwar. The case of the plaintiffs is that of the four sons Rajkrishna, Nabeen and Umacharan continued to live as members of a Dayabhaga joint family after their father's death and that Prankrishna abandoned his share in the ancestral properties and started a new business of his own and separated from the joint family; and this is common ground. The plaint further alleges that after Bishwanath's death, Rajkrishna, Nabeen and Umacharan started a joint family partnership business in castor-oil-seeds; that, on 21st July 1862,, Rajkrishna executed a will and died a short time after in the same year. In this will he made provisions for carrying out of the business by Nabeen for the maintenance of his wife after his death; that, at the time of death of Rajkrishna, his son Narasingha was a minor; that Nabeen, following the directions of his elder brother, carried on the business with due diligence and acquired considerable properties both movable and immovable, mentioned in Schs. A and B to the plaint; that Nabeen died leaving him surviving his son Nandalal, the husband of defendant 2, and his grandson Kanai, now deceased, the husband of defendant 1; that, prior to his death in the year 1892, Nabreen executed the will on 18th June 1891, in which he recites that all the properties acquired with the profits of the castor-oil business were his self-acquired properties. It may be stated here that, by the will, Nabeen appoints Narasingha and Kanai as executors and Nanda who



was an ascetic was given a legacy of Rs. 500 and in case of his return he was given a legacy of 25 rupees per month; the will further provides that:

"If any sons be born to him (Narasingha) then you, the executors, shall be entitled to my entire estate upon effecting a partition thereof in two equal shares. If, on the other hand, no son is born to him, then, in that case, the daughters of the said Narasingha shall be entitled to a 4 annas (four annas) share of the said estate; while Kanailal shall get the remaining twelve annas share thereof.

That probate of the will was taken by both Narasingha and Kanai on 10th September 1892. The plaint alleges that Nabin had no authority to make a disposition of Rajkrishna's share in the oil business and in the joint properties that were acquired out of the profits of the same; that Narasingha died after making a will dated 23rd Chaitra 1300 B. S., corresponding to 5th April 1894, and leaving him surviving his wife Mahamaya and his daughters, the two plaintiffs in the suit. In para. 13 of the plaint the plaintiffs submit that their father Narasingha was under a misapprehension of facts and law as regards his own right and erroneously thought that he was entitled only to a four annas share of the joint estate under the will of his uncle Nabeen, although, as a matter of fact, eight annas share of Rajkrishna had already vested in him. This is the foundation of the plaintiffs' title regarding the eight-annas share of the disputed properties.

The plaintiffs claim a further two annas share on the basis of the will of Nabeen, but as this claim has been abandoned both before the lower Courts and before us nothing further need be said about the two annas share. The plaintiffs further said that the defendants are in possession of the properties mentioned in Schs. A and B and that the plaintiffs are in possession of a portion of the same; that in spite of repeated demands the defendants are not giving to the plaintiffs their share, after partition by metes and bounds. Hence the cause of action for the suit. It may be mentioned here that it is common ground that on 23rd December 1879, Umacharan separated from his two step-brothers giving up his share in the joint properties by taking the sum of Rs. 20,000 and executed a deed of release in favour of Nabeen and Rajkrishna's son Narasingha.

In their written statements the defendants raised several defences to the suit. We propose to notice those defences which are material to the controversy in the present appeal. Such defences are: (1) that the plaintiffs' claim is barred by the operation of Art. 11-A, Lim. Act, and by O. 21, R. 63, Civil P. C.; (2) that the properties are the self-acquisitions of Nabeen and that the heirs of Rajkrishna had no title to the same: (3) that whatever properties were acquired by Rajkrishna were compulsorily taken by the Government for the Dakshineshwar powder magazine; (4) that the title of the plaintiffs to the properties left by Nabeen has been extinguished by Mahamaya's taking a sum of Rs. 20,000 as provided for by Nabeen's will; (5) that, assuming that the properties were joint properties of Rajkrishna and Nabeen, as the father of the piaintiffs admitted in his last will that he had got only four annas share in the properties in suit, Narasingha, by his acts and conduct by taking probate of Nabeen's will, could not himself have claimed eight annas share and the plaintiffs as his (Narasingha's heirs are bound by the election

made by their father and cannot claim that the properties were not self-acquired properties of Nabeen; (6) that plaintiffs' title has been extinguished by adverse possession of the defendants for more than 12 years [see para. 30 of the written statement] and (7) that a moiety of plot 2 having been sold to one Amulyacharan Das by Nandalal, the suit is not maintainable in respect of that plot in the absence of Amulya.

On these pleadings both oral and documentary evidence was led on both sides and several issues were raised in the suit. They are to be found at p. 37 of the paper-book. The Subordinate Judge has reached the following conclusion on the points which were debated before us. He holds : (1) that the castor-oil business was joint family property ; (2) thas after the nadabi by Umacharan the entire property in Sch. A which grew out of the joint business came to belong to Nabeen and Narasingha in equal shares; (3) that Nabin was not the sole owner of the property or the business and his will is operative only in respect of his half share in these properties; (4) that by Nabin's will Narasingha got no share and the will of Nabin has been wholly misconceived both by Narasingha and his successor-in-interest ; (5) that the acts which resulted from such misconception cannot make any change in the course of legal inheritance; (6) that the will by Narasingha is void; (7) that plaintiffs as heirs of Narasingha are entitled to half the property in Sch. A; (8) plaintiffs cannot get any relief regarding the movables in Sch. B; (9) O. 21, R. 63 is no bar to the present suit; and (10) the defendants have not been able to establish that plaintiffs' title has been extinguished either by adverse possession for more than the statutory period or ouster. He has, accordingly, decreed the suit in part as indicated above.

This judgment has been challenged in appeal on seven grounds and I will indicate the grounds and deal with them in the order in which Mr. Rupendrakumar Mitra, who appears for the appellant, has argued them. It has been argued, in the first place, that Narasingha having accepted the administration of the estate of Nabeen as executor, he and his heirs are estopped from setting up a title in himself or themselves in a part of the property which he has taken under Nabeen's will. It is pointed out that there is a clear assertion in Nabeen's will that the properties in suit are his self-acquired properties. The material portion of the will with reference to this is to be found at p. 23, part 2 of the paper-book and runs as follows:

"When my elder brother Rajkrishna Niyogi was alive, we had very little properties. Upon his demise, I have, with my own labour and by doing business, etc., increased the estate and purchased immovable properties also at various places—some in my own name and others in the name of my said son Nandalal Niyogi by whom I got a deed of "declaration of trust" executed (in my favour) later on. Thus although the properties are my self-acquired properties, yet as Narasingha Babajiu is very obedient and dear to me, I make the following provisions."

It is argued that, even assuming that the properties disposed of by the will are joint properties and that Narasingha had half and Nabeen another half-share of the same, the effect of Narasingha's taking out probate of the will is that he was estopped from asserting that the said properties are joint properties and this estoppel is available against Narasingha's heirs. It was open to Narasingha not to take out probate, but having taken out probate he could not say that a portion of the estate which the testator had devised was Narasingha's. Once having made his election Narasingha cannot be permitted to withdraw from the position that the entire property did belong to Nabeen, and, in support of this position, reliance has been placed on the decision of the Madras High Court in the case of *Munisami Chetty* v. *Maruthammal* (1) and to two English cases, namely, *Board* v. *Board* (2) and *Dalton* v. *Fitzgerald* (3). These cases no doubt lay down the proposition that anyone taking possession under a will cannot set up an adverse title.

It seems to us that this doctrine is subject to the qualification that the election must be made with full knowledge of the circumstances. In this case, it appears to us that Narasingha was six years old when his father died. He was an infant and it has not been shown that he was cognizant of the will of Rajkrishna which stated in para. 4 that

1. (1910) 34 Mad 211=7 I C 176.
2. (1873) 9 Q B 48=43 L J Q B 4=22 W R 206=29 L T 459.
3. (1897) 2 Ch 86=66 L J Ch 604=45 W R 685=76 L T 700.

the karbar and the bhadrasan were the joint properties of both Rajkrishna and Nabeen. By the will of Rajkrishna, Nabeen was appointed as executor and trustee. Nabeen, in betrayal of that trust, makes no reference whatsoever to Rajkrishna's will and it can hardly be said, in these circumstances, that Narasingha was fully cognizant of the true state of things when he made the election and took probate. It has been argued for the appellant that all the cards were laid bare before Narasingha seeing that the order forms for purchase and sale of castor-oil (at pp. 143 and 144 of the paper book) were in the joint names of Rajkrishna and Nabeen and these order forms were produced from Narasingha's box, as is deposed to by plaintiffs' witness Dhirendra, son of Bhubalika. We do not think that any knowledge can be imputed to Narasingha of these two contract forms from the mere fact that they were found along with other papers in his box. It is next said that there is conclusive evidence to show that Narasingha knew of Rajkrishna's will, for this fact is recited in the nadabi farkhat patra of Umacharan executed on 23rd December 1879. This document, it is true, referred to Rajkrishna's will and is a statement made by Umacharan and not by Narasingha, but from this it would not be a legitimate inference to draw that Narasingha was aware of the contents of the will of his father Rajkrishna.

In the cases cited, possession was taken under the will and it was held, in those circumstances, that it was not open to such a person to question the validity of the will. It does not appear clear in this case that Narasingha took possession under Nabeen's will; it rather seems that Narasingha was in possession from before the execution of the will. This circumstance also distinguishes the present case from the case of *Board* v. *Board* (2) referred to above. For the reasons given above we are of opinion that Narasingha's heirs are not precluded from showing that Nabin had no power to dispose of whatever belonged to Rajkrishna. The second ground taken turns on the construction of Narasingha's will. It is argued that, under Cl. (5) of the said will, Narasingha's widow Mahamaya was given the entire eight annas share in the disputed properties which he inherited from Rajkrishna, for it was provided that:

"If the said Mahamaya Dasee does not pull on well with the said Kanailal Niyogi and the members of the family, then, in that case, the said wife shall be entitled to a lump sum of Rs. 20,000 from the said Kanailal Niyogi and his representatives. If the said Mahamaya Dassee gets the said amount, then neither she nor any of my other heirs shall have any claim, title or interest to or in the movable and immovable properties left by me. Even if such a claim be asserted, the same shall not be accepted. But the said Mahamaya Dassee shall during her lifetime, be entitled to live in our bhadrasan (dwelling house) and upon her demise my heirs such as daughters and daughter's sons shall get from the said Kanailal Niyogi the sum of Rs. 2,500 only."

The will is addressed to Mahamaya and it is said that, under Cl. (5), the material portion of which has been quoted above, the residue of the estate, after the payment of the legacies and payment of the expenses for the daily and occasional religious rites and payment of certain sums for the marriage of Ambalika Dasee, the unmarried daughter of the testator, will pass to Mahamaya Dasee and as she has taken the sum of Rs. 20,000 from Kanai, the plaintiffs are not entitled to any of the properties in suit subject to the tender of Rs. 2,500 to them before suit and it is said that the tender has been made. In order to consider the soundness of this contention the effect of Cl. (3) of the will must be taken into account. By this clause Narasingha states that, save and except the four annas share which he has in the movable and immovables, the business in castor-seeds and the castor-oil mill as bequeathed to him by Nabeen's will he had got no other properties and that those properties were undivided and held by him jointly with Kanailal. Now it appears, from the following provisions in Nabeen's will, namely, that if any son be born to him (Narasingha) then you the executors shall be entitled to my entire estate upon effecting a partition thereof in two equal shares. If, on the other hand, no son is born to him then in that case the daughters of the said Narasingha shall be entitled to a four annas share "of the said estate." It appears therefore clear that Narasingha got nothing under Nabeen's will, as no son was born to him.

But Narasingha had eight annas share in the disputed properties by inheritance from Rajkrishna and by his will Narasingha certainly disposed of the four annas share, although he was under the mistaken belief that he had got the four annas share under Nabeen's will. The question is whether the remaining four annas of his inheritance passed to Mahamaya under the residuary gift in Cl. (5). The appellant argues that the residuary bequest in Cl, (5) is expressed in terms wide enough to include whatever estate not otherwise disposed of by the will, Narasingha had at his death, whether he knew that he had it or not and in support of this construction attention is drawn in particular to the words

"neither she nor any of my other heirs shall have any claim, title or interest to or in the movable and immovable properties left by me,"

as also to para. 2 of the will by which Mahamaya and Kanai were appointed as executrix and executor

"to all the properties movable and immovable which I now have or which I may hereafter acquire."

Reliance is placed on the case of *In re Bagot Paton* v. *Ormerod* (4), in support of this contention. The facts of the case just referred to were that a testatrix, by mistake, recited in her will that she had settled upon a certain relation a particular property, which, in fact, was still at her disposition. The will contains other recitals of other properties and also a residuary bequest in favour of Ormerod. It was held that the property which she thought erroneously she had settled upon her relation passed under the residuary gift. Lord Lindley pointed out:

She intended whatever was hers, and was not otherwise disposed of, to go to her residuary legatee. It is true that she did not intend this particular fund to go at once to him, because she thought she had settled it already, and that therefore it was not hers. She made a mistake; it was hers, and the residuary bequest in terms carries it.

But the rule laid down in this case is subject to the qualification indicated in the judgment of Kekewich, J., in the same case in the following passage:

Of course a testator may enumerate his estate in such terms that there can be left no doubt but that he means that enumerated estate, and that only to pass, and then the residuary gift, however large in its terms, may be construed to include only such portions of the enumerated estate as are not specifically given.

4. (1893) 3 Ch. 348.

If one looks to para. 3 of Narasingha's will it appears clear that Narasingha enumerated his estate by saying that his estate consisted of nothing else except the four annas share in the movable and immovable properties, business in castor-seeds and the castor-oil mill bequeathed to him under Nabeen's will. The residuary estate, in my opinion, should be construed to include such portions of the enumerated estates as were not specifically given. On a proper constructien of the several clauses of the will, I am of opinion that residuary gift cannot apply to the other four annas share which descended to Narasingha from Rajkrishna as this was property unknown to the testator. There is also some authority for saying that there is a difference between the Indian and English law in this respect. Under the Indian law it would seem that a residuary clause does not apply to property unknown to the testator. In the case of *Kunthalammmal* v. *Suryaprakasaroya Mudaliar* (5), Bakewell, J., pointed out that the residuary clause in the form in which it appears in English wills is practically unknown to the ordinary testator in Madras and the rules of construction which have been laid down by English courts are not applicable. In that case the residuary bequest was in the following terms:

The sum which may be left after deducting the abovementioned legacies and such other expenses shall be utilised in my name for Pooja and other charities in Vytheshwarer temple.

Unknown to the testator there was a sum of Rs. 4,000 lying to his credit with the Registrar of the High Court and it was held that that sum was not disposed of under the above residuary clause of the will and that the plaintiff was entitled to it as on an intestacy. The contention therefore of the appellant that the entire eight annas share of Rajkrishna, to which Narasingha was entitled, passed under the will must fail. Mahamaya obtained the four annas on Narasingha's death as on an intestacy and had a Hindu widow's estate in the same.

So far as the other four annas, which passed under Nabeen's will to Mahamaya, is concerned, it appears that Mahamaya, in lieu of the four annas share, took Rs 20,000 from Kanai and abandoned her rights in the same. It appears

5. (1915) 38 Mad 1096=31 I C 494.

from the farkhatnama (Ex. F) dated 7th January 1897 that Mahamaya acknowledged the receipt of Rs. 20,000 from Kanai in Government currency notes and executed the deed of release which was attested by Mr. Hirendranath Datta, a well-known solicitor of the High Court, and, on the same date she lent this sum of Rs. 20,000 to Kanai and his father Nanda on mortgage of some of the properties released by her in favour of Kanai. She obtained a decree on the mortgage against Nanda and Susheela, the widow of Kanai, who was then dead, on 19th December 1903 (see Ex. H, p. 73) and in execution of the decree purchased 23 bighas odd situate at Alambazar, Baranagar, Raja's garden, and another plot, on 18th December 1905. She sold these two parcels of land to one Binodlal Ghosh on 31st August 1906 for a sum of Rs. 32,000. The present plaintiffs also joined in the conveyance. It is clear therefore that so far as the four annas share of the properties, now in dispute, except the dwelling house is concerned the title of plaintiffs is extinguished by farkhatnama and the receipt of Rs. 20,000 by Mahamaya. The second ground taken therefore succeeds to this limited extent. With regard to the question of this four annas share in the dwelling house different considerations arise.

In order to understand the third ground urged before us, certain new events will have to be referred to. It appears that Nabeen started an oil mill in Arhiadaha. The business prospered for a certain time, but, after the death of Nabeen, the business dwindled and became a losing concern. One of the unsecured creditors of the said business, named Sadasukh Kuthari, instituted a suit against Susheela, defendant 1, in the present suit and the administratrix to the estate of her husband, in the Original Side of this Court and on 2nd September 1903 Sadasukh obtained a decree for Rs. 2,484 against Susheela (see Ex. 5, p. 66). On 16th January 1905 in execution of the said decree, all the properties, which form the subject-matter of the present suit, were sold and purchased by Sadasukh for the sum of Rs. 2,800 (see Ex. C-1, p. 68). Kuthari took symbolical possession of the properties and actual possession of all the properties in suit except the dwelling house, i. e., item 1 of the present plaint. It appears that the entire sum due on the mortgage executed in favour of Mahamaya by Kanai and Nanda was not realised by the sale of the mortgaged properties and Mahamaya applied on 15th January 1907, for a personal decree against Nanda. During the pendency of such application, Mahamaya died, in 1908, and the present plaintiffs 1 and 2 got themselves substituted in place of Mahamaya in the personal decree proceedings. After obtaining a personal decree, the plaintiffs proceeded to execute the decree by attachment of the dwelling house—item 1 of the plaint, alleging that the said dwelling house belonged exclusively to Kanai and was in possession of Kanai's widow Susheela (see Ex. D-3, pp. 92-97) and this dwelling house was actually attached on 21st February 1913 (see Ex. B, pp. 98-99). As soon as the present plaintiffs attached the dwelling house, Sadasukh's son Kasturchand preferred a claim to the said dwelling house and the claim was allowed. It is necessary to quote some of the remarks made by the Subordinate Judge, 24-Parganas, in the judgment in the claim case:

"The only thing which seems to have led the decree-holder, who, I should note, also lives in the same house, to attach this property as if it still belongs to Susheelabala, is that, instead of ousting Susheelabala's father-in-law and his people, the claimant has allowed them to live in it together with the decree-holder who has a charge on it but into which it is not necessary for me to enter here."

And again, in another place, the sub-Judge remarks "the decree-holder herself has the right of occupancy of a part of it." On the result of these claim proceedings, which terminated in August 1913, it is argued that as no suit was brought under O. 21, R. 63, Civil P. C., within one year from the date of the order allowing the claim, the order has become final and conclusive and the present suit for partition of the said dwelling house is barred. We are unable to accept this contention for the claim proceedings were started against the present plaintiffs in their capacity as stridhan heirs to their mother Mahamaya in respect of the personal decree obtained by them as such heirs. The present suit has been brought by the plaintiffs under a very different title, namely. as heirs to their father's estate.

The order of 30th August 1913, is conclusive against the plaintiffs as representing their mother's estate; but it is not conclusive against them as claiming under their father. Although the persons against whom the order was made are identical with the persons who want to get behind the order physically, they are, in the eye of the law, different persons as they claim under different titles. This ground which concerns the dwelling house only must fail.

The fourth ground taken is that the evidence leads to the conclusion that the properties in suit were the self-acquired properties of Nabin and consequently plaintiffs have no right to the same. This ground has only been faintly urged before us by Mr. Mitra and there is abundant evidence on the record to justify the conclusion that the items of immovable property in Sch. A to the plaint were purchased with the joint family funds and were acquired out of the joint family partnership business in castor-oil. It appears that in 1871 a portion of the family dwelling house was acquired compulsorily for Dakshineshwar powder magazine and a sum of Rs. 24,000 was paid to Nabeen, as representing the family, for the value of these structures, which they had on the land acquired, and it is this sum which might have been applied for carrying on the joint family business. Therefore all the properties in suit which were acquired out of this business belongs to Nabin and Rajkrishna jointly. The fifth ground taken is that the suit is barred by adverse possession by the defendants for more than the statutory period of 12 years. This is a ground which deserves very serious consideration in view of the events to be narrated presently. It appears that all the properties in suit were purchased by Kuthari in January 1905, and that, after Kuthari's purchase, he took possession af all the properties except the dwelling house (item 1 of the plaint). The defendants' case is that all the other properties besides the (bhadrashan) was in Kasturchand's possession from 1905 to 1919 when they were sold to Nanda who was the gomasta of Kuthari (see Ex. A, p. 127) and since then they were in possession of Nanda and after his death, of his grandson Subodh, defendant 3 (see p. 98). (After discussing the evidence, his Lordship held that Mahamaya and the plaintiffs were ousted from possession of all the properties except the dwelling house and that the plaintiffs' claim with regard to the four items of the properties of Sch. A besides item 1 is barred by adverse possession. The judgment then proceeded.) The Subordinate Judge, dealing with this part of the case, which is raised by issues 7, 9 and 19, observed as follows:

"As to adverse possession I do not think any one has claimed . . . the parties are co-owners and there never has been a direct or open assertion of hostile title or any positive ouster. The trust placed upon Nabeen descended to his heirs and I do not think there can be any question of limitation."

Mr. U. N. Sen Gupta, the learned counsel who appeared for respondents, has tried to meet the case of adverse possession or ouster on the same line of reasoning as has been adopted by the Subordinate Judge. He has argued that, in the case of joint property, possession or exclusive occupation by one co-sharer without more is not sufficient to constitute ouster or adverse possession even if such exclusive possession extends long beyond the statutory period of 12 years and in support of this proposition he has relied on the decision of the Judicial Committee of the Privy Council in *Corea* v. *Appuhamy* (6), and on the case of *Hardit Singh* v. *Gurmukh Singh* (7), which was also the decision of the Privy Council. But this rule can have have no application to the present case seeing that the four items of the immovable property besides the dwelling house were rightly or wrongly taken possession of by Kuthari, in 1905, and passed out of the joint family property and Kuthari having possessed them for more than 12 years had acquired an indefeasible right to them by adverse possession. So that when Nanda, who was Kuthari's gomasta purchased back the four items of the property from Kuthari with his own money, his possession cannot be said to be the possession of the cosharer. By the sale in execution of the decree by Kuthari against Susheela, the right, title and interest of Nanda might have passed but Kuthari took possession, not simply of the share of Nabeen, but the entire

6. (1912) A C 230=81 L J P C 151=105 L T 836.
7. A I R 1918 P C 1=47 I C 626=64 P R 1918 (P C).

properties. In this view, the fact of Nabeen's being a trustee does not affect the question of adverse possession. We are of opinion therefore that the plaintiffs' right to the eight annas share of the properties Nos. 2, 3, 4 and 5 of the plaint is extinguished by adverse possession of Kuthari and of defendant 3 for more than 12 years and plaintiffs' claim in respect of those properties must be dismissed. The question of adverse possession with regard to the dwelling house stands on a different footing. There can be no doubt on the evidence that the plaintiffs have been in actual possession of a portion of the dwelling house. Great stress has been laid on behalf of the appellant on the following passage in the claim proceeding [(Ex. 1), p. 102] :

" On the whole, it appears to me that Nandlal and his people are occupying the house through the claimant's permission and their possession should be regarded as the possession of the claimant (Kuthari)."

This finding can only refer to the part of the house occupied by Susheelabala and her father-in-law, for the same claim-proceeding shows that the decree-holder Ambalika, one of the plaintiffs, was held to have a charge on the house and the Court also recognised the fact that the decree-holder herself has the right of occupancy of a part of it (see Ex. 1, p. 102) and that seems to be the correct view, for Kuthari did only purchase the right, title and interest of Susheela as administratrix of Kanai's estate in the dwelling house and Kuthari's claim could only refer to the share of Kanai in the dwelling house. We are not unmindful of a statement in Ex. D-3, pp. 95-97, that the present plaintiffs as heirs of Mahamaya wanted to execute their personal decree by attaching the whole dwelling house. Column 10 of the petition is rather a loose statement, for the fact remains that the plaintiffs themselves were in possession of a portion of the dwelling house and they could not have intended to attach their own interest in the same; and the existence of this interest was recognised by the Subordinate Judge in the claim proceeding when he said that

" the decree-holder herself has the right of occupancy of a part of it."

I am therefore of opinion that, so far as the four annas share of the dwelling house, which is not affected by Narasingha's will, is concerned, the plaintiffs' right is not extinguished by adverse possession. With regard to the other four annas share of the dwelling house, which is touched by Narasingha's will, the provisions of the said will have to be considered. The material portion of the will is as follows :

" But the said Mahamaya Dasee shall, during her lifetime, be entitled to live in our bhadrashan (dwelling house) and upon her demise my heirs such as daughters and daughter's sons shall get from the said K nailal Niyogi the sum of Rupees 2,500 only. Save and except these my heirs shall have no claim to my bhadrashan (dwelling house."

Having regard to this clause of the will, it appears clear that plaintiffs are not entitled to get this four annas share, but are entitled to get the sum of Rupees 2,500 with interest at six per cent per annum from the date of the institution of the suit till realization. Sixthly, it is argued that if all the five points fail, plaintiffs are not entitled to decree without payment of the sum of Rs. 20,000 with interest. In the view which we have taken, this ground does not require to be considered. The seventh ground taken relates to item No. 2 of the plaint. It is said that this property was sold to one Amulya on 5th March 1920 and the claim for partition of this property cannot be determined in his absence. This ground also does not require consideration, as plaintiffs' suit for partition of this plot must be dismissed on the ground of adverse possession, as already stated. The result is that the decree and judgment of the Subordinate Judge must be set aside and in lieu thereof the following decree will be made. Plaintiffs' title to four annas share of the dwelling house item 1, Sch. A be declared. Plaintiffs will recover from the defendants the sum of Rs. 2,500 (Rupees two thousand five hundred) only with interest at the rate of six per cent per annum from the date of the institution of the suit till realization. Let a commissioner be appointed to effect a partition of item 1, Sch. A. Plaintiffs' claim with regard to items 2, 3, 4 and 5, Sch. A be dismissed. Plaintiffs' claim for the moveables in Sch. B be also dismissed. The commissioner is directed to effect a partition of item 1 according to the convenience and existing possession of the parties as far as may be practicable

The costs of the partition shall be borne equally by the parties.

Henderson, J.—I have had the advantage of reading the judgment which has just been delivered by my learned brother, but I should like to say something with regard to some of the points which have been raised before us. I will first deal with the question whether the properties in suit belonged to Nabeen alone. Now, it is common ground that there was a nucleus, which consisted of the castor-oil business, which was carried on jointly by Rajkrishna and Nabeen. The site was eventually acquired by Government and the business was then transferred to another site in Arhiadaha. The properties in question were purchased out of the profits of that business and the point at issue is whether that business was joint or the business of Nabeen alone. The business, having originally been joint, it is clearly for the appellant to establish his case.

Sukumaree Dassee, the widow of Nandalal, stated in her evidence that the business was kept in abeyance for a period of two years after the acquisition of the original site and that Nabeen then started a new business with money borrowed from her father. This of course would be conclusive in favour of the appellant. But I should not be prepared to accept a mere statement by an interested witness, entirely uncorroborated, as it is, by any documentary evidence: in fact, Mr. Mitra did not place any reliance upon it in the course of his argument.

It is clear that, in order to rebut the presumption in favour of the plaintiffs, the appellant must establish facts which are inconsistent with it: circumstances which are consistent with either case cannot be said to rebut the presumption. The following facts are relied upon by the appellant: (a) statements made by Nabeen in his will; (b) statements made by Narasingha in his will; (c) the conduct of Narasingha, his wife and the plaintiffs themselves; (d) the properties were consistently dealt with by Nabeen and Kanai on the footing that they belonged to Nabeen alone. Baldly stated, these facts may suggest that the appellant has a strong case; but if they are examined in connexion with their context, it seems clear that they do not really rebut the presumption. Narasingha's wife and daughter had no personal knowledge in the matter and would naturally accept the position adopted by Narasingha himself. Now, it would be going too far to infer that Narasingha knew that these properties were acquired by Nabeen alone; in my judgment, the proper inference to draw is merely that he thought that they were. He was in fact not in a position to know. When his father died, he was a child of six years and everything was left in the hands of Nabeen; if Nabeen chose to claim the whole business as his own, there was prima facie no reason for Narasingha to disbelieve him.

On the other hand, there is one circumstance which supports the case of the plaintiffs. When the original site was acquired, one would expect that the whole of the compensation money would be used for the purpose of setting up a new business. The award was made in favour of Nabeen. If in fact he only used his share for this purpose, he must have made over the other half in favour of Narasingha. But there is no evidence at all to show that Narasingha ever got his share. For these reasons, I am of opinion that the decision of the learned Subordinate Judge on this point was correct. I will now deal with the question of adverse possession. The case of the plaintiffs is that they are still in joint possession and it has, accordingly, been argued on their behalf that no question of adverse possession arises at all: this position was accepted by the learned Subordinate Judge. In her evidence the plaintiff Bhubalika frankly admitted that, except for the house, she is not in possession at all; the other plaintiff, Ambalika, tried to make out that she was in possession of all the properties; but she broke down hopelessly in cross-examination. She does not live in the house at all but resides with her husband in Calcutta and her claim to possession is based on an allegation that she spent two or four nights in the house in the course of several years. I am clearly of opinion that a few spasmodic visits of this kind to see her sister would not amount to possession. The conclusion to be drawn on this part of the case is that Ambalika is out of possession altogether and that the possession of Bhubalika is confined to residence in the house.

This residence is not denied; but the case of the appellant is that this residence is merely permissive and was never that of a co-sharer. The first point to notice in this connexion is that the possession of the appellant is based upon a title which is inconsistent not only with that of Narasingha but also with that of Nabeen himself. The appellant is in possession through inheritance from his grand-father Nandalal, who was 'entirely excluded by Nabeen's will and who purchased the property from a stranger some years after the latter had himself purchased it in execution of a decree. In these circumstances, it would be rather strange if the plaintiffs thought that the appellant was in possession jointly with them as co-sharer.

In fact, the conduct of the plaintiffs themselves shows that they were aware that the property was being held adversely to them and they actually accepted the position as correct. In connexion with the administration of the will of Nabeen, the appellant's father Kanai paid off the plaintiff's mother by executing a mortgage in her favour. She instituted a suit on the mortgage and eventually put the decree into execution; the price fetched at the sale of the mortgaged property was not sufficient and she then obtained a personal decree. After her death the plaintiffs put the decree into execution and proceeded to attach the house, which is one of the properties now in dispute. In the meantime, the appellant's father Kanai had died and the judgment-debtor was the present defendant 2 as executrix .to his estate. Before taking out execution, the plaintiffs had obtained a succession certificate.

In the petition for execution it was prayed that this house, which was alleged to be in the possession of the judgment-debtor, might be attached and sold in satisfaction of their decree. This application was quite inconsistent with their present case and shows that at that time they claimed neither title nor possession. A stranger intervened in the course of these execution proceedings and filed a claim to this house on the ground that it had previously been purchased by his father in execution of another decree. He admitted that the judgment-debtor was in actual possession, but claimed that this possession was permissive only, as his father had allowed her husband to continue in residence after symbolical possession had been taken. This dispute was fought out between the claimant and the plaintiffs; the learned Subordinate Judge decided it in favour of the claimant, holding that his case of permissive possession was true and that the actual possession should be regarded as being held on his behalf. The plaintiffs did not institute any suit and have accepted the position that both title and possession had passed to the transferee of the appellant's mother. It is true that, in the judgment dealing with the claim case, the Subordinate Judge refers to a charge in favour of one of the plaintiffs, into which it was not necessary for him to enter, and to her right of occupancy in a part of the property. I have not been able to discover what exactly he means by this. But the present claim of the plaintiffs is based neither upon a charge nor upon a right of residence; in fact they claim something totally different and their present claim is inconsistent with the position they adopted in the claim case. As already noticed, they sought to sell the whole of the residence. The claimant objected on the ground that he had already purchased it himself. He was successful. In my opinion, these remarks in the order afford no assistance to the plaintiffs in the present case.

In these circumstances, it seems to me to be perfectly idle for the plaintiffs to come forward now and say that they are in joint possession with the appellant as his cosharers. Ambalika's evidence that she was continually asking in vain for her share in the profits of the property cannot be accepted; if it were true this suit would have been brought long ago. The evidence given on behalf of the appellant to show that Bhubalika's possession is permissive only receives the strongest possible corroboration from the conduct of the plaintiffs themselves. I have no doubt that, until the quarrel which took place shortly before the institution of this suit, it never entered the head of either of the plaintiffs that they had either title to or possession in the property and am clearly of opinion that they are not in possession. In connexion with Mr. Mitra's argument that, in any view of the case, the plaintiffs' title has been extinguished by ad-

verse possession, there are three points of time at which it might be said that possession became adverse : (1) the application for probate of the will of Nabeen; (2) the purchase in execution of a decree by the Marwari Kuthari; (3) the conveyance in favour of Nandalal. It seems from the judgment of the learned Subordinate Judge that he thought that possession began to be adverse with Nandalal's purchase; but inasmuch as that took place within 12 years of the suit, it is of no practical importance.

Nabeen's will set up a claim to the whole of the property. The executors were the appellant's father Kanai and the plaintiffs' father Narasingha; they got probate in 1892. According to the plaintiffs' case, eight annas in the property really belonged to Narasingha; but, inspite of this fact, he joined with Kanai in asserting a hostile title and taking possession under it. On this part of the case the learned Subordinate Judge seems to hold that the possession of Nabeen's executors could not be adverse, because Nabeen himself was the executor of the will of Narasingha's father, Rajkrishna: at any rate he says that the trust placed upon Nabeen descended to his heir. But neither of the executors was Nabeen's heir and all the properties in dispute were acquired after Rajkrishna's death. In my opinion, the possession of Nabeen's executors was adverse to Narasingha's title with the result that there was complete ouster of Narasingha.

The case with regard to the purchase of Kuthari is even stronger. It has been proved that he took symbolical possession: it was however argued on behalf of the plaintiffs that he never took actual possession. In my judgment the evidence is conclusive that he did. I have already dealt with the actual possession of the house. This very question was fought out between him and the plaintiffs in the claim case, where it was decided that possession was with him: the plaintiffs cannot therefore be allowed to say now that it was merely symbolical. There can be no question that the decree was a genuine one and, as was pointed out by the learned Judge who decided the claim case, there is no reason why the auction-purchaser should have given up any of the property after having bought it. He was paid the compensation awarded by the Collector on account of acquisition of a portion of the property: his successors are admittedly in possession of the rest of the property covered by the sale-certificate. The property now in dispute is all covered by the conveyance executed in favour of Nandalal some years later. In my judgment, the only inference to be drawn from these facts is that actual and not merely symbolical possession was taken and I do not think that the matter would have been carried any further by the examination of a few witnesses to prove collection of rent and isolated acts of possession. For these reasons, I am of opinion that the plaintiffs' title has been extinguished by adverse possession.

I agree that no case of estoppel has been made out. I am satisfied that Narasingha took possession of the property as executor of Nabeen's will: but, as my learned brother has pointed out, he was not aware of the real facts when he applied for probate : indeed it may be doubtful whether he would ever have made the application, had he been aware of them. I am also very doubtful whether in any event the plaintiffs themselves would be estopped in view of the fact that they are entirely out of possession. The result is that I would dismiss the suit. But as the point on which I have the misfortune to differ from my learned brother relates only to a four annas share in the residence and Mr. Mitra intimated, in the course of his argument, that the appellant would not be averse to giving this concession to the plaintiffs, I concur in the order which my learned brother proposes to make.

K.S. *Appeal allowed.*

A. I. R. 1934 Calcutta 367

JACK AND NAG, JJ.

Masihuddin and *others*—Appellants.

v.

Akbar Ali and *others*—Respondents.

Appeals Nos. 1114 and 1115 of 1931, Decided on 22nd August 1933, against decree of First Class Sub-Judge, Tippera, D/- 3rd December 1930.

Bengal Tenancy Act (1885), old S. 49 (b) and new S. 48-C (d)— Notice served before amending Act—Under raiyat is liable to be ejected.

Section 49 (b) as inserted by the Bengal Tenancy Amendment Act 4 of 1928 is not re-

trospective in operation. An under-raiyat on whom a notice is served under old S. 49 (b) is therefore liable to ejectment although in the meantime new S. 48-C has come into operation: *AIR* 1926 *Cal* 436, *Ref.* [P 368 C 1, 2]

Hamidul Haq Choudhury and *Rashidul Hasan*—for Appellants.

Jatindra Mohan Choudhury and *Amarendra Mohan Mitra*— for Respondents.

Judgment.—These two analogous appeals have arisen out of suits for ejectment of under-raiyats after service of notice under S. 49 (b), Ben. Ten. Act of 1885. In each case the notice expired on 13th April 1929 and under the provisions of the Act the tenant was on that date liable to ejectment. But meantime Act 4 of 1928 repealed S. 49 of Act 8 of 1885. The new Act came into operation on 21st February 1929 admittedly if the new Act applies the tenants would not be liable to ejectment as they have homesteads on the land [S. 48 (c), Cl. (d) proviso 1 (2)] and have been in possession for more than 12 years.

Under Cl. 6 (c), General Clauses Act, the repeal of an Act shall not affect any right acquired under the Act so repealed unless a different intention appears. There is nothing in the new Act showing that it was intended to be retrospective in its effect and therefore the repeal of the old Act will not affect the right which the landlord acquired to eject the tenants on 13th April 1929, a right which he acquired under the old S. 49 (b). But it is said S 49 (b) did not confer a new right, it merely placed a bar on the exercise of a pre-existing right of ejectment. In this connexion reference was made to the case of *Suresh Chandra Chatterjee* v. *Kanti Chandra Bhattacharjee* (1) where it was held that where a temporary Rent Act had run out it ceased to have any effect on subsequent proceedings for ejectment, the bar imposed by the Act having ceased to exist. But in that case any vested right acquired under the temporary Act ceased automatically on the expiry of the Act so that the circumstances there were entirely different. There is however considerable force in this argument and it is with some hesitation that I reject it, but it is clear that from another point of view the law, i. e., S. 49 (b) of the Act cancelled any previously existing right of ejectment and substituted a new right which may be said to have been acquired under the Act and the right which the landlord had was one under the provisions of the Act, and one therefore which was not taken away by the repealing Act. The case of *Quilter* v. *Mapleson* (2) has been referred to show that the Amended Tenancy Act of 1928, must be taken to be retrospective in intendment of implication but that case refers to the provisions of the conveyancing and Law of Property Act of 1881 in which sub-S. 9 of S. 14 expressly makes the section apply to old leases and the Act was held to be to some extent retrospective on this and other grounds. In the present case as S. 48 (c) prescribes a new form of notice it seems therefore that the section was not intended to have retrospective effect.

The landlord is therefore entitled to eject the tenant in each of these cases under S. 49 (b), of the Tenancy Act of 1885. The suits are remanded to the trial Court for disposal of the remaining issues accordingly. In the circumstances the parties will pay their own costs up to this point. The future costs will be fixed by the trial Court.

Nag, J.—I agree.

R.K. *Appeals allowed.*

1. AIR 1926 Cal 436=110 I C 715.

2. (1883) 9 Q B D 672=52 L J Q B 44=41 W R 75=47 L T 562.

A. I. R. 1934 Calcutta 368

MITTER AND HENDERSON, JJ.

Abani Mohan Bhaattcharjee—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeals Nos. 516 and 517 of 1933, Decided on 31st July 1933.

(a) Arms Act (1878), S. 4—Definition of "arms" is not exhaustive — Every air gun is not excluded.

The definition of "arms" is intentionally wide and is not exhaustive, every type of air gun or air pistol has not been excluded from the definition. [P 369 C 2]

(b) Arms Act (1878), S. 19 (f)—License is required for each separate weapon.

The essence of the offence is the possession of arms without license and a license is required for each separate weapon. [P 370 C 1]

(c) Penal Code (1860), S. 120-B — Conspiracy to commit offences under S. 19 (f), Arms Act—Prosecution's failure to connect accused with knowledge of revolver—From mere sheltering co-accused (his cousin) he cannot be convicted of conspiracy.

When once the prosecution fails to connect the accused with the knowledge of the revolver, he cannot be convicted of conspiracy to commit the specific offences under S. 19 (f), Arms Act.

It cannot be inferred merely from the fact that he gave shelter to the co-accused (his cousin) that he was privy to any offence the latter might commit. [P 370 C 1]

Sudhanshu Sekhar Mukherjee and *Ajit K. Dutt*—for Appellants.

Khondkar and *Anil Chandra Roy Choudhury*—for the Crown.

Mitter, J.—I have had the advantage of reading beforehand the judgment which my learned brother is about to deliver in these two appeals; I entirely agree with him in the conclusions reached by him in the reasonings on which those conclusions are based, and in the order which he proposes to make in these two appeals.

Henderson, J.—The facts of the case out of which these appeals have arisen are briefly as follows. The appellant Probhat is a detenue who was interned at Faridpur, a village in the District of Burdwan. He ran away on 9th January 1932, and disappeared. On receipt of certain information a party of Police Officers raided No. 4 Ahiritola, 1st lane: the room where the absconder was expected to be found was vacant. The owner of the house Dhakaram made some inquiries and informed the Inspector P. W. 1 that the occupants of the room in question had removed to the house of Nagen Das (P. W. 6) in Sitala Lane. The Inspector and some other Police Officers went there. On being summoned the appellant came out and was arrested. The police then searched the room and recovered the revolver (Ex. 2) and air pistol (Ex. 3). It is the prosecution case that the room as in the occupation of both the appellants. Three charges were framed against the appellants—the first under S.19 (f),Arms Act, read with S. 19 (a) with reference to the revolver : the second under S. 19 (f) with reference to the air pistol and the third under S. 120, B. I. P. C. setting out a conspiracy to commit the offences specified in the two former charges. The learned magistrate convicted both the appellants on all three charges : he made the last two sentences concurrent with each other but consecutive to that passed on the first charge.

In appeal the following points have been pressed on behalf of both the appellants (1) that the conviction on the third charge cannot be supported (2) that no license was necessary for the air pistol (3) that in any view only one offence under S. 19 (f) of the Act was committed. On behalf of Abani it is urged that he had nothing to do with the pistols and is entitled to an acquittal. On behalf of Probhat it was contended (1) that the pistols were planted by the police (2) that possession has not been brought home to him. With regard to the first point it is to be noted that the magistrate accepted the prosecution case in full and convicted both appellants of the specific offences under S. 19 (f): there was nothing left over to form the basis of a charge of conspiracy: the basis of that charge was an alleged agreement to do an illegal act. There is no evidence of any such agreement and this conviction is based solely upon an inference from the fact of possession. In these circumstances the conviction both of the specific offences and a conspiracy to commit them has very little meaning and the practical effect of imposing consecutive sentences is to punish the appellants twice over for one act. In view of the findings arrived at by the learned Magistrate we should not be prepared to uphold the conviction and sentence on the third charge. There are two branches to Mr. Mukherjee's argument on the second point: he contends firstly that an air gun or air pistol does not come within the definition of "Arms" in S. 4 and secondly that air pistol of this particular type are exempted under the Government notification referred to by the learned Magistrate.

The definition of "arms" in S. 4 is intentionally wide and the list of weapons referred to therein is clearly not exhaustive. In our opinion it cannot be said that every type of air gun or air pistol must be excluded from the definition. On the other hand the Government Notification makes it necessary to take out a license even for air guns coming within item 2 (iii) of Sch. 2 of the rules. It appears however from the evidence of the expert that this particular weapon is a toy pistol and in our opinion it will suffice if the sentence on the second charge is made concurrent with that on the first.

The third point is based on the analogy of a charge under S. 411, I. P. C. It is argued that only one offence can be committed at any given time and it is quite

immaterial how many unlicensed arms are possessed. In our opinion this contention must be overruled. The essence of the offence is the possession of arms without a license and a license is required for each separate weapon. In dealing with the facts of the case it must be noted that it was contended on Abani's behalf that he is not proved to have resided anywhere with Probhat. There is independent and one-sided evidence to show that he was the actual tenant of both the rooms; if he was really living somewhere else, he could easily have proved it: but he made no attempt to do so. But in our opinion this does not carry the prosecution case any further. The evidence must be taken as a whole. It has been proved that Abani was in occupation of the room in Ahiritola Lane some two or three months before Probhat arrived. He is in regular employment and used to be absent at his work from 8 a. m. to 10 p. m. It is thus clear that he gave shelter to his cousin, who was an escaped detenue. Nothing further is proved against him. He was admittedly not in the room when the pistols were found. We are not impressed by the evidence given that Abani went cut that night about 8 p. m.: this statement was not made to the police.

But apart from that the pistols might have been introduced after his departure. The case against him depends solely upon circumstantial evidences and the circumstances are consistent with his innocence. When once the prosecution fail to connect him with knowledge of the revolver, it is clear that he cannot be convicted of conspiracy. It would be impossible to infer merely from the fact that he gave shelter to Probhat that he was privy to any offence the latter might commit. He is therefore entitled to an acquittal. It remains to consider the specific defence of Probhat. We are satisfied that there is no substance in the suggestion that the revolver was planted by the police: it is in fact nothing more than a suggestion. Neither in his statement to the Court nor at the time did the appellant himself make any such suggestion. The search was witnessed by independent persons of the locality. The police were not even investigating a case at the time. They were there in order to arrest an absconding detenue and did not even know that they would find him. The search of the room where he was found was a matter of routine. It was finally argued that the conviction cannot stand, as it is impossible to say which of the appellants had the pistol under his control. But the present case is not one of that nature. The pistol was found in an open suit case. This appellant was alone in the room at the time. He never disclaimed any knowledge of it or suggested that it might have been introduced by Abani. In our opinion his guilt is fully brought home to him.

The result is that the appeal of Abani is allowed: the conviction and sentences are set aside and he will be set at liberty immediately. In the case of Probhat the conviction and sentence on the third charge is set aside: the conviction and sentences on the first and second charges are maintained but the sentences will be concurrent. With this modification his appeal is dismissed.

R.G. *Order accordingly.*

A. I. R. 1934 Calcutta 370

NASIM ALI, J.

Annada Sundari Gupta—Plaintiff—Appellant.

v.

Ratan Ram Deb—Defendant — Respondent.

Appeal No. 1430 of 1931, Decided on 21st November 1933, from appellate decree of 4th Addl. Sub-Judge, Sylhet D/- 10th January 1931.

(a) Will—Construction—Will must be read as a whole—Held absolute estate was not conferred.

The relevant portion of a will was as follows:

"In case I die sonless my wife G. D. shall become the owner and possessor, in absolute right, of the rest of my properties moveable and immovable, excluding the lands mentioned in the schedule having equal and same powers as myself and with full powers to make sale or gift of the same for valid reasons etc."

Held: that (i) the will is to be read as a whole and the intention of the testator is to be gathered from all the terms of the will taken together; (ii) the intention of the testator was not to create an absolute interest in favour of the widow with unrestricted powers of transfer but to enable her to enjoy the properties for her life with powers to alienate the same or portion thereof if there was any legal necessity for such alienation: *A I R* 1933 *P C* 67, *Dist.*

[P 371 C 2]

(b) Will—Construction — Construction of similar words in different will is not to be followed.

It is always dangerous to construe in one way or other by the construction of more or less similar words in different will which was adopted by a Court in another case. The question in each case is what was the paramount intention of the testator as expressed in the will taken as a whole. [P 372 C 1]

Paresh Lal Shome—for Appellant.

Priya Nath Dutta—for Respondent.

Judgment. — This is the plaintiff's appeal in a suit for recovery of arrears of rent for the years 1332 to 1335 B. S. with damages and costs. The plaintiff's case is that her father was the owner of the land for which the rent is claimed, that the suit lands along with other lands were bequeathed by him in favour of her mother absolutely, that after her death she being the sole heiress of her mother is entitled to recover rent from the tenant defendant. The defence substantially is that the suit is bad for defect of parties inasmuch as under the terms of the will left by the plaintiff's father her mother got only a limited estate and after her death the plaintiff as well as other persons, namely, Nagendra Chandra Dutta and others were entitled to get the rent. The learned Munsif held that under the will the plaintiff as well as the other persons alleged by the defendant became entitled to the property after the death of the plaintiff's mother and in that view dismissed the plaintiff's suit as being not maintainable at the instance of the plaintiff alone. The plaintiff thereupon preferred an appeal to the lower appellate Court. The learned Judge dismissed the appeal. Hence the present appeal by the plaintiff to this Court. The decision of this case really turns upon the construction of the will of the late Dwip Chandra Dutta of which probate was taken in due course. The following are the relevant portions of the will:

Para. 1. — In case I die sonless my wife Gunamoyee Dassi shall become the owner and possessor, in absolute right, of the rest of my properties moveable and immovable excluding the lands mentioned in the schedule having equal and same powers as myself and with full powers to make sale or gift of the same fcr valid reasons and abiding by the following provisions. Only she will not be competent to sell the lands appertaining to my ancestral Khanabari to anybody other than a co-sharer.

Para. 3.—If I die sonless my wife will have the power to adopt one or more sons and if she makes such adoption such adopted son would be the full owner of the property left undisposed of by her along with the properties mentioned in Schs. 2 and 3.

Para. 4. — If my wife dies without making any adoption in the manner stated above my married daughter Sm. Ananda Moyee Dassy and my unmarried daughters Sm. Swarna Moyee Dassy and Sm. Sarada Sundari Dassy and my nephews Sarat Chandra Dutt, Golok Chandra Dutt, Tarak Chandra Dutta, Ishan Chandra Dutta and Nabin Chandra Dutta will be entitled in equal shares to all the properties moveable and immovable that would be left after the sales made by her excluding therefrom the land mentioned in the schedule below.

Admittedly the land in this suit is not included in any of the schedules given in the will, and was not disposed of by the widow during her lifetime. If upon a proper construction of the will the widow got an absolute interest in the land in question, the plaintiff is entitled to a decree. If on the other hand, the widow had a limited interest, the plaintiff's suit must fail for defect of party. The point for decision therefore is whether under the terms of the will the widow Gunamoyee got an absolute interest or only a limited interest. The words "having equal and same right as myself and shall be the owner and possessor in absolute right" if not otherwise qualified would indicate the creation of an absolute interest. But the words used in the same sentence, namely, "with powers to make sale or gift for valid reasons" would go to show that the object of the testator was to restrict the powers of transfer. Reading para. 1 as a whole it seems to me that the intention of the testator was not to create an absolute interest in favour of the widow with unrestricted powers of transfer, but to enable her to enjoy the properties for her life with powers to alienate the same or portion thereof if there was any legal necessity for such alienation. This construction is supported further by the recitals in paras. 3 and 4 quoted above. The will is to be

read as a whole and the intention of the testator is to be gathered from all the terms of the will taken together. It was contended by the learned advocate for the appellant that the restrictions put upon the power of the widow about transfers are repugnant to the real intention of the testator and are therefore void.

I am unable to accept this contention. Para. 1 of the will must be read as a whole and reading the paragraph as a whole there cannot be any doubt that the testator had no intention of giving an absolute right to the widow. If the contention of the appellant about the meaning of para. 1 of the will be accepted, the expressions about the restrictions on transfer and the other paragraphs quoted above would become wholly meaningless. In my judgment the construction put upon the will by the Courts below is correct, and is justified by the terms of the will taken as a whole.

My attention was drawn to the decision of the Judicial Committee in the case of *Rai Biswanath Prosad Sing* v. *Chandrika Prosad Kumari* (1). In that case there was no restriction on the donee's power of transfer and there was nothing definite to the contrary in the other terms of the will to qualify the meaning of the expression indicating an absolute estate. Other cases were also cited both by the appellant and respondent, but it is always dangerous to construe in one way or other by the construction of more or less similar words in a different will which was adopted by a Court in another case. The question in each case is what was the paramount intention of the testator as expressed in the will taken as a whole. In my judgment the widow Gunamoyee Dassi took only a limited interest and after her death the plaintiff alone is not entitled to claim rent for the land in suit. The result therefore is that this appeal is dismissed, but in view of the circumstances of this case I make no order as to costs. Leave to appeal under S. 15 of the Letters Patent is refused.

K.S. *Appeal dismissed.*

1. A I R 1933 P C 67=142 I C 6=60 I A 56=55 All 61 (PC).

A. I. R. 1934 Calcutta 372

C.C. GHOSE, AG. C. J. AND COSTELLO, J.

Misrilal Raidani — Defendant—Appellant.

v.

Netaichand Nandi — Plaintiff—Respondent.

Appeal No. 103 of 1932, Decided on 29th May 1933.

(a) Vendor and Purchaser—Power of trustees to sell property of charity—Purchaser has to show sale is beneficial to charity—Trust.

Under certain circumstances trustees have the power to sell property in their possession for provident administration of a particular charity, but the purchaser takes the property subject to the obligation of showing that the sale was beneficial to the charity and justified by the circumstances. [P 375 C 2]

(b) Vendor and Purchaser—Contract for purchase on approval of title by solicitor of vendee — Vendor being purchaser from trustee of charity—Vendor failing to satisfy as to power of trustees to sell property to him—Vendee's solicitor advising client to reject title does not act capriciously or unreasonably or in non-legal manner—Legal Practitioner.

A contract to purchase certain property was entered into subject to the approval of the title by the Solicitors of the vendee. The vendors were purchasers from trustees of a charity and when asked by the Solicitor of the vendee as to the title of the trustees to sell the property of the charity, the vendors were not able to satisfy the vendee's Solicitors, nor did they take steps to prove that the sale in their favour was a valid one. Hence the vendee's Solicitors advised their clients to reject the title.

Held: that the Solicitors did not act capriciously or unreasonably or in a non-legal manner and the purchaser was in the circumstances which had happened, entitled to ask for a refund of the earnest money. [P 375 C 2; P 376 C 1]

(c) Trusts — Charitable trusts — Trustees can sell only if scheme authorizes them to sell or sale is sanctioned by Court.

Per *Costello, J.*—In order that trustees of charitable trusts may sell or mortgage trust property, it is necessary that there should either be a scheme containing a provision authorizing the trustees to sell, mortgage or otherwise deal with the trust property or else they should come to Court and ask the Court to exercise its chancery jurisdiction and give sanction for a particular sale. In the absence of any of these the vendee takes subject to the obligation of showing that the sale was beneficial to the charity. [P 377 C 1]

S. C. Roy (*Sr.*) and *H. N. Sanyal*—for Appellant.

S. M. Bose and *S. B. Sinha*—for Respondent.

C. C. Ghose, Ag. C. J.—This is an appeal against a decision of Roy, J., in the circumstances stated below: On 21st April 1931 the present appellant Misrilal Raidani entered into an agreement with one Netaichand Nandi for the sale

to the latter of Premises No. 6, Temple Street, in the town of Calcutta. The agreement was reduced into writing and is printed on p. 5 of the paper-book. It was stated in the agreement that, subject to the approval of title to the premises by the purchaser's Solicitors, Messrs. G. C. Chunder & Co., these premises were to be purchased by Netaichand Nandi provided it was shown that the fee simple in possession was free from incumbrances, for a sum of Rs. 73,000. On the date of the agreement a sum of Rs. 1,001 was paid by way of earnest and in part payment of the purchase-money to the vendor and the vendor agreed to deliver or cause to be delivered all the title-deeds of the said premises to the purchaser's Solicitors within seven days from the date of the agreement and the sale and purchase was to be completed within six weeks from the date of delivery of the title-deeds. The vendor agreed that sufficient time before the date fixed for completion to make out a good title to the premises to be sold to the reasonable requisitions of the purchaser's Solicitors was to be had. The agreement further provided that in case the title was not approved of by the purchaser's Solicitors the vendor should, on demand, refund to the purchaser the earnest money and should also pay his costs of and incidental to the investigation of title; such costs however were not to exceed Rs. 80 in an aggregate.

What happened was this: The property to be sold was apparently in possession of the Governors of the Mayo Hospital. The property in question was sold to the present appellant Misrilal Raidani on 30th September 1918 by means of a regular conveyance from the Governors of the Mayo Hospital. On 28th April 1931 Messrs. G. C. Chunder & Co , sent certain requisitions to the vendor : (1) as to the authority of the Governors of the Mayo Hospital to convey the property as they did in September 1918 to Misrilal Raidani; (2) as to a certain mortgage of the premises in question with the Allahabad Bank; and (3) as to whether it was necessary that the members of the family of Misrilal Raidani—the family being one governed by the Mitakshara School of Hindu Law —should join, and about certain other matters. The vendor's Solicitor was Mr. Hem Chunder De and a copy of this letter containing the requisitions was sent to Mr. De on 30th April 1931. Mr. De was not in a position to answer the requisitions and he wrote in to say that he was communicating with Messrs. Sanderson & Co., who were the Solicitors of the Governors of the Mayo Hospital and that as soon as he got the necessary information he would communicate again. Nothing apparently was done in the matter of answering the requisitions between 13th May 1931 and 2nd June 1931. On this last mentioned date Mr. De purported to answer Messrs. G. C. Chunder & Co's., requisitions. On 8th June 1931 Messrs. G. C. Chunder & Co., took up this position that the Governors of the Mayo Hospital were not in a position to sell without express authority and that such authority must be shown by the vendor's Solicitor. The letter of 8th June is an important one and it will be found printed on p. 105 of the paper-book. In the course of their letter Messrs. G. C. Chunder & Co., observed as follows :

"The Governors of the Hospital were in the position of Trustees of a Public Charitable Trust and, in the absence of an express authority to sell, they cannot by their own resolution invoke such authority. Unless such authority is satisfactorily proved 'we shall not be in a position to accept the title.' "

This letter was replied to on the next day and the only point that was made in that letter was that the Governors were satisfied that they did not require any sanction of the Government for the sale by them of property in their possession or as belonging to the Mayo Hospital. On 22nd June Mr. De—the Solicitor on behalf of the vendor—wrote to say that the property in question, namely, Premises No. 6, Temple Street, vested in the Governors of the Mayo Hospital with right of disposal and as such the sanction of the Local Government was unnecessary. It may be mentioned in passing that no one has raised any question of the necessity of sanction of the Local Government up to the present point. Mr. De went on to add: "'Had it not been so, it would have been extremely' unlikely that responsible personages like the 'Metropolitan of Calcutta, the Chief Justice and Judges of the High Court' and others would have participated in the sale." The only comment that is necessary on this state-

ment is that it was an entirely fortuitous circumstance that the Trustees of the Mayo Hospital happened to be, among others, the Metropolitan of Calcutta (obviously a mistake for the Metropolitan of India) and the Chief Justice of this Court; but, in my opinion, no comfort whatsoever could be derived by the vendor from the circumstance that among the Trustees were men of distinction like those referred to above. Messrs. G. C. Chunder & Co., replied to this letter on 25th June and they pointed out, rightly enough, that the mere fact that personages like the Metropolitan, the Chief Justice and other Judges had participated in the sale was no proof of title of the Governors of the Hospital to sell the property in the absence of authority conferred on them by the original trust or by an order of Court. This letter provoked a reply from Mr. De which is printed on p. 113 of the paper-book. Apparently nothing came out of the correspondence and finally on 2nd July 1931 Messrs. G. C. Chunder & Co., intimated that their client—the purchaser—was not prepared to accept the title and in the circumstances the title was rejected. The title having been rejected there was some further correspondence cn the demand of Messrs. G. C. Chunder & Co., that their client, the purchaser, should get back the amount of the earnest money which he had paid—a request which was not complied with; and finally on 5th January 1932 the present suit was filed by the purchaser asking for a refund of the earnest money which has been paid.

At the trial before Roy, J., the Solicitor Mr. Deb who had charge of this business in the firm of Messrs. G. C. Chunder & Co., gave evidence and was cross-examined at considerable length by Mr. S. C. Roy. The trend of the cross-examination, as far as one can make out, was that the reasonable requisitions of the Solicitors had been met and that the Solicitors in rejecting the title on 2nd July 1931 had not acted in a reasonable and legal manner; in other words the suggestion was that the rejection by the Solicitors on 2nd July 1931 was unreasonable and capricious and that inasmuch as it had been made clear to them that there was no trust deed forthcoming and as the purchaser was not prepared in the circumstances to accept the vendor's statement nothing could be done and that the purchaser should have been content with the long possession of the Governors of the Mayo Hospital of the property in question. As a matter of fact, a small point was sought to be raised, namely, whether having regard to the fact that the conveyance in favour of the vendor was so far back as 1918, the purchaser should not have been content with accepting the possessory title of the vendor for this fairly long period from 1918 to 1931. It may be mentioned in passing that the possessory title of the vendor was not referred to in so many words in the correspondence until after the institution of the present suit.

In addition to the evidence of the solicitor Mr. Deb, there was also the evidence of the Resident Medical Officer Dr. Dutt of the Mayo Hospital; but he was not able, as far as one can gather from his evidence, to show that there was a trust deed in existence requiring observance thereof by the Governors of the Mayo Hospital. Another point which was sought to be made out from the evidence of the Resident Medical Officer was that the exigencies of the Hospital required that this property should be sold and accordingly a resolution was adopted by the Governors who approved of the sale to the present vendor in 1918. In addition to this oral evidence a large mass of documentary evidence was produced showing how the property in question came to be acquired by the Governors of the Mayo Hospital. It is true that the acquisition was so far back as 1825 and that a patta from the Government was obtained in 1844.

The conveyance in favour of the vendor dated some time in 1918 was produced and in this state of the record it was contended in the Court below as it has been contended before us that the circumstances under which the solicitors came to reject the title to the premises in question showed that they acted in an unreasonable, non-legal and capricious manner. Roy, J., has come to certain definite findings of fact and one of the findings of fact which is to be found on p. 81 of the paper book is that in his opinion the solicitors for the purchaser had acted in a bona fide manner, i. e., had not acted mala fide and had not acted in a capricious or arbitrary manner in

rejecting the title which they did on 2nd July 1931. Mr. S. C. Roy has contended that the present Bench was in the same position as the learned Judge in the Court below was and that if we found on an examination of the facts that the solicitors had acted capriciously in rejecting the title as they did on 2nd July 1931, the finding of the fact arrived at by the learned Judge of the Court below would not stand in our way of reversing his judgment if we thought fit to do so. To a certein extent Mr. Roy's contention may be accepted; that is to say, he is entitled to ask us to canvass the whole question for ourselves and to require us to be satisfied that the rejection by the solicitors was not unreasonable. We have accordingly gone through the entire record; we have scanned and scrutinized the correspondence from April 1931 to 2nd July 1931 and also the later correspondence even after the institution of the suit and we have perused the deposition of the solicitor Mr. Deb and such portions of the evidence of the Resident Medical Officer to which our attention has been drawn; but we are bound to say that on an independent examination of the entire record our conclusion is the same as that of Roy, J. In our opinion there was ample time between April and 2nd July 1931, for the vendor to take such steps as he might have been minded to satisfy the solicitors of the purchaser that a good and marketable title could be made out and that all the reasonable requisitions of the solicitors could be met. Nothing in this direction was done; and, as far as one can see, the solicitor for the vendor was engaged in prolonging the correspondence unnecessarily and without attending to the realities of the situation,

From the very start the question of all other questions which attracted the attention of the solicitors for the purchaser was whether the Governors of the Mayo Hospital had the necessary authority or power to sell and, if so, to what was that power to be traced. No answer apparently was sought to be given; nor was it suggested at any time between the relevant dates that an attempt was going to be made to satisfy even a fastidious solicitor for the purchaser that there was in reality no defect whatsoever in the title of the premises and that the defect, if any, was remediable and was going to be remedied by means of an application and an order thereon to and from this Court. Nothing was done and, in the end, the solicitors found it incumbent upon themselves to state that in the circumstances which had obtained they could not advise their client to accept the title and that therefore their client must reject the title.

It is said by Mr. Roy that the Governors as trustees of this Charitable Institution had authority to sell the premises if they thought that such a course was rendered necessary by reason of what is described in the books as provident administration of the charity. "Under certain circumstances trustees have the power to sell property in their possession for provident administration" of a particular charity; but it is settled law that the purchaser takes the property subject to the obligation of showing that the sale was beneficial to the charity and justified by the circumstances. If the purchaser's solicitors could advise the purchaser to take the property, the purchaser would have taken the property subject to the obligation of showing that the sale was beneficial to the charity and justified by the circumstances. One is entitled to ask whether the purchaser's solicitors could, in view of the duty which they owed to their client, advise the purchaser to take on himself the obligation or onus of satisfying that this sale was beneficial to the charity and justified by the circumstances. No conscientious solicitor worth his salt would have taken upon himself the duty of advising his client to take such property with such an onerous obligation resting on the purchaser. In that state of circumstances, speaking for myself I have no hesitation in saying that the solicitors in the present case were abundantly justified in advising their client not to take upon himself the obligation referred to above and to content himself by rejecting the title.

It is really unnecessary to go into the matter further and at greater length because I am satisfied from an examination of the material documents produced in this case and on the relevant correspondence that the reasonable requisitiosn of the solicitors not having been

met there was no other course open to them but to advise their client to reject the title. My conclusion therefore is that the solicitors have not acted capriciously or unreasonably or, to quote Mr. Roy's words in a non-legal manner and therefore in my view the purchaser was in the circumstances which had happened, entitled to ask for a refund of the earnest money. The result therefore is that in my opinion the judgment of Mr. Roy must be affirmed and the appeal which had and has no merits whatsoever must be dismissed with costs. In assessing the costs of this appeal fees to two counsels on behalf of the respondent will be allowed.

Costello, J.—I agree that this appeal must be dismissed. I think the learned Judge in the Court below was right in coming to the conclusion as he did that the Solicitors for the purchaser acted reasonably and bona fide and that therefore the plaintiff was entitled to demand and obtain refund of the earnest money and the amount provided in the agreement for sale to be paid as costs incidental to the investigation of the title. To my mind it is quite clear that in the circumstances of this case no competent and careful Solicitor would have done otherwise than advise the purchaser that the title to these premises No. 6, Temple Street, was not a satisfactory one and that on the ground that it had not been established that the Governors of the Mayo Hospital had proper authority to sell the land, as they did, in the year 1918 to the present appellant Misrilal Raidani. The position appears to have been this. The Mayo Hospital was established more than a century ago, that is to say in the year 1792. It was then established under the title of the "The Native Hospital." It is said by Mr. Roy that it had been ascertained from Messrs. Sanderson & Co., the Solicitors to the Hospital, that it is governed by a governing body the members of which were and are elected from time to time by the subscribers to the fund of the Institution subject to the approval of the Governor-General in Council. The name of the Institution was changed in the year 1872 to that of "Mayo Native Hospital" and it is now known simply as the "Mayo Hospital." But there is no record that any trust was formally established by a deed or otherwise and it is perfectly plain that no scheme was ever drawn up by any properly constituted authority. The position of the Governors seems to be to a large extent regulated by certain "rules" which provide for the management of the Institution and the election of the Governors in the way I have mentioned.

It is to be noted that there is no statutory enactment in this country dealing with Charitable Trusts. Therefore in order to ascertain what the position is it is necessary to have reference to the law as it was in England prior to the various Statutes specially enacted for the control and direction of Charitable Trusts. In England the law has been brought right up to date, if I may use the expression, in the Settled Land Act of 1925. By S. 29 of that Act it is provided that, for the purpose of that section, all land vested in Trustees for Charitable purposes shall be deemed settled land, and the Trustees are to have the powers conferred by the Act on a tenant for life and on the Trustees of a Settlement. That provision of course is for a very limited purpose; and outside that the position is that unless they are acting under other statutory provisions, authority or under the authority of the Chancery Division or a scheme legally established or with the approval of the Charity Commissioners, Charity Trustees are prohibited from selling or charging any portion of their charity lands. It follows, I think, that in this country, as there is no enactment dealing with this matter and as there is no authority in India corresponding to the Charity Commission in England, the authority of Charity Trustees to sell Charity lands must be conferred upon them by virtue of relevant provisions in a scheme legally established under sanction of the Court or else by an order obtaining from the Court in the exercise of jurisdiction of a nature analogous to the jurisdiction of the Courts of Chanaery in England.

Mr. Roy relied on the case of In re: *Mason's Orphanage* and *London and North Western Railway Co.* (1). The head note of that case runs as follows: A deed founding a "Charity, and fully enrolled under 9 Geo. 2. C. 36, is not" a

1. (1896) 1 Ch. 596=65 L J Ch 439=44 W R 339=74 L T 161.

Scheme legally established "within S. 29, Charitable Trust" Amendment Act, 1855, and the Trustees in whom the lands of the charity are vested cannot sell such lands under a power of sale contained in the deed, otherwise than with the authority of "Parliament or of the Court or with the approval of the Charity Commissioners." That case therefore so far from being of any assistance to the appellant in the present instance operates to my mind in a contrary sense, because it shows that even if there had been a trust deed in existence that deed of itself might not have been sufficient to authorise the Trustees of the Hospital to dispose of any portion of the land held by them as such Trustees. In order to have the necessary power to dispose of such property it would appear from this very case that there should either be a "scheme" containing a provision authorising the Trustees to sell, mortgage or otherwise deal with the trust property or else they should come to Court and ask the Court to exercise its chancery jurisdiction and give sanction for a partlcular sale. In my opinion, unless there is either a "scheme" which in this country would have to be framed under the authority of the Court or sanction is obtained from the Court for a particular sale, the position then is as stated by my Lord the Acting Chief Justice. To use the words of Sterling, J. in the case just referred to, "even when no express power of sale existed, a sale might be made" of the charity estate, provided it were in accordance with a provident administration of the estate for the benefit of the charity; but the purchaser took subject to the obligation of showing that the sale was beneficial to the charity and justified "by the circumstances." The matter is dealt with in Dart on Vendors and Purchasers as follows :

"There is no positive law that property belonging to a charity should be absolutely inalienable, but when the dealing is with the Trustees on their own authority, the onus is thrown on the alienee and those claiming under him of showing that the sale was beneficial to the Charity; and, unless this can be done, the transaction will be set aside."

It follows that in the present instance in the absence of a properly constituted Scheme sanctioned by the Court and in the absence of an application to the Court for a sanction ad-hoc, the position of the purchaser would be as indicated by the passage I have just quoted. Therefore no competent attorney would be likely to allow his client as a purchaser to put himself into the position of having to take the risk that at some time or other he might be called upon to show the purchase made by him was beneficial to the charity whose trustees were the vendors to him. It is not surprising therefore and indeed it was in my opinion reasonable and proper that the Solicitors for the purchaser, should, by the letter of 2nd July 1931 finally have declined to proceed to completion of the sale, especially bearing in mind that although by their letter of 25th June 1931 they suggested to the vendor that he should put himself in order by applying to the Court, the vendor declined or at any rate neglected to take any such course. The judgment of the learned Judge in the Court of first instance therefore is in my opinion correct.

K.S. *Appeal dismissed.*

A. I. R. 1934 Calcutta 377

MUKERJI, J.

Akhil Bandhu Guha and *others*—Appellants.

v.

Sm. Suradhuni Debya Chowdhurani and *others*—Respondents.

Preliminary Point in Original decree No. 2 of 1934, Decided on 13th December 1933.

(a) Court-fees Act (7 of 1870), S. 6, Sch. 1, Art. 1 and Sch. 2, Art. 17—Construction.

It is not the policy of law to tax with court-fees ad valorem every advantage which a party is seeking for in Courts. [P 379 C 1]

(b) Court-fees Act (7 of 1870), Sch. 1, Art. 1 and Sch. 2, Art. 17 (iv)—Suit against mortgagor joining other mortgagee with both prior and subsequent mortgages—Decree in form 9, App. D, ignoring prior mortgagee's claim as such — Prior mortgagee praying for decree in form 10, App. D, with liberty to sell property covered by his subsequent mortgage, but not included in mortgage in suit—Memorandum of appeal must be stamped under Sch. 2, Article 17 (iv)—Civil P. C. (1908), App. D, forms 9 and 10.

A held a prior mortgage and two subsequent mortgages in respect of some properties which were covered by the mortgage of *S*. *S* brought a suit for the enforcement of his mortgage. The dues on all the four mortgages were found by the Court and a decree passed in form 9 of App. D, which is the form applicable to a decree in a suit by the first mortgagee against the mortgagor with second mortgagee as a party. This was done ignoring *A's* prior mortgage which, if

it had been taken into account, would have made *S* the second mortgagee and *A* first mortgagee as well as subsequent mortgagee, and refusing *A's* prayer for decree in form 10 as *S* had not prayed for redemption of *A's* prior mortgage. The Court had also refused *A's* prayer to be given liberty to apply for sale of additional property mortgageed under one of the subsequent mortgages but not covered by *S's* mortgage. The memorandum of appeal preferred by *A* repeated the prayers refused and bore court-fee under Sch. 2, Art. 17 (4) :

Held : that the dues on *A's* mortgages could not be regarded as the value of the subject-matter in dispute and the advantages which *A* was seeking could not be assessed at money value so long as *A* was asking for them in the suit by *S* and that the memorandum of appeal could not be brought within Art. 1, Sch. 1 and was properly stamped. [P 378 C 2; P 379 C 1]

Atul Chandra Gupta, Ramendra Chandra Roy and *Hiran Kumar Roy*—for Appellants.

S. C. Basak and *Rupendra Kumar Mitter*—for the Secretary of State.

Judgment. — The appellants held a prior mortgage (Ex. S) and two subsequent mortgages (Exs. R and T) in respect of some properties which are also covered by a mortgage (Ex. 1) in favour of the plaintiff-respondent. There are some additional properties in Ex. 1 and Ex. T, but the matter is of no importance in this connexion. There were two mortgagors, of whom one having died, the other is now the sole respondent representing the entire interest of the mortgagors.

The suit was for enforcement of the plaintiff's mortgage. The dues on all the four mortgages have been found by the Court below, which has made a decree in form 9, App. D, which is the form applicable to a decree in a suit by the first mortgagee against the mortgagor with the second mortgagee as a party. The Court has thus given the plaintiff relief on the basis of his being the first mortgagee and ignoring the appellant's mortgage (Ex. S), which, if it is taken into account, would make the plaintiff the second mortgagee and would make the appellants the first mortgagees as well as subsequent mortgagees after the plaintiff's mortgage.

On the basis on which the Court below has proceeded : (a) The Court has made a decree in form 9 and has refused to make a decree in form 10 as was asked for on behalf of the appellants' because the plaintiff had not prayed for redemption of the appellants prior mortgage. It has thus ordered the sale of the property subject to the prior mortgage unless a sale free from the prior mortgage is properly applied for under O. 34, R. 12. (b) The Court has refused the appellants' prayer to be given liberty to apply for the sale of the additional property mortgaged by Ex. T (which is not in Ex. 1). It has held that this is an advantage which the appellants are claiming in excess of what they can have in the plaintiff's suit. (c) The Court has refussd the appellants' prayer for a reservation of their right to apply for a personal decree. It has held that such a right cannot be reserved for a defendant.

The prayers, refused as above, have been repeated in the memorandum of appeal which the appellants have preferred. We are not concerned, at the present stage, with the merits of the prayers or of the grounds upon which they have been refused. The question, at this stage, is only a question of court-fees. The Crown relies upon Sch 1, Art. 1 and contends that the case falls within the words :

" Memorandum of appeal not otherwise provided in this Act . . . . when the amount or value of the subject matter in dispute, etc."

The appellants desire to bring the case within the words of Sch. 2, Article 17 (vi) :

" Memorandum of appeal in each of the following suits . . . . every suit where it is not possible to estimate at a money-value the subject-matter in dispute and which is not otherwise provided by this Act."

It is conceded that there is no other provision which need be considered or is specifically applicable. The appellants no doubt are asking for certain advantages, but they are doing so only on the footing of their being prior as well as subsequent mortgagees who were made parties to the suit. The decree which has been or may be passed in the suit will, no doubt, be a decree to their advantage and which they will be competent to execute, to the extent that it entitles them to any relief or reliefs on their own mortgages. But their position in the appeal must be that as defendants in the plaintiff's suit they are entitled to have certain rights protected in the decree which the plaintiff obtains or has obtained. This being the true view to take of the situation I am unable to see how the dues on the appellants' mortgage or mortgages can be regarded as

the value of the subject-matter in dispute, or how the dispute, such as there is in the appeal, may be valued in terms of such dues. In my opinion the advantages which the appellants are seeking cannot be assessed at a money-value, so long as they are asking for them in the present suit or in the present appeal.

It should be remembered that it has not been the policy of the law to tax with court-fees ad valorem every advantage which a party is seeking for in Courts: were it otherwise a written statement by a puisne mortgagee would have been so taxed. The fact seems to me to be this: that until the amendments of the Code in 1929 a prior mortgagee's rights were not required to be adjudicated on in a suit by a puisne mortgagee in the manner now provided for, and that the legislature, while it has now enacted form 10 and given it statutory recognition in Rr. 2 (3) and 4 (4), O. 34, has not yet made any provision for court-fees which may be payable by the prior mortgagee. Whether it is possible for the appellants to get in the present suit the advantages he wants is of course a different matter, and, as I have already stated, with that we are not concerned at the present stage. But I am clearly of opinion that the present case cannot be brought within Art. 1, Sch. 1 without unduly straining the words of that article.

The appeal has arisen out of a suit which is not otherwise provided for by the Act and it is not possible te estimate at a money-value the subject-matter of the dispute which is there in the appeal. The case, in my judgment. comes within the words of Cl. (vi), Article 17, Sch. 2 of the Act, and the memorandum of appeal should bear the court-fees required by that clause.

V.B. *Order accordingly.*

A. I. R. 1934 Calcutta 379

MUKERJEE AND S. K. GHOSE, JJ.

Kandarpa Mohan Gossain—Applt.

v.

Akhoy Chandra Bose and *another*—Respondents.

Appeal No. 23 of 1933, Decided on 23rd August 1933.

(a) Deed — Construction — Donee having power to appoint successor—No gift over in favour of successor is created.

Where the donee is competent under the terms of the deed, to appoint his successor, the deed cannot be read as providing for a gift over in favour of the successor. [P 382 C 1]

(b) Deed—Construction—To get out of *Tagore* v. *Tagore* donee must not be after-born and gift over must be effective.

A person who is not an after-born is not hit by *I. A. Sup, Vol.* 47 provided there is an effective gift over in the donee's favour. If the gift over is a gift to a class the rule of construction in *Leake* v. *Robinson*, 2 *Mer* 363, is not to be applied, but if the plan be to give a present gift to persons capable of taking, that gift is effectual, even though it may also be intended that other persons, incapable of taking should come in afterwards and share in the gift. [P 382 C 1]

(c) Deed—Construction—Duty of Court—Donor Hindu—Court must consider that notions of Hindus are different from those of Englishmen.

The Court, in construing the intentions of a Hindu donor or a Hindu testator, must bear in mind that the form of expression, or the literal sense, is not to be so much regarded as the real meaning of the parties and that notions present to the mind of a Hindu donor or Hindu testator are often very different from those which are present to the minds of an English testator or an English donor even though much the same form of words is used by both: 6 *All* 560 (*P C*), *Ref.* [P 383 C 1, 2]

(d) Deed—Construction—Donee having uncontrolled power of alienation—Gift is absolute—Mere word "absolute" is not always sufficient—Much depends upon intention of parties.

A gift is absolute, when by such gift an interest or ownership is created, entitling the donee to deal with the subject of the gift according to his pleasure, and conferring upon him an uncontrollable power of alienation, either by deed, gift or will. In other words, the powers of a donee under such a gift are not confined to any particular mode or modes of dealing with the thing owned, but are of indefinte extent, both as regards possession, use or enjoyment and alienation thereof. The word "absolute" implies both unlimited in estate and unfettered in respect of any condition or trust. While the word "absolute" itself, generally speaking, is sufficient to create an absolute estate there may be cases in which it does not; and words of inheritance also do not necessarily always confer such an estate. The question is always a question of intention to be gathered from the entire context taken together. There may be various kinds of restraint imposed on the power of alienation, e. g., alienations of a particular class or to a particular class of individuals or the restricting may be to a particular time: *Irvine* v. *Sullivan*, (1869) 8 *Eq* 673 and *In re Macleay*, (1875), 20 *Eq* 186, *Ref.* [P 383 C 2]

(e) Deed—Construction—Gift unlimited—Construction of—Gift for life or absolute gift possible—General power of appointment with gift over—First gift is absolute.

Where there is a gift not limited in any way but equally capable of being construed as a gift

for life or an absolute gift, and it is followed by a general power of appointment and a gift over in default of appointment, the first gift should be treated as an absolute gift unless the whole frame of the will suggests otherwise.

[P 384 C 1]

(f) Hindu law—Endowment—Construction—Deed of settlement, dedicating properties to deity—Settlors appointed shebaits—Provision as to successors—Appointment of successors, coupled with provision for office to be limited to eldest male descendants connotes absolute gift of shebaitship.

By a deed of settlement of 13th September 1916 two sisters *A* and *B* dedicated certain properties to a deity and appointed themselves shebaits for their lives with power to nominate or appoint their successors by deed or will. In default of such apppointment by *A*, *M* (her spiritual guide) or in case of default *M's* eldest male heir, and in like default by *B*, *H* (her spiritual guide) or in case of his death *H's* eldest male heir, jointly with the survivor of the settlors and after the settlor's death without any appointment of successors, *M* and *H* or their or his eldest male heir were to act as joint shebaits and thereafter the future shebaits were to be the eldest male descendants of *M* and *H*. Every future shebait was to have power to nominate and appoint by deed or will his successor in office. At no time there would be less than two shebaits. *B* died without appointing a successor. *H* then acted as shebait and on *H's* death without appointing a successor his son *K* brought a suit, while *A* was alive to establish his right to succeed his father *H* as shebait.

Held: the true intention of the deed was to confer the shebaitship in absolute right to *H* with power to him to appoint his successor at any time he pleased, and should he not exercise that power to leave the shebaitship to be inheritance to the eldest inherited by his heirs, but with a condition restricting such inheritance to the eldest descendant to the exclusion of others. Although the condition was invalid, that did not affect the gift in favour of *H* which was in absolute gift of the shebait in his favour descendible on his heirs in the line of inheritance as under the Hindu law on *H's* death therefore *K* came to be entitled to the shebaitship. [P 384 C 1]

J. C. Hazra and *S. Hazra*—for Appellant.

S. N. Banerjee and *Shambhu Banerjee*—for Respondent.

Judgment.—For the purposes of the question which falls for determination in this appeal it would be sufficient to state the following facts: On 13th September 1916, two ladies, Surobala Dasi and Sarajubala Dasi, who were sisters, dedicated by a deed of settlement a piece of land with a temple and a house standing thereon to a deity whom they had installed and consecrated therein and appointed themselves shebaits and conveyed to themselves the said properties upon trust for the management and performance of the worship of the said deity. It was provided in the deed that the expenses of the worship were to be defrayed out of the moneys to be paid to them by the trustees of the temple, derived from properties to be settled thereafter for the maintenance thereof, and that the shebaits shall have no proprietary interest in the temple and house and the land appertaining thereto and shall have no power to sell, mortgage, alienate, encumber or in any way deal therewith but shall merely be managers for the protection and repairs of the premises and performance of the worship according to a scheduled scheme. Then followed Cl. 5 of the deed which is the clause of importance in this case. It ran in these words:

"That the said settlors shall during their natural lives act as such shebaits as aforesaid with power to each of them to nominate or appoint by deed or will her successor in office. In default of such appointment by the said Sm. Surobala Dasi her spiritual guide, Babu Mohendra Nath Chatterji of Salkia, or in case of default his eldest male heir, and in like default by the said Sm. Sarajubala Dasi her spiritual guide Babu Hari Mchan Gcssain, or in the case of his death his eldest male heir, jointly with the survivor of the said settlors, and after the death of both of the said settlors and in default of such appointment as aforesaid the said two spiritual guides or their or his eldest male heir shall act as joint shebaits, of the said deities, and thenceforth the future shebaits shall consist of the eldest male descendants of the said Mohendra Nath Chatterji and the said Hari Mohan Gossain, provided always that every future shebait of the said deities shall have like power to nominate and appoint by deed or will his successor in office."

Sarajubala acted as shebait until she died in April 1917 without appointing her successor. Thereupon the said Harimohan Gossain acted as shebait. Surobala never acted as shebait. On 19th July 1921 Harimohan Gossain died without appointing any successor, and thereupon the plaintiff Kandarpa Mohan Gossain, who is the only son of Harimohan acted as shebait in his place. On 20th April 1931 Surobala died appointing her successor. The present suit was instituted while she was alive and with her as a defendant. The question to be determined is, whether the plaintiff was entitled to succeed his father Harimohan as shebait. Lort Williams, J., has held upon the authority of *Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore* (1)

1. (1872) I A Sup Vol 47=9 Beng L R 377=18 W R 359=2 Suther 692=3 Sar 82 (P C).

and *Monohar Mukherjee* v. *Bhupendra Nath Mukherjee* (2), that the provision in the deed that the succession is to be held by certain heirs of Harimohan to the exclusion of others in a line contrary to the Hindu law of inheritance was invalid, and so the plaintiff, who can succeed only under that provision had no title. He has held that upon the terms of the deed the only question was whether the plaintiff can be said to have taken by way of gift over upon the death of his father Harimohan, or whether he could only take by way of inheritance under a provision which was invalid. He has held that the intention of the deed was not to provide for a gift over after Harimohan's death in favour of the plaintiff, in which case only the plaintiff could succeed. In the above view, he has dismissed the suit, which rests on the foundation of the plaintiff's title as shebait. The plaintiff has appealed.

Before dealing with the appeal it would be convenient to notice a contention which Mr. Banerji has put forward on behalf of the defendant, now respondent. He has urged that even on the assumption that the provision referred to above is a valid one, it gives no place to the plaintiff. He has contended that the plaintiff could come in on the death of Sarajubala, if Harimohan was not then alive, under the words,

"in like default by the said Sm. Sarajubala Dasi her spiritual guide Babu Hari Mohan Gossain, or in case of his death his eldest male heir."

And that opportunity not having occurred, it has been contended, the plaintiff's next opportunity to come in would be after the death of both the settlors, under the words

"after the death of both of the said settlors, and in default of such appointment as aforesaid the said two spiritual guides or their or his eldest male heirs."

Surabala, as already stated, died after the institution of the suit. It is said accordingly that for the period antecedent to the suit, which is the relevant period for which plaintiff's title is in dispute, the plaintiff had no title. In our opinion such a construction should not be favoured because in that case after Harimohan's death and till Surabala died there would be nobody competent to take as shebait in the place of Sarajubala, but that could never be the intention of the settlors; for the settlors in Cl. (6) of the deed have expressly declared,

"it being the intention of the said settlors that at no time hereafter there shall be less than two shebaits of the said deities."

Mr. Hazra's first contention in the appeal is that it should have been held that in favour of the plaintiff there was a gift over of the shebaitship after Harimohan's death, and such gift should take effect. Considerable reliance has been placed in this behalf upon the following passage in the judgment of their Lordships of the Judicial Committee in *Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore* (1):

"If, on the other hand, the gift were to a man and his heirs, to be selected from a line other than that specified by law, expressly excluding the legal course of inheritance, as, for instance, if an estate were granted to a man and his eldest nephew, and the eldest nephew of such eldest nephew, and so forth for ever, to take as his heirs, to the exclusion of all other heirs, and without any of the persons so taking having the power to dispose of the estate during his lifetime, here, in asmuch as the inheritance so described is not legal such a gift can not take effect, except in favour of such persons as could take under a gift to the extent to which the gift is consistent with the law. The first taker would, in this case, take for his lifetime, because the giver had at least that intention. He could not take more because the language is inconsistent with his having any different inheritance from that which the gift attempts to confer, and that estate of inheritance which it confers is void".

Reliance is placed upon the word "person" used in the plural, and the words "first taker", and it is argued that these words indicate that such of the persons namely "eldest nephew", "eldest nephew of such eldest nephew" and so forth were also regarded by their Lordships as persons in whose favour there was a gift over and could be takers of the gift to the extent that the gift was consistent with law. From this it is argued that the plaintiff is also to be regarded as a person in whose favour there was a gift over, and if it is possible to hold that he could take the gift as it is possible because he is the only son of Harimohan and was alive at the date of the deed, it should be held that the plaintiff did on Harimohan's death acquire a title under the gift. This argument overlooks a fact, which in our opinion is a most important fact namely that in the hypothetical case which their Lordships were dealing with in

2. A I R 1932 Cal 791 = 141 I C 544 (F B).

the passage quoted above there was a reservation in these words,

"and without any of the porsons so taking having the power to dispose of the estate during his life-time".

In the present case Harimohan was competent, under the terms of the deed, to appoint his successor. That being the position the deed cannot be read as providing for a gift over in favour of the plaintiff.

We shall refer now to some of the cases upon which Mr. Hazra has relied. While not disputing the correctness of the Full Bench decision Mr. Hazra has contended that that decision does not touch the present case because in the Order of Reference in that case it was said that

"successive life estates are no part of the Hindu law of inheritance, but a man can be appointed to an office for life and save as regards after-born persons no difficulty has ever been suggested."

And he has contended that as the plaintiff was not an after-born he is not hit by *Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore* (1). This, of course, cannot be disputed provided it may be held that there was an effective gift over in plaintiff's favour. If it can be so held then there can be no question that if the gift over is a gift to a class the rule of construction in *Leake* v. *Robinson* (3), is not to be applied but that if the plan be to give a gift to persons capable of taking, that gift is effectual, even though it was also intended that the other persons, incapable of taking should come in afterwards and share in the gift. This latter rule of construction was well expressed by Wilson, J., at the end of his illuminating judgment in the case of *Ramlal Sett* v. *Kanai Lal Sett* (4), in the words that he should be

"prepared to hold as a general rule that where there is a gift to a class some of whom are or may be incapacitated from taking because not born at the date of the gift or the death of the testator as the case may be and where there is no other objection to the gift, it should enure for the benefit of those members of the class who are capable of taking."

Some of the cases cited by Mr. Hazra are cases illustrative of this rule of construction : *Kumar Tarakeswar Roy* v. *Soshi Sikhaseswar* (5) and *Bhagabati Barmanya* v. *Kate Charan Singh* (6). Another decision relied upon was *Kamini* v. *Dasi Asutosh* (7) and the argument based on it was that upon a clause in the Will concerned in that case, which has now been found to be invalid (see *Pramatha* v. *Anukul Chandra* (8), approved in *Monohar Mukerji* v. *Bhupendra Nath Mukerji* (2), Ashutosh who came within that clause was allowed to succeed. In our opinion however that case cannot be used as an authority for such a purpose, because no such question was decided in it. Lastly, the case of *Gopal Chunder Bose* v. *Kartick Chunder Dey* (9) has been cited. In that case there was a Will containing a clause that a shebaitship should be held by the testator's wife, and after her death by his son and after his death

"by my daughter and her husband Nando Doolal Bose and their male children successively."

The clause was construed as meaning the daughter, the daughter's husband and their male children for their respective lives and in that sense 'successively,' and not that the word 'successively' should be read as meaning son and sons' sons in succession; and this construction was upheld by the Judicial Committee. We do not see that this case assists the plaintiff.

We have examined the terms of the deed to which we have referred above as closely as possible and we think we must agree with Lort-Williams, J., in holding that it is not possible to read it as making an independent gift over in favour of the plaintiff, but that if the plaintiff was to come in at all he must come in as the eldest male descendant of Hari Mohan and to the exclusion of Harimohan's other heirs and that in that way the case in *Madhav Rao* v. *Balabhai* (10) is distinguishable and should be distinguished.

The appellant's first contention based upon the position that there was a gift over and that the same should take effect, so far as the plaintiff is concerned, for he was not an after-taker but was a person alive at the date of the gift must in our judgment, fail.

3. 2 Mer 363.
4. (1886) 12 Cal 663.
5. (1884) 9 Cal 952=10 IA 51=4 Sar 439 (PC).
6. (1911) 38 Cal 468=10 I C 641=38 I A 54 (P C).
7. (1889) 16 Cal 103=16 I A 159 (PC).
8. A I R 1925 Cal 225=85 I C 857.
9. (1902) 29 Cal 716 (PC).
10. A I R 1928 P C 33=107 I C 119=55 I A 74 =52 Bom 176 (PC).

Mr. Hazra has next contended that the plaintiff was entitled to succeed as heir to his father Harimohan. This contention, it is apparent, can only succeed if there was an appointment of him by Harimohan as provided for in the deed or if Harimohan had an absolute estate conferred on him by the deed. As regards appointment, it is nobody's case. The other matter has to be carefully examined. In construing gifts of this character the observations of the Judicial Committee in *Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore* (1) should be borne in mind:

"Another general principle applicable to transfer by gift (more liberally applied in the law of England than to gifts intra vivos) is that a benignant construction is to be used; and if the real meaning of the document can be reasonably ascertained from the language used, though that language may be ungrammatical or untechnical, or mistaken as to name or description, or in any manner incorrect, provided it sufficiently indicate what was meant, that meaning shall be enforced to the extent and in the form which the law allows. Accordingly, if the gift confers an estate upon a man with words imperfectly describing the kind of inheritance, but showing that it was intended that he should have an estate of inheritance, the language would be read as conferring an estate inheritable as the law directs. If an estate were given to a man simply without express words of inheritance, it would, in the absence of a conflicting context, carry by Hindu law (as under the present state of law it does by will in England) an estate of inheritance. If there were added to such a gift an imperfect description of it as a gift of inheritance, not excluding the inheritance imposed by the law, an estate of inheritance would pass. If again, the gift were in terms of an estate inheritable in law, with superadded words, restricting the power of transfer which the law annexes to that estate the restriction would be rejected as being repugnant, or, rather, as being an attempt to take away the power of transfer which the law attaches to the estate which the giver has sufficiently shown his intention to create, though he adds a qualification which the law does not recognize."

And from the observations which their Lordships of the Judicial Committee, have made in different decisions from time to time, it is clear that the Court, in construing the intentions of a Hindu donor or a Hindu testator, must bear in mind that the form of expression, or the literal sense is not to be so much regarded as the real meaning of the parties: see *Hanooman Perhad* v. *Babooee Munraj* (11) and that notions present to the mind of a Hindu donor or Hindu testator are often very different from those which are present to the minds of an English testator or an English donor even though much the same form of words are used by both: see *Rai Bishen Chand* v. *Asmaida Koer* (12).

Now, what is the gift of an absolute estate? A gift is absolute, when by such gift an interest or ownership is created, entitling the donee to deal with the subject of the gift according to his pleasure, and conferring upon him an uncontrollable power of alienation, either by deed, gift or will. In other words, the powers of a donee under such a gift are not confined to any particular mode or modes of dealing with the thing owned but are of indefinite extent, both as regards possession, use or enjoyment and alienation thereof. The word "absolute" implies both unlimited in estate and unfettered in respect of any condition or trust: Per *James V. C.* In *Irvine* v. *Sullivan* (13) at p. 680. While the word "absolute" itself, generally speaking, is sufficient to create an absolute estate there may be cases in which it does not; and words of inheritance also do not necessarily always confer such an estate. The question is always a question of intention to be gathered from the entire context taken together. If shebaitship is property, what was granted to Harimohan was that property not fettered by any condition or limitation, as regards its possession, use or mode of enjoyment. The question to be considered is was any power to dispose of the shebaitship given to Harimohan? There may be various kinds of restraint imposed on the power of alienation: You may prohibit alienation absolutely; you may restrict it by prohibiting a particular class of alienation; you may restrict it by prohibiting it to a particular class of individuals or you may restrict alienation by restricting it to a particular time: see Jessel M. R. in *In re Macleay* (14). Apart from such restrictions as there must be by reason of the character of the property itself, i. e., the shebaitship, there was no restriction of

11. (1854-1857) 6 M I A 392=18 W R 81 N=2 Suther 29=1 Sar 522 (P C).

12. (1883) 6 All 560=11 I A 164=4 Sar 512 (P C).
13. (1869) 8 Eq 673=38 L J Ch 635=17 W R 1083.
14. (1875) 20 Eq 186=44 L J Ch 441=23 W R 718=32 L T 682.

any of the above descriptions in this case. There are no words indicating "for life" used in connexion with the gift to Harimohan. The power of nomination and appointment of a successor by deed or will was given; indicating that even during Harimohan's lifetime, somebody else nominated and appointed by him could take as shebait. In Jarman on Wills, 7th Edn., Vol. 2, p. 766 it is said:

"Whenever a testator gives property to *A* and then provides for the case of *A's* dying without having disposed of it, the question arises whether the original gift is an absolute one, in which case the gift over is repugnant and void; or whether *A* takes an estate for life, with a general power of appointment, followed by a gift over in default of appointment."

It has been pointed out by the learned Author that the distinction is difficult to draw, but the cases referred to by him in connexion with this matter do, in our opinion, lend support to the proposition that where there is a gift not limited in any way but equally capable of being construed as a gift for life or an absolute gift, and it is followed by a general power of appointment and a gift over in default of appointment, the first gift should be treated as an absolute gift unless the whole frame of the will suggests otherwise. In our judgment, the true intention of the deed in the present case was to confer the shebaitship in absolute right to Harimohan, with power to him to appoint his successor at any time he pleased, and should he not exercise that power to leave the shebaitship to be inherited by his heirs, but with a condition restricting such inheritance to the eldest descendant to the exclusion of others. The condition, it is true, is invalid. But that does not, in our judgment, affect the gift in favour of Harimohan which was an absolute gift of the shebait in his favour, descendible on his heirs in the line of inheritance as under the Hindu law. We hold therefore that the plaintiff on Harimohan's death came to be entitled to the shebaitship.

We accordingly allow the appeal with costs against the respondent, and, finding the question of title in plaintiff's favour, send back the case for the determination of those questions which have not yet been determined.

V.B. *Appeal allowed.*

A. I. R. 1934 Calcutta 384

MUKERJI, J.

Mahim Chandra Gope—Appellant.

v.

Sailendra Chandra De and *others*—Respondents.

Appeal No. 2672 of 1930, Decided on 24th January 1933, from appellate decree of First Court Sub-J., Mymensingh, D/- 23rd June 1930.

Civil P. C. (1908), S. 11 — Mortgage executed by two brothers in respect of undivided shares of themselves as well as share of another brother—Suit on mortgage— No averment in plaint that mortgagors were expressly or impliedly authorised to mortgage share of other brother also—Other brother impleaded with no averment against him in plaint—Suit decreed ex parte and property sold in execution—Subsequent suit by son of third brother for declaration of title and possession of his father's share — Suit held not barred by doctrine of constructive res judicata.

Three brothers had certain undivided but definite shares in property. Two of them mortgaged the shares of the three brothers and a suit was filed on the mortgage by the mortgagee impleading the two mortgagors as principal defendants and the third brother as a pro forma defendant. There was no averment in the plaint that the executant brothers were expressly or impliedly authorised by the third brother to mortgage his share also nor was there any other averment against him in the plaint except the statement at the end of the plaint under the heading "remarks" that he had been impleaded as a party in order that the suit may be decided in his presence. The suit was decreed exparte and in execution the property was sold. Subsequently the sons of the third brother sued for declaration of their title and for possession of their father's share. It was contended that as his father was a party in the suit he and his sons were bound by the decree in the mortgage suit and their present suit was barred.

Held: that if in answer to the plaint, the plaintiffs' father as pro forma defendant, had raised a plea that the mortgagors had no right to mortgage anything more than their own share or that in the share of 8 annas which had been under mortgage, he had a share which the mortgagors had no authority to mortgage, such a defence would have raised a question of title paramount which fell outside the scope of the suit as framed. It was only by pleading expressly in the plaint that the share of the plaintiffs' father had, in fact, been mortgaged under an authority, express or implied, that the suit could have been made to embrace a scope sufficient to be open to such a defence. The question of title of the plaintiffs' father did not arise in the mortgage suit, and any decision that may have been intended was not a decision by which the plaintiffs' father was, or the plaintiffs were, bound. Nor could the omission on the part of the plaintiffs' father to raise the question of his own title in that suit preclude him from raising it in any subsequent

litigation, or the plaintiff from setting it up in the present suit. [P 387 C 1, 2]

Annada Charan Karkoon—for Appellant.

Upendra Kumar Roy — for Respondent.

Judgment.—The plaintiffs' case was that their father, by inheritance and by joint purchases with his own brothers, i. e., defendants 2 and 3, had a 5 annas and odd share in a certain taluk, that defendants 2 and 3 also, by inheritance by joint purchases with the plaintiffs' father, had a 4 annas and old share therein, and that the plaintiffs' father thereafter made several separate purchases with his own funds in respect of a total share of 3 annas odd share of the taluq. Their case further was that although defendants 2 and 3 had thus only a 4 annas odd share as aforesaid, they mortgaged an 8 annas share to the father of defendant 1 and that the father of defendant 1 on the basis of the said mortgage obtained an exparte decree, got it made final, put the decree to execution and purchased the said 8 annas share, and after having obtained delivery of possession got his name registered in the Collectorate in respect of it. The plaintiffs' case was that they had been thus dispossessed from a 3 annas odd share in the taluk and they asked for a declaration of their title to that share, alleging that the said share did not pass by the mortgage sale, that they were minors at the date of the execution and the sale, that no proper guardian was appointed for them in those proceedings and that the entire proceedings were tainted with collusion and fraud and were accordingly not binding on them. The defence was a denial of the allegations made in the plaint, and an averment that the plaintiffs were bound by the decree on the mortgage and the sale thereunder.

The facts which require mention are the following: defendants 2 and 3 executed the mortgage in 1902. In 1909 the mortgagee instituted the suit with defendants 2 and 3 as the principal defendants, and impleading the plaintiffs' father as the pro forma defendant. An exparte preliminary decree was passed in 1909, and it was eventually made final in 1911. After that, as has been found by both the Courts below the plaintiffs' father died, and after his death, exceution was taken in respect of the decree. The plaintiffs were admittedly minors at the time. The sale took place in 1912, and the mortgagee auction-purchaser took delivery of possession in 1913. In 1915 the plaintiffs, represented by their maternal uncle as their guardian, applied to set aside the exparte decree, but failed in the trial Court as well as in appeal. In 1916 the mortgagee obtained a personal decree for the balance against defendants 2 and 3 and as against the assets of the plaintiffs' father in the hands of the plaintiffs. Subsequently, the father of defendant 1, and thereafter in 1925, defendant 1 himself got his name registered in respect of the purchased 8 annas share. The present suit was commenced on 4th May 1927. The Munsif held that the question of the plaintiffs' title is not barred on any principle of res judicata by reason of the decision in the mortgage suit; but that there was no collusion or fraud in connexion with the execution proceedings and the sale, and that the decree and the sale were binding upon the plaintiffs because their father was a party to the mortgage suit just as much as defendants 2 and 3 were. He held accordingly that the plaintiffs' right to the taluk had passed to defendant 1's father by his purchase. In this view of the matter the Munsif dismissed the suit. It appears to have been conceded before the Subordinate Judge on behalf of the defendants that if the mortgage decree did not bind the plaintiffs, the execution proceedings culminating in the sale of the mortgaged properties and the purchase thereof by the father of defendant 1 would not bind the plaintiffs. On that concession being made the Subordinate Judge did not feel called upon to adjudicate upon the validity of those proceedings. He observed however that,

> "the plaintiffs had impeached the execution proceedings as not binding on them as they were not properly represented therein by their legal guardian,"

but he found that "there was a good deal of force in their contention." As regards the merits of the decree itself, his finding was that defendants 2 and 3 had, when they had only a 4 annas odd share, misrepresented their share to have been 8 annas, and there was

no evidence to show that the plaintiffs' father was in any way benefited by the mortgage. He held on the evidence thus:

"On the other hand, the evidence for the plaintiffs clearly proves that the father of the plaintiffs was in affluent circumstances and had no necessity for raising any money by loan through his brothers defendants 2 and 3."

He held that the decree in the mortgage suit did not operate as a bar to the trial of the question of the plaintiffs' title because the question of title that has been raised in the present suit could not and need not have been raised in the previous suit, having regard to its frame and constitution. The Subordinate Judge therefore made a decree in plaintiffs' favour. Defendant 1 has then preferred this appeal. The question raised on his behalf is whether the plaintiffs are precluded from claiming the share they have claimed in this suit, seeing that their father was a party to the mortgage suit in which the decree for sale was made. The Subordinate Judge has dealt with this question in these words:

"In the plaint of the mortgage suit defendants 2 and 3 to this suit were impleaded as the principal defendants and the father of the plaintiffs as pro forma defendant. In the body of the plaint there is no allegation that defendants 2 and 3 had contracted the mortgage-debt in the interest of the joint family property, but in a remark just before the verification it was stated that as defendants 2 and 3 had borrowed on the mortgage of joint family property and for joint property purposes, the suit should be tried in the presence of the father of the plaintiffs as pro forma defendant 3 in that case * * * The matter is not altogether free from doubt and difficulty. As far as I have been able to hunt up, this matter seems to have been set at rest by the decision of the Calcutta High Court in the case reported in *A. I. R.* 1929 *Cal* 672 * * * In my opinion the facts of the case also attract the application of the principle laid down in *Madhu Sudan* v. *Brae* (1)."

The Subordinate Judge thus held in effect that the principle of constructive res judicata cannot apply to the case, that it was not necessary for the plaintiffs' father in the mortgage suit to set up his own title to the share, and that therefore the plaintiffs are competent to canvas their title to the share they have claimed in the present suit, a title which on the merits he found in their favour.

Now, the answer to the question must depend entirely on the question whether upon the plaint, as framed, the plaintiffs father was bound to raise in that suit the question of his title to any share in the mortgaged property. The suit was tried exparte in all its stages. If the suit had been a contested one, the course of litigation, the judgment, and the terms of the decree would have been of considerable assistance; because in that case the answer would have depended upon what was actually decided and possibly also on what could be taken to have been understood by the parties as the issues involved. Upon the judgment that was passed exparte as aforesaid, I think it is fairly clear that the Court meant to decide that the plaintiffs' father was bound by the mortgage that had been made by his brothers, and intended to pass an effective decree for sale in respect of the eight annas share mortgaged, binding the plaintiffs' father also. But unless the decree was one which the plaint, in its natural meaning, called for, the plaintiff's father would not, in my opinion, be legitimately bound by it. We have therefore to fall back upon the plaint in order to understand its plain import and significance.

I have read the plaint as carefully as I could. I attach no importance whatever to the fact that the plaintiffs' father, who was defendant 3, was only a pro forma defendant. Nor am I prepared to regard the statement, contained though it was in a solitary paragrah after the prayers that were embodied in the plaint, as a statement not contained in the plaint. In other words, in my opinion, it made no difference that the statement on which the defendants in the present suit relies was not contained in the body of the plaint, but in a separate paragraph after prayers, and under the heading "remark." But what was the statement? Translated, it runs thus:

"As defendants 1 and 2 had borrowed the money by mortgaging (ijmali) joint property for purposes of the joint family, defendant 3 is impleaded as a party in order that the suit may be decided in his presence."

My attention has been drawn on behalf of the appellant to the fact that in the body of the plaint and in the prayers the general word "defendants" has been used, without making any discrimination between the principal defendants and the proforma defendant; and from this it has been argued on their behalf that a decree binding against all

1. (1889) 16 Cal 300 (F B).

the defendants and in respect of the entire 8 annas share mortgaged was asked for. In such a case however the explanation under the heading of "Remarks" would have been wholly unnecessary; and, on the other hand, it would have been very necessary to make an averment that the two principal defendants had mortgaged the share of their brother as well under an implied authority from the latter, an averment which is not to be found anywhere in the plaint. It may then be asked, why if no such averment was implied, was the statement and the heading of "remarks" made at all. The explanation, in my opinion, is that the two brothers had mortgaged an undivided share in a joint family property, and the plaintiff mortgagee may have been advised that to make such a mortgage valid it was necessary to show that money was necessary for joint family purposes. This however is a mere speculation. But I cannot omit to attach very great weight to the fact of the omission to plead, in the plaint, that the mortgage had been in respect of the plaintiffs' father's share as well. I am disposed to take the view that when there was no contest, a decision was obtained which purported to go beyond the scope of the suit and the claim made in the plaint.

I do not propose to discuss the decisions to which the Subordinate Judge has referred, nor the decision to which the respondents have drawn my attention, because they are decisions on facts not at all identical and easily distinguishable. But I am of opinion that if in answer to such a plaint, the plaintiffs' father, as pro forma defendant, had raised a plea that the mortgagors had no right to mortgage anything more than their own share or that in the share eight annas which had been under mortgage, he had a share which the mortgagors had no authority to mortgage, such a defence would have raised a question of title paramount which fell outside the scope of the suit as framed. It was only by pleading expressly in the plaint that the share of the plaintiffs' father had, in fact, been mortgaged, under an authority express or implied, that the suit could have been made to embrace a scope sufficient to be open to such a defence. In my opinion, the question of the title of the plaintiffs' father did not arise in the mortgage suit, and any decision that may have been intended was not a decision by which the plaintiffs' father was or the plaintiffs are bound. Nor could the omission on the the part of the plaintiffs' father to raise the question of his own title in that suit preclude him from raising it in any subsequent litigation, or the plaintiff from setting it up in the present suit. I think I should agree with the view of the Subordinate Judge. The appeal is accordingly dismissed with costs. Leave is granted to the appellant to prefer an appeal under the Letters Patent.

K.S. *Appeal dismissed.*

A. I. R. 1934 Calcutta 387

MUKERJI AND BARTLEY, JJ.

Keshardeo Goenka and *others*—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 745 of 1933, Decided on 16th January 1934.

(a) Mines Act (4 of 1923), S. 3 (f)—"Mine" includes works which are incidental to mining operations.

The word "mine" includes in addition to excavations, machinery, etc., works which are incidental to or connected with mining operations. [P 388 C 1]

(b) Words and Phrases—Mine—Term is not definite—Primary signification can be enlarged according to intention of parties or legislature.

The term "mine" is not a definite term but is susceptible of limitation or expansion according to the intention in which it is used and its primary signification can always be enlarged if that is the intention of the contracting parties or the legislature: *Midland Ry. Co.* v. *Hautchwood Brick and Tile Co.*, (1882) 20 *Ch D* 552, *Glasgow Corporation* v. *Farie*, (1888) 13 *A C* 657, *Ref.* [P 389 C 1]

Ram Prosad Mukherji and *Mohit Kumar Chatterjee*—for Petitioners.

Probodh Chandra Chatterji—for the Crown.

Order.—Petitioners 1 and 2 are the owners of a colliery. They appointed one P. N. Ghose as the Manager of the Colliery in August 1932, but the appointment was rejected by the Chief Inspector of Mines on 16th September 1932 as Ghose was already Manager of another Colliery. The said two petitioners were therefore tried on the allegation that in spite of this rejection they allowed Ghose to continue as Manager of their Colliery from 16th to 30th September 1932.

On 1st October 1932 petitioners 1 and 2.informed the Chief Inspector of Mines that they had appointed their Assistant Manager, petitioner 3, to act as Manager of their Colliery for one month from 1st October 1932, as a temporary Manager in a case of emergency. During the course of that month the Chief Inspector of Mines drew the attention of the first two petitioners to the fact that as Mukherji, the third petitioner, had already been appointed a temporary manager after the resignation of the last incumbent in July, he could not be appointed a temporary manager a second time without his special sanction and required them to appoint a duly qualified manager at once. On 2nd November he paid a surprise visit to the colliery and it is said that when he did so he found that Mukherji was still in charge and work going on in it. These constitute another set of facts upon which the three petitioners were tried.

The first two petitioners therefore were tried for two offences for having contravened the provisions of S. 15 (1) and S. 15 (2), Mines Act (4 of 1923) read, with Regns. 21, 22 and 23 of the Indian Coal Mines Regulations, and the third petitioner for having contravened the provisions of S. 15 (2) of the Act read with Regn. 23 of the said Regulations. The offences are punishable under S. 39 of the Act. They have been convicted for the said offences and their sentences as modified by the Sessions Judge are that the first two have to pay a fine of Rs. 500 each, and the third a fine of Rs. 100. Of the grounds on which this rule has been obtained those that have been pressed before us are Nos. 7, 8 and 17.

On these grounds several arguments have been addressed to us. One of the arguments, and that is the main argument in so far as the conviction is based upon a contravention of S. 15 (2) of the Act, is that the expression "if a mine is worked" occurring in the said provision should be read as meaning actual mining operations, that is to say, such operation underground as relates to the actual raising of coal. The learned Judge has held that on 2nd November 1932 the mine was worked within the meaning of the provision. He has observed thus:

> "Mr. Lang deposed that on 2nd November he found no persons engaged underground but the pumping machinery was being worked and a number of the men were carrying out surface duties. As the trying Magistrate has pointed out, the definition of a 'mine' does not mean only underground but also surface activities which Mr. Lang saw fall under the heading of working of a mine."

It may be pointed out that in Mr. Lang's report it was said:

> "When I visited the mine 22 persons were employed loading waggons, and others were employed on the surface, but no miners were at work. Steam was up. Pump Khalasis had been employed on the 1st and over 50 persons had been employed on 31st October."

Now, the word "mine" is defined in Cl. (f), S. 3 of the Act. And the word is to be understood in the sense of that definition wherever it is to be found in the Act, unless there is anything repugnant in the subject or context. The definition, it must be conceded, is clumsy and very loosely expressed. According to the definition, the word means an excavation and includes works and machinery, tramways and sidings whether above or below ground in or adjacent to or belonging to a mine. It is expressed in the widest possible terms: and apart from anything else the expression "adjacent to' which connotes proximity or nearness and not necessarily the idea of touching, seems to have been misused. It is possible that if too strict an interpretation is applied it would include things never contemplated to come within its scope. But, as it stands, there can be no question that in addition to excavations, machinery, etc., and works which are incidental to or connected with mining operations clearly fall within the definition and are meant to be covered by it. This is sufficiently indicated by the definition of the word "employed" as given in S. 3, Cl. (d) of the Act. Whether a particular kind of work comes within the mischief of the definition or not must always be a question of fact. It may be pointed out that although the primary lexicographical meaning of the word "mine" standing alone is an underground excavation made for the purpose of getting minerals, the particular signification of the word as used in a contract, where there is no question of any definition, may be varied largely by the context, (see per Kay, J., in *Midland Ry. Co.* v. *Hautch-*

wood Brick & Tile Co. (1) and per Lord Halsbury, L. C. and Lord Watson and Lord Macnaghten, L.JJ., in *Glasgow Corporation* v. *Farie* (2). The term "mine" is not a definite term, but is susceptible of limitation or expansion according to the intention in which it is used and its primary signification can always be enlarged if that is the intention of the contracting parties or the legislature. We are of opinion that what was found by Mr. Lang as going on on the premises may well be regarded, on a question of fact, as amounting to a working of the mine within the meaning of the Act.

On the question of knowledge on the part of the petitioner 2, so far as that charge is concerned, we are unable to hold that the findings of the two Courts below are not correct. Nor are we prepared to hold that Regn. 24 of the Regulations would exonerate the petitioners in respect of the offence upon the facts that have been found against them. We have considered the question of the sentences so far as petitioners 1 and 2 are concerned. The sentences are no doubt heavy. But according to Mr. Lang's report, this was not the first occasion that the petitioners were found contravening the law, and moreover the contravention in the present case was persisted in inspite of the warning given in Ex. 2. The rule is discharged.

R.G. *Rule discharged.*

1. (1882) 20 Ch D 552=51 L J Ch 778=46 L T 301=30 W R 640.
2. (1888) 13 A C 657=58 L J P C 33=60 L T 274=37 W R 627.

A. I. R. 1934 Calcutta 389

MUKERJI AND BARTLEY, JJ.

Basanta Kumar Das—Petitioner.

v.

Corporation of Calcutta — Opposite Party.

Criminal Revn. No. 1060 of 1933, Decided on 3rd January 1934.

(a) Calcutta Municipal Act (1923), S. 363 and Sch. 17, R. 65--Corporation's power to revoke permission is absolute in a sense that no other authority can revise it—S. 363 gives discretion to Court in making order for demolition—Court must go into exact circumstances under which revocation took place or extent of misrepresentation in granting of permission.

Power of the corporation to revoke the permission for erecting building on the ground of material misrepresentation is absolute in the sense that no other authority can revise it. But the word 'may' in S. 363 gives discretion to the Court in making the order for demolition. To use this discretion it must go into the exact circumstances under which the revocation took place or the extent to which the misrepresentation or fraudulent statement could have affected the granting of the permission. [P 390 C 2]

(b) Calcutta Municipal Act (1923), Schedule 17, R. 65—Natural justice demands that party should be given opportunity to put his case before withdrawing permission already granted.

When a party has acquired a valuable right in the shape of a permission to build, that permission cannot be withdrawn behind his back on a charge that he has been guilty of fraud or misrepresentation or without an opportunity being allowed to him to defend himself. Rules framed under the Act need not embody into themselves such elementary or fundamental principle of natural justice. [P 390 C 2]

(c) Calcutta Municipal Act (1923), Schedule 17, R. 65—Period between revocation of sanction to build and confirmation of revocation two and half years—Order of demolition was set aside.

Where sanction for erecting a building was revoked on 27th February 1928, but the revocation was not confirmed till 6th August 1930, the matter not being considered of any sufficient importance for any decisive action being taken, in such circumstances it would be wrong to make an order for demolition. [P 391 C 1]

L. P. E. Pugh and *Dinesh Chandra Roy*—for Petitioner.

Narendra Kumar Basu and *Satindra Nath Mukherjee*—for Opposite Party.

Order.—This rule is directed against an order of demolition passed by the Municipal Magistrate of Calcutta under S. 363, Calcutta Municipal Act. The Magistrate has ordered that certain structures, said to be unauthorized in premises No. 62, Baranashi Ghose Street, be demolished by the Corporation at the expense of the owner.

The facts shortly stated are the following: The petitioner was the owner of the western portion of the said premises. In February 1926 he asked for sanction to erect certain structures on his part of the premises, submitting with his application a plan showing the entire premises. The District Building Surveyor refused sanction upon certain grounds, and on that the petitioner preferred an appeal which was heard and decided by the Building Committee on 14th June 1926. Their order was that the appeal should be allowed and that formal sanction should issue on the petitioner opening out some proposed spaces as shown in the plan. This condition being fulfilled and a report to that effect being made by the Building Inspector on 6th June 1927, a formal

sanction was issued on 8th of that month. On 15th August 1927 a motion was tabled for revocation of the sanction. On 27th February 1928 the Building Committee revoked the sanction. This revocation was confirmed on 6th August 1930. Three days after, the usual notice under S. 363 of the Act, was given to the petitioner, and thereafter on 24th October 1930 the Corporation resolved to move the Magistrate for demolition of the structures. As the result of the proceedings thus started, the order complained of in this case has been passed by the Magistrate.

One of the contentions urged in support of this rule relates to the validity of the revocation of the sanction. The revocation was in accordance with R. 65, Sch. 17 and purported to be on the ground that the permission was granted in consequence of a material misrepresentation of fraudulent settlement contained in the petitioner's application for sanction. Under this rule, it may be pointed out,

"when such permission is cancelled any work done thereunder shall be deemed to have been done without permission."

The misrepresentation, as far as may be gathered, was this: that while in August 1925 a partition of the entire premises was effected by an arbitration held at the instance of all the co-owners the plan submitted for sanction in February 1926 did not show any sign of that partition. The Magistrate has stated in his explanation that the revocation proceedings show that this omission and perhaps some other facts also were considered as material misrepresentation, and that if the true state of things were known the decision of the Building Committee in the matter of granting of the sanction would have been otherwise.

The Magistrate has held that R. 65, Sch. 17, makes the Corporation the final authority to decide whether there was any material misrepresentation or not and that he had no opportunity to go into that question. He therefore held that the structures erected under the sanction must be taken as erected without sanction. There was a complaint on behalf of the petitioner that no notice had been given to him of the revocation proceedings. On this point, the Magistrate held that no notice was neassary as the rule did not speak of any; and he found also that the petitioner was present during the consideration of the revocation matter. On these findings and also upon the finding that the structures infringed Rr. 3, 23, 29 and 32, Sch. 17—a fact which does not seem to have been disputed — the learned Magistrate has made the order of demolition.

The learned Magistrate, in our judgment, was in error in supposing that once he arrived at the findings aforesaid nothing else was necessary for him to consider in order to justify the order that he made. It is true that under R. 65, Sch. 17 the power of the Corporation to cancel a permission on the ground of material misrepresentation by the applicant is absolute. But it is so only in the sense that no other authority can revise the order of revocation or restore the permission so cancelled. In the Court which has to make the order of demolition there is a discretion which the word "may" used in S. 363 of the Act in reference to this matter, plainly indicates. For a proper exercise of that discretion it is absolutely necessary for the Court to go into the question as to what the exact circumstances were under which the revocation was made or the extent to which the misrepresentation or fraudulent statement, if any, could have affected in granting of the permission. Unless a consideration of these matters were open to the Court, its existence can hardly be justified and it would not be possible for it to shape its order in the light of those principles which have to be borne in mind by a Court issuing an injunction for demolition, the powers and duties of which are pari passu with those of the Municipal Magistrate in a matter of this description.

So far as notice is concerned, the rule does not speak of any. But it can hardly be expected that rules framed under the Act should embody and incorporate into themselves such an elementary and fundamental principle of natural justice which no individual or body corporate can be permitted to forget, namely, that when a party has acquired a valuable right in the shape of a permission to build, that permission could be withdrawn behind his back on a charge that he has been guilty of fraud or misrepresentation and without an opportunity

being allowed to him to say what he may have to say in his defence. In the present case, however, this omission has not resulted in prejudice to the petitioner for the finding is that he was present at the deliberations relating to the revocation.

To determine whether the discretion which the law vests in the Court should be exercised in favour of the Corporation in this case, one of the matters that must be taken into consideration is the length of time that has elapsed since the completion of the structures, which on account of the revocation must now be deemed to be unauthorized. On this point the evidence stands thus. An officer of the Corporation has said definitely that the erection was completed by March or April 1927. Mr. Basu appearing on behalf of the Corporation has asked us to regard this statement as a mistake, because the petitioner in his petition to this Court has stated that the constructions were made after the formal sanction was obtained, that is to say after 14th June 1927. Speaking of events nearly five years old one is not unlikely to make mistakes; and the petitioner is not less likely to make such a mistake than the Corporation Officer. But the construction must have been completed in any event within a short time of the sanction, that is to say some time about the end of 1927. It is a wonder that though the sanction was revoked on 27th February 1928 the revocation was not confirmed till 6th August 1930, that is to say that the matter was left hanging in the air for two years and a half, the matter not being considered of any sufficient importance for any decisive action being taken. In such circumstances it would, in our opinion, be quite wrong to make an order for demolition. The deviations from the rules, such as they are in the present case, were all condoned by the District Building Committee on the petitioner fulfilling certain requirements. Such representations, if any, as there may have been, had little bearing on the question of safely of the building or its sanitation, though there may have been some inconvenience to the petitioner's co-owner or it may as well be that the rights of the latter have been infringed. With that however we are not concerned in the present case. The rule is made absolute and the order complained of is set aside.

R.G. *Rule made absolute.*

A. I. R. 1934 Calcutta 391

MUKERJI AND S. K. GHOSE, JJ.

Hiralal Das and *others* — Accused — Petitioners.

v.

Emperor—Opposite Party.

Criminal Misc. Case No. 14 of 1934, Decided on 26th January 1934.

Criminal P. C. (1898), Ss. 196-A, Cl. (2) and 195—Transfer of the case to some other Magistrate is not justified because the Magistrate had to examine the papers of the case before granting his consent under S. 196 A, Cl. (2)— Criminal P. C. Ss. 526 and 556.

The order consenting to the initiation of proceedings made under Cl. (2), S. 196-A stands on a very different footing from a complaint made under S. 195, Criminal P. C. A public servant who or a Court which makes a complaint under S. 195, Criminal P. C., can on no account be allowed to take part in holding the trial of the case which is started on the basis of such complaint. But the consent that is necessary for the purpose of Cl. (2), S. 196-A has to be obtained only to ensure that a charge of conspiracy is not launched in respect of conspiracy which is not of a sufficiently serious nature, or in other words to save an accused person from unnecessary harassment. To determine whether consent should be given what the Magistrate is to see is not whether the allegations made on behalf of the prosecution are true, but whether if the allegations are true they would make out a case of such a nature as would require a trial on the charge of conspiracy in the interest of public justice. To hold under such circumstances that the Magistrate, by reason of the fact that he has made the order, has done something which makes it expedient for the ends of justice that the case should not be tried by him is, impossible. [P 392 C 1]

Sures Chandra Taluqdar— for Petitioners.

Order.—When we heard this application on the 22nd instant we were of opinion that no allegation contained in any of the paragraphs of the petition other than para. 10, would justify us in making an order for transfer, and we asked for an explanation from the learned Magistrate as to what exactly he had done in connexion with the proceedings relating to S. 196-A, which is the matter referred to in para. 10. We have now received the explanation. It seems to us plain that in order to issue a Rule in this case for its transfer, we shall have to hold either that the learned Magistrate is disqualified from trying it in view of S. 556, Criminal

P. C., on one or other of the grounds mentioned in S. 526 of the Criminal P. C., exists which would require such a transfer so far as S. 556, Criminal P. C., is concerned, it cannot be said, and indeed it has not been said by Mr. Taluqdar who has argued the case of the petitioners with great ability and insistence that any disqualification has resulted from the consent which the learned Magistrate has given to the initiation of the proceedings in accordance with Cl. (2), S. 196-A, of the Code. Mr. Taluqdar has contended that it is, on the whole, desirable, having regard to the fact that the learned Magistrate had to examine the papers of the case before granting his consent that some Magistrate other than he should try the case. Now, the order consenting to the initiation of proceedings made under Cl. (2), S. 196-A, stands on a very different footing from a complaint made under S. 195, Criminal P. C. A public servant who or a Court which makes a complaint under S. 195, Criminal P. C., can on no account be allowed to take part in holding the trial of the case which is started on the basis of such complaint.

But the consent that is necessary for the purpose of Cl. (2), S. 196-A, has to be obtained only to ensure that a charge of conspiracy is not launched in respect of a conspiracy which is not of a sufficiently serious nature, or in other words to save an accused person from unnecessary harassment. To determine whether consent should be given what the Magistrate is to see is not whether the allegations made on behalf of the prosecution are true, but whether if the allegations are true they would make out a case of such a nature as would require a trial on a charge of conspiracy in the interests of public justice. It is not suggested that the learned Magistrate has done anything beyond what is necessary for the purpose of making an order under the clause aforesaid. In fact he has done no more than examined the police chalan. To hold under such circumstances that the Magistrate, by reason of the fact that he has made the order, has done something which makes it expedient for the ends of justice that the case should not be tried by him is, in our opinion, impossible. In our opinion, therefore, the application ought not to be granted. It is accordingly rejected.

R.G. *Revision dismissed.*

A. I. R. 1934 Calcutta 392

MUKERJI AND S. K. GHOSE, JJ.

Prokash Chandra Sircar—Complainant—Petitioner.

v.

Mohim Chand Haldar — Accused — Opposite Party.

Criminal Revn. No. 1214 of 1933, Decided on 25th January 1934.

Jurisdiction —Criminal Court — Non-accounting itself offence—Place of accounting is the place of offence—Criminal Procedure Code, S. 181.

Where there is no definite allegation of mis-appropriation having been committed, in any particular place, in respect of a sum which forms the subject-matter of a case, but the allegation is merely of non-accounting in respect of the sum, failure to account may itself be taken as evidence of intention to mis-appropriate and the offence of mis-appropriation is deemed to have been committed at the place at which the accused ought to have rendered the accounts: *A I R* 1925 *Cal* 613, *Expl.* [P 393 C 1]

Probodh Chandra Chatterjee—for Petitioner.

Satindra Nath Mukherjee—for Opposite Party.

Mukerji, J. — This Rule has been issued at the instance of a complainant who instituted a complaint under S. 408, I. P. C. The complaint related to a sum of Rs. 1,033 odd and purported to be against the accused as a gomastha attached to the Sudder Kutcherry of the estate of Sri Sri Radha Madan Mohan Jeu which is situated at No. 3, Gocul Mitter Lane, Calcutta. The complainant's case is that the accused as such Gomastha in the said estate was in charge of collections from tenants in various Mouzas in the district of Burdwan and that it was his duty to remit all realizations made by him and to render an account in respect of the same in the said Sudder Kutcherry. The complaint was based on the allegation that there was no account rendered in respect of the amount in question. After summons was issued the accused appeared and the case came on before Mr. H. K. De, 4th Presidency Magistrate, Calcutta. Mr. De heard both sides on the question of jurisdiction and came to the conclusion that no part of the offence was committed within the jurisdiction of the Court of the Presidency Magis-

trate and that the entire offence was committed within the jurisdiction of the Burdwan Court. Being of that opinion, he made an order transferring the case to the District Magistrate of Burdwan and forwarding the case to his file. The order of transfer, it may be pointed out is not strictly in accordance with S. 186 of the Code. That, however is a very small matter. What is important is that the case has been disposed of by the learned Magistrate on the ground that he had no jurisdiction to entertain it. It is against this order that the present Rule has been obtained.

There can be no question that if the decision of this Court in the case of *Gunananda Dhone* v. *Santi Prakash Nandy* (1), be correct, then the Calcutta Court has jurisdiction to entertain the present case. To that decision, I was a party; but for my present purposes, it is not necessary for me to endeavour to justify what was said in that decision. The decision has been doubted in a later decision of this Court in the case of *G. N. Pascal* v. *Raj Kishore Mathur* (2), and dissented from in the case of *Paul De Flonder* v. *Emperor* (3). In the former of these cases the facts had not been investigated and no definite rule was laid down. But it is clear that even upon the view which has been taken in the latter case, the Court of the Presidency Magistrate of Calcutta has ample jurisdiction to deal with the present case. In the case of *Paul De Flonder* v. *Emperor* (3) it has been said:

"If there is no evidence as to where the mis-appropriation was committed other than the fact of non-accounting, then the failure to account may itself be taken as evidence of intention to mis-appropriate and the offence being thus taken to have been committed at the place where the accused ought to have rendered the account the venue may be laid there."

In the present case it has not been alleged by the complainant that there was mis-appropriation committed in respect of the sum which forms the subject-matter of this case or any component parts of it at any particular place but the whole of the case as to mis-appropriation is founded upon the allegation that there was no accounting in respect of the money. Account, as already stated, was to be rendered at the Sudder Kutcherry in Calcutta. I am unable to see how it can be said, as has been stated by the learned Magistrate in his explanation, that in the present case if there has been any mis-appropriation such mis appropriation must have taken place in Burdwan. There is no such allegation, nor is there any evidence to that effect. The Rule accordingly should be made absolute. The order which the learned Magistrate has made and to which reference has been made above is set aside and it is ordered that the case be now taken up by the learned Magistrate and dealt with in accordance with law.

S. K. Ghose, J.—I agree.

v.v. *Case remanded.*

1. A I R 1925 Cal 613=86 I C 213=26 Cr L J 725.
2. A I R 1931 Cal 521=133 I C 703=32 Cr L J 1042.
3. A I R 1931 Cal 528=1931 Cr C 680=134 I C 433=32 Cr L J 1167=59 Cal 92.

A. I. R. 1934 Calcutta 393

MUKERJI AND S. K. GHOSE, JJ.

Abdul Majid Basunia and *others*—Petitioners.

v.

Nripendra Nath Mazumdar—Opposite party.

Criminal Revn. No. 56 of 1934, Decided on 1st February 1934.

(a) Criminal P. C. (1898), S. 144—Sub-divisional Mgaistrate on tour—Sending case under S. 144 to Deputy Magistrate—Deputy Magistrate passing order—Sub-divisional Magistrate returned from tour on the morning of the date of order—Deputy Magistrate had jurisdiction to pass orders.

The Deputy Magistrate had jurisdiction to pass orders under S. 144 inasmuch as he was dealing with the file of the Subdivisional Magistrate during the latter's absence on tour. The fact that the Subdivisional Magistrate returned from tour the morning on which the order was passed but where it was not known that he would attend the Court does not make any difference. [P 394 C 2]

(b) Criminal P. C. (1898), S. 144—An ex parte order cannot be made.

Under the law an ex parte order under S. 144 may be made in cases of emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed. But when such an order is made a party aggrieved might appear before the Magistrate who had made the order ex parte and ask him to rescind or alter the order and Cl. (5) of the section says that where such an application is received the Magistrate shall afford to the applicant an early opportunity of appearing before him whether in person or by pleader and showing cause against the order by adducing evidence. [P 395 C 1, 2]

(c) Criminal P. C. (1898), S. 144, Cl. (3)—Notice in wider terms than the order and not

following the terms of Cl. 3—Pr edure held unwarranted.

The notice issued under S. 144 was couched in terms far wider than the terms of the order itself and where again so far as the order meant to operate against the public generally the notice did not follow the terms of Cl. (3).

Held: that such procedure is not warranted by S. 144: *AIR* 1925 *Cal* 625, *Rel on*.

[P 396 C 1, 2]

Sontosh Kumar Bose and *Debabrata Mukerji*—for Petitioners.

Girija Prasanna Sanyal and *Sourendra Mohan Ghosh*—Opposite party.

Judgment.—This rule has been issued at the instance of five persons against whom an order under S. 144, Criminal Procedure Code, was made by the Deputy Magistrate of Jalpaiguri on 11th December 1933. The order was made in connexion with a hat which was established at Taluk Jamgram at a distance of about a furlong from an old and long established hat which was in existence at a place called Baura. The two hats began to sit on one and the same days, namely Mondays and Thursdays. For the purposes of this case it is necessary to set out a few facts. The police of Patgram, within whose jurisdiction the places aforesaid are situate, submitted a report to the effect that there was no apprehension of the breach of the peace by reason of the hats being situated in close proximity to each other and though they were being held on one and the same days. This report was placed before the Subdivisional Magistrate at the instance of the first party but the Subdivisional Magistrate was not satisfied that upon such report, challenged though it was by the first party, he would be justified in making an order under S. 144, Criminal P. C., against the second party.

On 1st December 1933 he made an order calling upon the first party to adduce evidence on 8th December 1933, in order to show that there was really an apprehension of an immediate breach of the peace and he also made an order calling upon the second party, the petitioners in this Rule to appear before him and represent their case, if they liked to do so. In the meantime the police appears to have served warning notices under S. 154, I. P. C., on both the parties. On 8th December 1933 the Subdivisional Officer was away on tour and the Deputy Magistrate, Mr. K. P. Ghose, was in charge of the current file of the Court of the Subdivisional Magistrate. He was busy with some other case on that date and could not therefore take up the present case till the next day, i. e., the 9th December 1933. On the date last-mentioned seven witnesses were examined on behalf of the first party and were cross examined on behalf of the second party, the petitioners before us. On 11th December 1933 Mr. K. P. Ghose on a consideration of the materials that he had before him decided to issue orders under S. 144, Criminal P. C., forbidding the second party as also the public generally from holding the hat. It is this order under S. 144, Criminal P. C., that was issued by Mr. K. P. Ghose against which the present rule is directed.

One of the grounds on which this rule has been issued relates to the question of jurisdiction of Mr. K. P. Ghose to make the order aforesaid. The question of jurisdiction arises in this way. On the date on which Mr K. P. Ghose made the order the Subdivisional Magistrate appears to have returned from his tour and was present at the head-quarters; and the contention put forward on behalf of the petitioners is to the effect that in such circumstances Mr. K. P. Ghose who was only in charge of the current files of the Court of the Subdivisional Magistrate had no jurisdiction to deal with the case and pass final orders on it. This question has been considered by the Deputy Commissioner to whom an application was made by the petitioners subsequently under Cl. 4, S. 144, Criminal P. C. The learned Deputy Commissioner has disposed of this question in the following words:

"It was further argued that the learned Deputy Magistrate who passed the order complained of had no jurisdiction to do so. But in my opinion he had jurisdiction inasmuch as he was dealing with the file of the Subdivisional Magistrate during the latter's absence on tour. It is true that the Subdivisional Magistrate returned from tour the morning on which the order was passed, but it was not known that he would attend Court and he did not do so until late."

In the circumstances referred to by the learned Deputy Commissioner we think it was open to Mr. K. P. Ghose to deal with the case as he has done. It is not suggested that Mr. K. P. Ghose is otherwise disqualified from making an an order under S. 144, Criminal P. C.

This ground therefore in our opinion is not well founded.

The second ground on which the order complained of is assailed relates to a question of procedure and it arises in this way: It has already been stated that by the order which the Subdivisional Magistrate had made, the first party had been called upon to adduce evidence and the second party, that is to say the petitioners before us, were allowed to appear and represent their case if they wanted to do so. It appears that the learned Deputy Magistrate allowed the second party to cross-examine the witnesses examined on behalf of the first party. When the witnesses for the first party had been examined a petition appears to have been put in on behalf of the second party in which it was prayed that a local investigation might be made and also that evidence might be taken and then the case disposed of. On this petition the learned Deputy Magistrate made an order in these words:

"The first party was asked to adduce evidence in support of their prayer for proceeding against the second party and that has been done The second parry was allowed to cross-examine the witnesses examined. This may be filed."

Apparently, by this petition the second party prayed that the case might not be disposed of on the evidence of the witnesses examined on behalf of the first party alone but that a local investigation might also be made and further that witnesses might be allowed to be examined on their own behalf. Otherwise there is no meaning in the statement that is to be found in this petition and which is to the effect that evidence might be taken of the witnesses before the case was disposed of. The position therefore was that this prayer of the petitioners being refused the case was disposed of on such evidence only as the first party had adduced in the case. A complaint with regard to this matter also appears to have been made before the Deputy Commissioner when the second party moved him under Cl. (4), S. 144, Criminal P. C., for setting aside the order. This will appear from ground No. 2 taken in the petition for revision filed in this connexion. Under the law an ex parte order under S. 144, Criminal P. C., may be made in cases of emergency, or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed: Cl. (2), S. 144, Criminal P. C. But when such an order is made it is clear from the provision of Cl. (4) of that section that a party aggrieved might appear before the Magistrate who had made the order ex parte and ask him to rescind or alter the order and Cl. (5) of the section says that where such an application is received the Magistrate shall afford to the applicant an early opportunity of appearing before him, whether in person or by pleader, and showing cause against the order.

If the order which was made by the learned Deputy Magistrate under S. 144, Criminal P. C., on 11th December 1933, be regarded as an ex parte order made under the provision of Cl. (2), S. 144 of the Code, the petitioners undoubtedly had the right to have an opportunity of appearing before the Magistrate and showing cause against the order, and one of the ways in which they could have done so was by adducing evidence for the purpose of satisfying the Magistrate that the order should be cancelled or rescinded. The petitioners also had the right, when the order is treated as one under S. 144, Cl. (2) of the Code, to go before ths District Magistrate and to ask for a similar opportunity. If the order is to be treated under that subsection the petitioners are entitled to have that opportunity but neither the trial Magistrate nor the learned Deputy Commissioner has given such an opportunity to the petitioners. The position therefore is that if the order is to be treated as one passed ex parte, the petitioners must now be given an opportunity to adduce evidence in order to show cause against it and to have it rescinded or altered. But then the difficulty in allowing this order to remain as an ex parte order against the petitioners, with liberty to adduce evidence in order to have it rescinded or altered is that the order is not in accordance with law for certain reasons which we shall presently give. The order as drawn up on 11th December 1933 runs in these words:

"I do hereby direct under S. 144, Criminal P. C., the persons named in the margin in particular and the public generally from the date of the promulgation of this order to abstain from holding or attending hat at or near Taluk Jamgram, P. S. Patgram, on Mondays and

Thursdays and not to do any unlawful acts by seizing and restraining traders and threatening or committing violence to people so as to dissuade them from attending Baura hat and not to commit any breach of the peace or disturb the public tranquillity."

This order is set out iu the notice that was issued and subsequently served on the petitioners. It cannot be gainsaid that the terms of this notice must follow the terms of the order in pursuance of which the notice is issued. If one looks at the terms of that order one finds that what was stated there was something different. What was stated was this:

"Issue orders under S. 144, Criminal P. C., forbidding the public generally and the persons named in the petition particularly to hold hats at Jamgram Taluk west of Baura hat on Mondays and Thursdays, etc."

While it may be conceded that it is open to a Magistrate to make the order in such terms as holding a hat at or near the Taluk Jamgram in order that it may not be possible for the party against whom such an order is made to evade the terms of the order by removing the hat, the holding of which is sought to be prevented to a short distance at the same time it is perfectly clear that before a notice containing such terms is issued there must be a proper determination of the question as regards the limits within which the order is to be operative. So far as the order of Mr. K. P. Ghose is made in pursuance of which the notice was issued there was no question of restraining the petitioners from holding or attending the hat at any place beyond the limits of Jamgram Taluk. But the notice that was issued, as has already been stated, was couched in terms far wider than the terms of the order itself. Then again so far as the order means to operate as against the public generally it does not follow the terms of Cl. (3), S. 144 of the Code as has been pointed out in the case of *Ashutosh Roy* v. *Harish Chandra* (1). Such an order under S. 144 of the Code in so far as it directs the public in general to abstain from attending the hat is not warranted by the terms of Cl. (3), S. 144 of the Code because such an order can only be against the public in general within the limitation imposed by that clause, namely, that it can be made against them only when frequenting or visiting a particular place. In that way again the order is not one which is warranted by the provisions of the law. We are of opinion therefore that the order complained of in this case, even though it may be treated as an ex parte order made against the second party, cannot be allowed to stand for the reasons which we have already given. The Rule, in our judgment, should be made absolute and we order accordingly.

The result is that the order complained of is set aside leaving it to the authorities to take preventive action in future should such action be necessary for the maintenance of public peace.

R.G. *Rule made absolute.*

1. AIR 1925 Cal 625=86 I C 810=26 Cr L J 874.

A. I. R. 1934 Calcutta 396

COSTELLO AND MALLIK, JJ.

Sakti Saran Sinha and *others*—Petitioners.

v.

Radha Raman Mondal and *others*—Opposite Parties.

Civil Rule No. 904 of 1933, Decided on 24th August 1933, from order of Munsif, Birbhum, D/- 29th April 1933.

Bengal Tenancy Act (1885), S. 26-J—No limitation is provided by the Act for application under S. 26-J—Limitation Act (1908), Art. 181.

There is no provision for any limitation of time, for an application to recover balance of the landlords transfer-fee under S. 26-J. The only possible article applicable to such an application is Art. 181, Lim. Act. Amendment for providing limitation suggested. [P 397 C 2]

Apurba Charan Mukherjee and *Gopendra Nath Das*—for Petitioners.

Jyotish Chandra Sarkar and *Dhirendra Nath Sarkar*—for Opposite Parties.

Judgment. — This rule is directed against an order of the Munsif of Sadar Court, Suri, dated 25th January 1933. The present applicants made an application to have that order reviewed by the learned Munsif himself but on 29th April 1933 that application was rejected. The order complained of was made in connection with an application on the part of the present petitioners under S. 26-J, Ben. Ten. Act. As the learned Munsif has put it the application was assailed by the other side on two grounds, first because it was not brought within two months of the date of service of the notice and secondly, because the holding to which the notice referred was in fact a Mokarari holding and re-

corded as such in the Cadastral Survey Khatian.

It appears that the holding in question consisted of some 11½ bighas. Of these 11½ bighas 7 were sold by the opposite parties 3 and 4 to the father of the opposite parties 1 and 2. The transferors purported to transfer a holding which was Mokarari. Notice of that transfer was served on the first of the several petitioners before us Sakti Saran Sinha who is said to be a pleader by profession. That notice was given on 22nd July 1929. A similar notice of transfer appears to have been served on the remainder of the petitioners before us on 26th July 1929. The residue of the holding consisting of about 4½ bighas was sold by the opposite parties 3 and 4 to the father of the opposite parties 1 and 2 on a subsequent date and the sale again purported to be a sale of a Mokarari holding. Notice of this transfer was served on all the parties concerned that is to say the present petitioners on 10th February 1932. It must therefore be taken that on 10th February 1932 the present petitioners were aware of the fact that the transfer of the whole of the holding had taken place and the transfer was upon the basis that the holding was Mokarari. One would have thought that in those circumstances if the petitioners thought, as they think now, that the holding was not mokarari and therefore they were entitled to a Selami on the basis that the holding was in the nature of an occupancy holding they would have taken immediate steps to have had the matter properly decided by applying under S. 26-J for the balance of the landlord's transfer-fee. The petitioners however took no steps until 16th July 1932 when they made the application which ultimately resulted in the order of the Munsif which is now challenged. The learned Munsil having as I have said, pointed cut that two points had been raised by those opposing the application dealt with the matter on the footing of the first of those two points and he came to the conclusion that although there is no specific provision in S. 26-J or indeed in any of the sections dealing with the point nevertheless by analogy of the provisions contained in S. 26-F, sub-S. 1 with regard to the time within which a landlord may apply to Court that the holding shall be transferred to him it ought to be held, at any rate by implication, that the limit of time within which an application should be made under S. 26-J is a period of two months.

It appears however on a close and careful examination of all those sections which are numbered 26 and distinguished by a letter of the alphabet that in none of them is there any provision, certainly no express provision or even any implied provision for any such limitation of time as the learned Munsif seems to think. We have come to the conclusion that the position is that no limitation was provided in the Bengal Tenancy Act as regards limitation for an application to recover balance of the landlords transfer-fee. As has now been decided by this Court the right procedure under S. 26-F is by way of an application and not by way of a suit. That being so it would seem, having regard to the provisions of S. 185 of the Act that as the proceedings under S. 26-J are to be by way of an application the only possible Article of the limitation Act which can be made applicable is Art. 181. Upon that view of the matter we have regretfully to come to the conclusion that the order made by the learned Munsif cannot be sustained. I should like to point out that it may well be that this question of limitation for applications in proceedings under S. 26-J may have been overlooked at the time when this section was drafted and enacted, because upon the footing that Art. 181 applies to proceedings under this section it brings it about that whereas under S. 26-F a landlord has only a total period of two months within which to exercise his right of pre-emption, under S. 26-J he may have almost an indefinite time within which to exercise his right to recover balance of landlord's transfer-fee, because although by virtue of Art. 181 he has to institute the proceedings within a period of three years those proceedings mav very likely be prolonged or adjourned for some reason or other with the result that several more months if not years might have elapsed before the moment arrives at which the money due to the landlord by way of balance of transfer-fee finds its way into Court so as to bring into operation the provisions of sub-S. 3, S. 26-J

It would seem that if and when there is any further amendment of the Bengal Tenancy Act this point might usefully be taken into consideration by the legislature.

In the meantime however it is our bounden duty to administer the law as it stands and although having regard to the delay in connexion with these proceedings particularly bearing in mind that even after the application for a review of the Munsif's order was rejected there was a further delay of some two and a half months before the matter was brought to this Court, nevertheless we think this is a case where we ought to exercise the discretion given to us by S. 115, Civil P. C. and to treat the order of the Munsif as an order which in effect touched upon a matter of jurisdiction. This rule must accordingly be made absolute and we direct the learned Munsif to hear the application upon its merits he not having gone into the second point which he himself stated as being one of the points taken in opposition to the application before him. Having regard to all the circumstances of the case we make no order as to costs of this rule.

B.M. *Rule made absolute.*

A. I. R. 1934 Calcutta 398

LORT-WILLIAMS AND M. C. GHOSE, JJ.

Dhan Gaji and *another*—Plaintiffs—Appellants.

v.

Nazamddin Pradhania and *others*—Defendants—Respondents.

Appeal No. 936 of 1932, Decided on 2nd February 1934, from appellate decree of Addl. Dist. Judge, Tippera, D/- 12th December 1931.

Words and Phrases—"Jote" is not necessarily equivalent to rayati holding.

In a suit for partition, on the allegation that *N* had a raiyati jote in respect of the lands in suit and that *N* died leaving as heirs two daughters, by the heirs of one of the daughters claiming a partition and separate possession of her share.

Held: that the mere expresson "jote" would not necessarily lead to the inference that the right of *N* was heritable. The onus of proof was upon the plaintiffs who claimed a share of the land in right of inheritance. It was for them to prove that the right of *N* was heritable. If the plaintiffs had proved that *N's* rights were heritable, then the mere fact that the defendant *N's* son took a fresh settlement two years after the death of *N* would not destory the heritable right of his brothers and sisters. [P 399 C 1]

Bhagirath Chandra Das—for Appellants.

Bankim Chandra Banerjea—for Respondents.

M. C. Ghose, J.—This is an appeal by the plaintiffs. The suit was for partition, on the allegation that Neamatulla had a raiyati jote in respect of the lands in suit and that he died leaving as heirs two sons and two daughters., The suit was instituted by the heirs of one of the daughters claiming a partition and separate possession of their share. The trial Court decreed the suit. The Court of appeal has reversed that decree and dismissed the suit. Hence the appeal by the plaintiffs. Upon hearing the learned Advocates on both sides and upon a perusal of the papers, the facts appear to be as follows: The land in suit was occupied by Neamatulla for about three years before his death which took place about 1893. After his death in 1895, defendant 1, who was the major son of Neamatulla executed a fresh kabuliyat in favour of the landlord and took settlement of the land in suit for a period of five years. Defendant 1 has since then been in possession of the lands. The other three children of Neamatulla were minors at the time. All of them were brought up by defendant 1 who gave away his two sisters in marriage and also provided a wife for his younger brother who however died shortly afterwards.

The first question decided by the Court of appeal is that the plaintiffs never had any actual possession of the suit ands and they are therefore not entitled to maintain the suit for partition. Upon that finding by the Court of appeal, the plaintiffs, with the permission of the Court, amended the plaint and paid ad valorem court-fees, praying that their title be declared and they be given possession of their share. The Court of appeal thereupon considered the question of title and came to the conclusion that the plaintiffs had failed to prove that they inherited the jote on the death of Neamatulla. It is urged by Mr. Das in appeal that the landlords' papers of 1296-1297 B. S. show that Neamatulla had a jote under the landlords. He argues that the terms "jote" means a raiyati holding and therefore Neamatulla's holding must have been a

raiyati holding either with or without the right of occupancy; if an occupancy raiyati holding, it was heritable under the Bengal Tenancy Act and if a non-occupancy raiyati holding, then also it was heritable in view of the decision in the Full Bench case of *Midnapore Zemindary Co. Ltd.* v. *Hrishikesh Ghosh* (1). In that case the defendant tenants were in occupation of the land for a period of 16 years when the landlords sued to eject them on the ground that they were non-occupancy raiyats and liable to be ejected. The Full Bench held that apart from possible exceptions with which they were not concerned, the holding of a non-occupancy raiyat was heritable.

The question is what sort of a right did Neamatulla have in this land. The judgment of the appellate Court shows that the only indication of his right is the expression "jote." It was held in the case of *Midnapur Zamindary Co. Ltd.* v. *Naresh Narayan Roy* (2) that the term "jote" is a general term and is not necessarily equivaleut to a raiyati jote. In my opinion the mere expression "jote" would not necessarily lead to the inference that the right of Neamatulla was heritable. It must be borne in mind that the onus of proof is upon the plaintiffs who claimed a share of the land in right of inheritance. It is for them to prove that the right of Neamatulla was heritable. The Court of appeal below has found that the evidence did not show that Neamatulla had occupancy right in the lands or that he was a settled raiyat of the village. Having regard to the state of evidence, he came to the conclusion that it was not proved that Neamatulla's heirs automatically were entitled to succeed to the lands on his death. I am of opinion that he was correct to hold that the plaintiffs had failed to show tat the rights of Neamatulla were heritable. On this finding the appeal is concluded. I think it necessary to add that if the plaintiffs had proved that Neamatulla's rights were heritable, then the mere fact that the defendant took fresh settlement two years after the death of Neamatulla would not destroy the heritable rights of his brothers and sisters. The appeal is dismissed with costs.

Lort-Williams, J.—I agree.

R.G. *Appeal dismissed.*

1. A I R 1914 Cal 757=25 I C 562=41 Cal 1108 (F B).
2. AIR 1922 P C 241=64 I C 231=48 I A 49=48 Cal 460 (P C).

A. I. R. 1934 Calcutta 399

MITTER AND HENDERSON, JJ.

Satish Chandra Sircar and *another*—Appellants.

v.

Haridas Mitra—Respondent.

Appeal No. 111 of 1932, Decided on 19th July 1933, from original decree of Dist. Judge, Nadia, D/- 11th March 1932.

(a) Hindu Law—Succession — In absence of heirs mere blood relation is not entitled to succeed in preference to Crown.

The Crown's right to come in accrues as soon as it is shown that there is no one in existence who comes in the line of heirs under the particular school of Hindu law by which the rights of the parties are governed. Hence, in absence of heirs, a mere blood relation is not entitled to succeed in preference to the Crown: 8 *M I A* 500 and 1 *Cal* 391 (*PC*), *Ref.* [P 400 C 1]

(b) Hindu Law — Dayabhaga School — Stridhan—Sister's son s son is no heir.

Under the Dayabhaga School, a sister's son's son is no heir to Stridhan property of a woman and he has no right to contest an application for letters of administration in respect of a will executed by the woman in respect of her Stridhana property. [P 401 C 1]

Jogesh Chandra Roy and *Gunendra Krishna Ghose*—for Appellants.

Bijan Kumar Mukherjee and *Pankaj Kumar Mukherjee*—for Respondent.

Mitter, J.—This is an appeal from an order of the District Judge of Nadia granting letters of administration with the will annexed to the respondent Haridas Mitra. It appears that the case made by the propounder of the will is that a lady of the name of Thakamani Dasi died on 27th May 1929, and that some time before this she executed a will dated 24th October 1928 by which she bequeathed her estate to the respondent Haridas. The will recites that neither Thakamani nor her sister-in-law, that is, husband's brother's wife, one Tarangini, had any child born of their womb, and that consequently both she and her husband's brother's wife, Tarangini, took as their son Haridas, the present respondent, who is the youngest son one Jogneswar Mitra of the village called Eruli. It is stated in this will that Jogneswar, the father of Haridas, was the son of the uncle of Tarangini, the husband's brother's wife

of the testatrix, and that both of them brought up the respondent. It is stated further in this will that at the time of the will the said Tarangini particularly requested the testratrix that she should give all her properties, moveable and immovable, to the respondent. It is further stated that the respondent lived as a member of the family of the testatrix and attracted her affection by his simplicity and good character and that he, Haridas, was particularly living as her adopted son. For these reasons the testatrix made a bequest in favour of Haridas in respect of her moveable and immovable properties with full rights of transfer by sale, gift and mortgage which Haridas was to enjoy in great felicity from generation to generation. Then certain provisions are made for the family worship.

The will seems to us to be a natural will having regard to the circumstances under which the will was executed and having regard to the condition of the family of the testatrix at the time of the execution of the will. Within a few days of the death of the testatrix an application for letters of administration with the will annexed was made by the respondent in this appeal on 8th June 1929. This application was contested by two persons, one Satish Chandra Sarkar who was objector No. 1 and who is the sister's son's son of the testatrix and by objector No. 2 who is the sisters's son's son-in-law. A question was raised with reference to the locus standi of both these objectors to contest the application for letters of administration, and the learned District Judge has come to the conclusion that both of them had no right to contest the present application as they are not in the line of heirs. The objector No. 2 has also set up a deed of gift executed 4 or 5 days before the death of the testatrix in his favour in respect of the Ranaghat house. This deed of gift is said to be registered. We are not really concerned in the present appeal with the question as to whether the deed of gift is or is not a valid one, for even if letters of administration are granted in respect of the properties mentioned in the will, this will operate on such properties as have not been disposed of by the testatrix before her death. The District Judge after taking oral evidence in the case has come to the conclusion that the will was duly executed by the testatrix and that she had full testamentary capacity at the time of the disposition of the will. He has accordingly granted letters of administration with the will annexed. Against this order the present appeal has been brought by the two objectors and the first question which arises for consideration is as to whether they have any right to contest the application for grant of letters of administration. We are of opinion that Satish Chandra Sirkar who claims to be the sister's son's son or sister's grandson of the testatrix is not an heir to the Stridhan property of Thakramani. In this connexion reference may be made to the law in this behalf with regard to succession to the Stridhan property of a woman under the Bengal School of Hindu law. Sir Gurudas Bannerjee in his Tagore Law Lectures on the Hindu law of marriage and Stridhan at p. 437, Edn. 3, states the law in this behalf as follows:

"After the husband, the brother and the parents, the next group of heirs is that indicated in the following text of Brihaspati":

'The mother's sister, the maternal uncle's wife, the paternal uncle's wife, the father's sister, the mother-in-law, and the wife of an elder brother, are pronounced similar to mothers. If they leave no issue of their bodies, nor son (of a rival wife) nor danghter's son, nor son of those persons. the sister's son and the rest shall take the property'."

'But the Bengal lawyers' as the learned author points out.'

"while adopting this text as indicative of the group of heirs that comes next, do not, like Devandabhatta, accept it as declaratory of the order in which those heirs succeed one after another"'

Then the learned author quotes certain passages from Jimutabahan, the author of the Dayabhaga. The learned author points out:

"Raghunandan, Srikrishna and Jagannatha agree with the author of Dayabhaga in laying down the same order of succession for these six heirs; and they refer to the same doctrine of spritual benefit as the basis of their conclusion. On failure of these six heirs, the succession devolves on the father-in-law, the husband's elder brother, and the rest, according to their nearness of Sapinda kinship."

It has been sought to be contended on behalf of the appellant by Mr. Roy, that as the objector No. 1, Satish, is a blood relation of the testatrix it should be held that he is entitled to succeed before the Crown gets the property. It is impossible to accept this

contention, for the Crown's right to come in accrues as soon as it it shown that there is no one in existence who comes in the line of heirs under the particular school of Hindu law by which the rights of the parties are governed. Indeed, it would be dangerous to accept the contention raised on behalf of the appellant and would interfere with the right of the Crown on failure of heirs which has already been crystallised in the decisions of the highest authority: *Collector of Masulipatam* v. *Cavaley* (1), *Sonet* v. *Himat* (2) It appears clear, however, on these texts that Satish is not even in the line of the sapindas of the father of the testatrix. He offers no oblation to the father of Thakamani who is the same person as the father of Satish s father's mother Bhabatarini. It has been held in this Court that daughter's grandson is not an heir. It seems to us far less would the father's daughter's grandson be an heir under the Hindu law. We are therefore clearly of opinion that Satish is not an heir to the Stridhan property of Thakamani and has no right to contest the application. With regard to Aghore no question of heirship can possibly arise and in these circumstances he also has no right to contest the application. In this view it would have been sufficient to dismiss this appeal on this ground.

But as the learned District Judge has allowed these two persons to contest the application and has taken evidence in their presence we have to accede to the request of the appellant to look into the merits of the case, namely, as to whether the will was a duly executed will of the testatrix and whether letters of administration should be granted in respect thereto. The will, as has already been stated, is the very natural will under the circumstances. The execution of the will has been sought to be proved by a number of witnesses who all attested the will as also by persons to whom the testatrix acknowledged the execution of the will. (After discussing the evidence, His Lordship held that the will was duly executed and the judgment concluded.) Having regard to all these consideration we are of opinion that this appeal must fail and must be dismissed with costs. We assess the hearing fee at five gold mohurs.

Henderson, J.—I agree. Mr. Roy laid great stress on the statements made in the deed of gift and the absence of any reference therein to the will and contended that the proper inference to draw would be that the will must have been created after the execution of the deed of gift. Whether the deed of gift is a valid document or not is a question which is not relevant to the present appeal. But if we assume in favour of the appellant No 2 that the deed is a valid one I can see nothing inconsistent between it and the will. The case of the proponent is that the testatrix executed the will in his favour out of her affection for him. The case of the appellant No. 2 is that the testatrix conveyed one of her properties to him out of affection. It is therefore quite clear that there is a residue remaining to be dealt with, a residue which she did not wish to make over to the appellant. It is therefore quite clear that the question whether she had greater affection for the proponent or for the appellant No. 2 is a matter which throws no light at all on the genuineness of the will. Accepting the case of the appellants the question would be whether she would prefer the residue of her properties to go to the proponent rather than to appellant No. 2. Of this there can be no question on the evidence which was adduced at the trial. In fact appellant No. 2 is not an heir at all and the real question was whether the testatrix bequeathed her properties to the proponent rather than that they should escheat to the Crown. In these circumstances there was clearly nothing suspicious about the will and thre is no reason why the deed of gift should have contained any reference to it. The case really depends on the credibility of the witnesses and I entirely agree with my learned brother that there is nothing in the case which would justify us in differing from the learned District Judge.

K,S. *Appeal dismissed.*

1. (1859) 8 M I A 500=2 W R 59=1 Suther 417=1 Sar 572 (P C).
2. (1875) 1 Cal 391=3 I A 92=25 W R 239=3 Sar 608 (P C).

A. I. R. 1934 Calcutta 402

MUKERJI AND S. K. GHOSE, JJ.

Hem Chandra Naskar and *another*—Appellants.

v.

Narendra Nath Bose and *others*—Respondents.

Appeal No. 250 of 1933, Decided on 28th August 1933, from appellate order of Dist Judge, 24-Pargannas, D/- 3rd May 1933.

(a) Civil P. C. (1908), O. 21, R. 32, Cl. 5—Cl 5 does not apply to prohibitory injunctions.

Clause 5, O. 21, R. 32 does not apply to prohibitory injunction, notwithstanding the fact that word injunction is used in that clause without any qualification or restriction. It is the act required to be done by the mandatory injunction that is "the act required to be done," within the meaning of Cl. 5: *A I R* 1919 *Cal* 674, *Dist.* [P 403 C 2]

(b) Interpretation of Statutes—Illustrations are useful for application of the statute.

Illustrations, no doubt, are no part of the section but they have been expressed by the Legislature as helpful in the working and application of the statute and their usefulness in that respect should not be impaired: *A I R* 1916 *P C* 242, *Ref.* [P 403 C 2]

(c) Civil P. C. (1908), O. 39, R. 2—Injunction can be passed by consent of parties—But it must be by order of Court—Civil P. C. (1908), O. 23, R. 3.

An injunction is an order of the Court, which, no doubt, may be passed by the consent of the parties and without a judicial determination of the circumstances justifying it, but it must be passed by a Court as its own order. [P 404 C 1]

(d) Civil P. C. (1908), S. 115—Mandatory injunction cannot be substituted for prohibitory injunction.

When a prohibitory injunction is disobeyed the executing Court is not competent to substitute therefor a mandatory injunction of a suitable character, even under the inherent powers. [P 403 C 2]

(e) Decree — Compromise decree — Construction — Decree providing that besides eight boat passages others should be closed by defendant—If not closed plaintiff to get them removed with Court's help—No more passages to be opened—Decree is merely a declaratory decree.

A compromise decree provided besides the said eight boat-passages the additional boat-passages and water-passages excavated by the defendants from the river *S* shall be closed by them within 15 days from the date of this Solenama. If they fail to do so, the plaintiff will be competent to have them closed on the strength of this Solenama decree with the help of the Court. Save and except the eight boat-passages they will not be competent to open any boat-passage or water-passage or draw water by any other means from the river:

Held: that the decree cannot be read as containing an injunction and that it should be treated as a decree embodying a contract between the parties and, in that way, is only a declaratory decree. [P 404 C 1]

H. D. Bose, *Bijan Kumar Mukherjee* and *Biswanath Naskar*—for Appellants.

Brojolal Chakravarty, *Radha Binode Pal* and *Prem Ranjan Roy Chowdhury*—for Respondents.

Mukerji, J.—The facts which have given rise to this appeal are quite simple and the question which falls for determination therein is equally so. The two parties are owners of lands on opposite sides of a river called Sumed Giri. In 1923 the appellants and others, as plaintiffs, sued the respondents, alleging that the latter had made openings at 31 places in the bund on the western bank of the river in order to convert their cultivable lands into fisheries and had thereby caused injury to the fisheries which the plaintiffs had from a long time before on the opposite bank. The substantial prayers in the plaint were the following: (Ka) a declaration in favour of the plaintiffs affirming their right and negativing the right of the defendants to take water from the river; (kha) a mandatory injunction on the defendants to close the 31 openings they had made; and (ga) a permanent injunction against the defendants restraining them from diverting the water and so the fish on to their lands. The suit ended in a compromise which was embodied in a petition, in which it was prayed that a decree in accordance with its terms might be passed. The decree that was passed purported to be on the basis of the terms contained in the petition, and made the petition a part of it. By this petition the parties agreed that out of the 31 passages only eight which were specified should be retained. It was further provided:

"Besides the said eight boat-passages the additional boat-passages and water-passages excavated by the Basu defendants from the river Sumed Giri shall be closed by them within 15 days from the date of this Solenama. If they fail to do so, the plaintiff will be competent to have them closed on the strength of this Solenama decree with the help of the Court. Save and except the said eight boat-passages they will not be competent to open any boat-passage or water-passage or draw water by any other means from the river Sumed Giri."

It is the decree-holders' case that the openings with the exception of the eight that were to be maintained were closed by the judgment-debtors, but that of late the latter have again opened some

30 passages in the place of the eight. They accordingly applied to have the openings in excess of the eight closed by execution of the decree. They prayed:

"The said judgment-debtors having opened about 30 water-passages in place of eight they are bound to close all the remaining water-passages keeping eight of them. As the judgment-debtors have not done so, it is prayed that a Nazir may be deputed by the Court to have all the water-passages over and above the eight in respect of the jalkars belonging to the defendants which lie on the west side of the river Sumed Giri and within the boundaries given in the schedule below filled up with earth, and that all costs in respect thereof as well as for execution may be realized from the defendants."

Amongst the objections that were taken to the execution of the decree the one that concerns us at this stage is the objection that the decree is not executable in the manner prayed for as it was not a decree for an injunction, but a decree embodying a contract between the parties and that, to the extent that it did so, it was but a declaratory one. The Subordinate Judge overruled this objection. He held:

"It was urged that a decree for a permanent injunction could only be passed in Forms Nos. 14 to 16 in the Appendix to the First Schedule of the Code of Civil Procedure relating to decrees. It is no doubt true that the compromise decree in this case has not been passed in any of the forms indicated in Appendix D, but I do not think that mere omission on the part of the Court to pass the decree in one of the above mentioned forms is at all sufficient for holding that the decree passed in Suit No. 178 of 1923 on compromise is not a decree for a perpetual injunction when I am fully satisfied from a perusal of the plaint and the decree that it is really a decree for a perpetual injunction. In construing the decree we must look to the substance and not the form of the decree. For the reasons stated above I have no hesitation in holding that the decree passed in Suit No. 178 of 1923 was a decree for a permanent injunction. In this view of the case the decree-holders are perfectly entitled to execute the decree in the manner prayed for under Cl. 5, R. 32, O. 21, Civil P. C."

The District Judge, on appeal by the judgment-debtors, held that there was no permanent injunction to execute and so the proceedings in execution must fail. He however ordered the proceedings to be treated as a suit on a contract embodied in the Solenamah decree and remanded the case to the lower Court to be treated on that footing. At the outset I may observe that I am not inclined to agree in the view expressed by Richardson, J., (concurrence in which was withheld by Beachcroft, J.), in the case of *Sachi Prosad* v. *Amar Nath* (1) that Cl. 5, O. 21, R. 32 applied to prohibitory as well as mandatory injunctions. With all deference to the learned Judge I am of opinion that notwithstanding that the word "injunction" is used in Cl. 5 without any qualification or restriction, that clause cannot be read as embracing prohibitory injunctions. The clause as well as the illustration appended to it make it, to my mind, perfectly clear that it is the act required to be done by the mandatory injunction that is "the act required to be done" within the meaning of the clause. Illustrations no doubt are no part of the section, but they have been expressed by the Legislature as helpful in the working and application of the statute and their usefulness in that respect should not be impaired: see *Mahomed Syedol Arrifin* v. *Yeoh Ooi Gark* (2). Moreover O. 42, R. 30 of the English Rules from which this rule has been borrowed with a slight change of wording applies only to mandamus, or mandatory order, injunction or judgment, and there the expression "act required to be done has the aforesaid limited meaning. Under the English Rules the mode of enforcing a prohibitory injunction is laid down in R. 7, O. 42, and is by attachment or commital, attachment there meaning, of course, of the person and not of the property. I am of opinion that while O. 21, R. 32, Cls. (1), (2) and (3) apply to both classes of injunctions and enable the decree-holder to put the judgment-debtor into civil prison and to attach the judgment-debtor's property and by these means to compel him to obey the decree, Cl. (5) has no application to the case of a simple prohibitory injunction.

The provisions of Cls. (1), (2) and (3) are highly penal in their character and they are intended to punish the defendant for disobedience of the decree and are not intended to be a satisfaction of the decree so as to prevent the decree-holder from taking further steps. In the case of mandatory injunction Cl. (5) would often give the decree-holder a complete remedy. But if a simple prohibitory injunction is disobeyed, a fresh cause of action arises for which adequate remedy, either by a mandatory injunction or in some other way has to be

1. A I R 1916 Cal 674=45 I C 864=46 Cal 103.
2. A I R 1916 P C 242=39 I C 401=43 I A 256.

sought for in a suit. I am not prepared to hold that when a prohibitory injunction is disobeyed the executing Court is competent to substitute therefor a mandatory injunction of a suitable character, even under the inherent powers which are reserved to Courts under S. 151, Civil P. C. The limited meaning that I am disposed to put upon Cl. 5 is what I think was in the minds of the learned Judges of the Allahabad High Court when they made the observation in the case of *Gordhan Lalji* v. *Maksudan Ballabh* (3) at p. 652 (of 40 *All*) at the top of that page.

But a still greater difficulty which I find in the appellants' way is that I cannot read the decree which they are seeking to execute as a decree for an injunction at all. The word "injunction" does not occur anywhere in the Solenamah nor at any place in the petition asking for a decree thereon. Nor indeed did the decree in my opinion, purport to think of an injunction at all. An injunction is an order of the Court which, no doubt, may be passed by consent of the parties and without a judicial determination of the circumstances justifying it—and in this respect I would differ from the view which the learned District Judge has taken, but after all it must be passed by the Court as its own order, disobedience of which would bring on the consequences that the statute provides for. I am unable to read the Solenamah as disclosing any intention on the part of the parties that the Court would make such an order. The Court passed the decree on the basis of the Solenamah and incorporated the Solenamah as a part of the decree. It had no right to add one jot or tittle to nor could it make any the slightest variation in the terms agreed upon between the parties. It is one thing for the parties to agree that one party shall have no right to, or shall not be able to keep or make more openings than eight, and quite a different thing for them to agree that the Court should make an order against that party prohibiting him from keeping or making more openings than eight. An agreement to the former effect does not necessarily mean an agreement to the latter effect; the two are wide apart. I find it impossible to hold either that there was an agreement that the Court would make an injunction or that the Court in fact did so.

It has been argued that if the intention of the parties, was not to have an injunction mandatory as well as prohibitory, then, were the parties agreeing to something that would be utterly useless to the plaintiffs? Because so far also as the closing down of the then existing openings in excess of the eight is concerned, there was no mandatory injunction expressly agreed upon in the Solenamah or asked for in the petition or granted by the decree. In other words, it has been asked, were the plaintiffs decree-holders then consenting to have a decree which would be a wholly infructuous decree and would not even entitle them to close down the openings in excess of the eight that were to be maintained? The answer to this question is quite simple. The Solenamah reserved to the plaintiffs the right to have those openings closed by the execution of the decree. The parties therefore provided by this clause the same effect as a mandatory injunction could otherwise have. If intention is to be judged from the words of the Solenamah, such intention, in my judgment, is apparent from the fact that, whereas in the case of the openings that were in existence then in excess of the eight it was provided that they would be closed down if need be by the execution of the decree, nothing of that description was said with regard to the stipulation that the defendants would not be competent, save and except the eight boat-passages, to open any others or draw water by any other means in future.

While I am not prepared to affirm all that has been said by the learned District Judge in his judgment, I agree in the view which he has ultimately taken, namely that the decree cannot be read as containing an injunction and that it should be treated as a decree embodying a contract between the parties and, in that way, is only a declaratory decree. The result is that, in my opinion, the appeal cannot succeed. It is accordingly dismissed. But in view of the circumstances of the case I am not willing to make any order for costs. The cross-objection is not pressed. It is accord-

3. A I R 1918 All 152=48 I C 26=40 All 648.

ingly dismissed but without any order for costs.

S. K. Ghose, J.—I agree.

B.M. *Order accordingly.*

A. I. R. 1934 Calcutta 405 (1)

MALLICK AND JACK, JJ.

Maharaj Bahadur Singh—Plaintiff—Petitioner.

v.

Narmada Charan Banerji — Defendant—Opposite Party.

Civil Rule No. 533 of 1933, Decided on 22nd May 1933, from order of Sub-Judge, Dinajpur, D/- 21st January 1933.

Civil P. C. (1908), O. 1, R. 3—Suit against pleader for wrongful act of substitution of defendant — Pleader pleading authority of plaintiff's Naib and Patwari—Common question arising if separate suits brought—Naib and Patwari should also be impleaded as defendants in suit against pleader.

The plaintiff sued his retained pleader for accounts and also for compensation for loss caused by some specific wrongful acts, one of them being that the defendant had made an unauthorized substitution of the defendant in a certain suit brought by the plaintiff. The pleader set up the defence that the substitution had been made under the instructions of the plaintiff's Naib and the Patwari. The plaintiff thereupon applied to the Court to implead the Naib and the Patwari as defendants in the suit brought against the pleader.

Held : that if separate suits were brought, one against the pleader and another against the Naib and the Patwari, there would be at least two common questions of fact, namely whether there had been a substitution of the defendant in the suit and whether the substitution had been made with the authority of the Naib and Patwari, the case therefore came within the purview of O. 1, R. 3. [P 405 C 2]

Naresh Chandra Sen Gupta, Urukramdas Chakravarti and *Prafulla Kumar Sirkar*—for Petitioner.

Girija Busan Sanyal, Nirode Bandhu Roy and *Sourindra Narayan Ghose*—for Opposite Party.

Mallick, J. — This rule is directed against an order of the Subordinate Judge of Dinajpur by which an application for impleading two men as defendants was rejected. The plaintiff petitioner sued the defendant, his retained pleader, for accounts and also for compensation for loss caused by some specific wrongful acts. One of the specific wrongful acts alleged that the defendant had made an unauthorized substitution of the defendant in a certain suit brought by the plaintiff. The pleader admitted the substitution but set up the defence that the substitution had been made under the instructions of the plaintiff's Naib, Chintaharan Ganguly and Patwari Male Mahommad. The plaintiff thereupon applied to the Court to implead the Naib and the Patwari as defendants in the suit brought against the pleader. This application was rejected and the present rule is directed against that order of refusal. This rule in my opinion, must succeed. The plaintiff claimed compensation for the loss incurred by him by the substitution of the defendant in the suit. If the substitution caused any loss to the plaintiff the question for determination by the Court would be whether the pleader was liable for making the substitution without any authority of the Naib and the Patwari, and if with their instruction, whether the Naib and the Patwari had any authority of the plaintiff to give that instruction.

The plaintiff's right to relief as against the pleader, or in the alternative as against the Naib and the Patwari, arises out of the substitution of the defendant in the suit — a substitution that was made either with or without any authority. If separate suits were brought, one against the pleader and another against the Naib and the Patwari, there would be at least two common questions of fact, namely whether there had been a substitution of the defendant in the suit and whether the substitution had been made with the authority of the Naib and the Patwari. I am therefore clearly of opinion that the case comes within the purview of O. 1, R. 3, Civil P. C., and that being so the order refusing to implead the Naib and the Patwari in the suit originally brought against the pleader cannot be maintained. The result is that the rule is made absolute with costs, hearing fee being assessed at one gold mohur.

Jack, J.– I agree.

R.G. *Order accordingly.*

A. I. R. 1934 Calcutta 405 (2)

MUKERJI AND S. K. GHOSE, JJ.

Kanayalal Bengani and *another*—Accused—Petitioners.

v.

Kanmull Lodha — Complainant—Opposite Party.

Criminal Revn. No. 1178 of 1933, Decided on 26th January 1934.

(a) **Jurisdiction — Calcutta Chief Presidency Magist ate—Criminal P. C., S. 21.**

All stipendiary as well as non-stipendiary Magistrates are subordinate to the Chief Presidency Magistrate, Calcutta [P 406 C 2]

(b) **Criminal P. C. (1898), S. 18 (4) — Powers of Additional Chief Presidency Magistrate.**

An Additional Chief Presidency Magistrate is vested with all the powers of the Chief Presidency Magistrate. [P 406 C 2]

(c) **Criminal P. C. (1898), S. 202 — Additional Chief Presidency Magistrate can send to another Presidency Magistrate case under S. 202 for report.**

An Additional Chief Presidency Magistrate is empowered to send a case to a Subordinate Magistrate such as another Presidency Magistrate for judicial enquiry and report under S. 202 of the Code. The issue of process by such a Subordinate Magistrate is illegal. [P 406 C 2]

N. K. Basu, B. C. Ghose and *Prafulla Chandra Chakravarti* — for Petitioners.

D. N. Bhattacharjee and *Nagendra Kumar Dutt*—for Opposite Party.

Judgment. — This is a Rule to show cause why the proceedings pending in the Court of Mr. H. K. Dey Fourth, Presidency Magistrate, in respect of a case under S. 380, I. P. C., should not be quashed or at any rate stayed till the disposal of a suit, No. 1125 of 1933, pending between the parties on the original side of this Court. On 13th May last the complainant laid an information of theft of two boxes of jewelleries. On that the two petitioners were arrested and an investigation being held by the police the petitioners were discharged : the Deputy Commissioner of Police observing that the case was doubtful and probably false. On 2nd June last the complainant lodged a complaint on which the Additional Chief Presidency Magistrate made an order under S. 202, Criminal P.C., sending the complaint to Mr. H. K. De for judicial enquiry and report. Mr. De thereupon examined some witnesses and issued summonses against the petitioners under S. 380, I. P. C. On 27th May last the firm of Indar Chand Lachmipat, of which petitioner 1 alleges he is a partner, instituted a suit against the complainant and his wife as defendants, wherein a pledge by the latter in respect of the said jewelleries has been set up.

The Rule, in so far as it relates to the quashing of the proceedings, is based upon the contention that Mr. De had no authority to issue the summonses inasmuch as the case had been sent to him merely for enquiry and report. The learned Magistrate in his explanation has observed that the mistake on his part in issuing summones was due to an oversight. On behalf of the complainant however it has been contended before us that the Fourth Presidency Magistrate is not subordinate to the Additional Chief Presidency Magistrate, and that therefore the latter had no jurisdiction to make an order sending the complaint to the former for enquiry and report in the terms of S. 202 of the Code. The argument further is that when the complaint came before Mr. De he could issue process on it, holding the enquiry as he has done. We are of opinion that the complainant's contention is not sound.

It is not disputed that all stipendiary as well as non-stipendiary Presidency Magistrates have been declared by the Local Government subordinate to the Chief Presidency Magistrate : vide notification No. 3540 J. D. published in the Calcutta Gazette, 1903, Pt. 1, dated 7th October 1903, p. 1321. By S. 18, Cl.(4) of the Code an Additional Chief Presidency Magistrate has been vested with all the powers of the Chief Presidency Magistrate. A power to send the case to a Subordinate Magistrate under S. 202 of the Code is one of those powers. A subordination by implication has been created by the said provision: for unless such subordination is assumed the exercise of the power would be impossible. We are of opinion therefore that the order which the Additional Chief Presidency Magistrate made was one which is authorized by law and which Mr. De had to comply with. In this view of the matter, the summonses issued on the accused should be quashed and we order accordingly. All that would be necessary for Mr. De is to send a report to the Additional Chief Presidency Magistrate and it will be for the latter to deal with the complaint in accordance with law.

As the question of stay has also been argued before us, we desire to state that upon the circumstances of the case we consider it one in which if process is issued, no trial should be held until the suit referred to in the Rule has been disposed of. The Rule is made absolute.

V.V. *Rule made absolute.*

A. I. R. 1934 Calcutta 407

GUHA AND NASIM ALI, JJ.

Hem Chandra Halder—Appellant.

v.

Emperor—Oppo-ite Party.

Criminal Appeal No. 826 of 1933, Decided on 5th February 1934.

Criminal Trial—In criminal cases moral certainty is necessary for conviction — In cases of circumstantial evidence incriminating facts must be inconsistent with innocence of accused.

In civil cases, a mere preponderance of probability, due regard being had to the burden of proof is a sufficient basis of decision; in criminal cases however a higher degree of assurance is demanded. The persuasion of guilt ought to amount to a moral certainty or such a moral certainty as convinces the mind of the tribunals as reasonable men, beyond all doubt : *R* v. *Burdett*, 4 *B* and *Ald* 95) *Ref.*

[P 408 C 2]

In cases of circumstantial evidence, in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. Circumstances of strong suspicion without more definite evidence are not sufficient to justify a conviction, even though the accused offers no explanation of them. The guilt of the accused cannot be taken to be established on the inconsistencies and improbabilities only. [P 408 C 2]

S. C. Taluqudar and *Purnendu Sekhar Bose*—for Appellant.

Khundkar and *Jitendra Nath Banerjea*—for the Crown.

Judgment. — The appellant, Hem Chandra Haldar, was on the complaint of Mr. H. Nicholas, Presidency Postmaster Calcutta, charged with the commission of an offence under S. 409, I. P. C., and the offence committed was specified in the manner following; That he, on or about 25th July 1933, being a Government servant employed in the General Post Office, as a postman, and in such capacity entrusted with or having dominion over property, to wit, Rupees 1,165-8-0 the amount collected by him from different firms in Calcutta, committed criminal breach of trust as a public servant. Upon the materials placed before the Court on behalf of the prosecution, the learned Chief Presidency Magistrate of Calcutta, by whom the appellant was tried, convicted him of the offence charged, and sentenced him to rigorous imprisonment for two years, by judgment passed on 18th September 1933.

The entrustment of the money, the amount of Rs. 1,165-8-0 was not in question; and what had to be decided in the case was whether there was a criminal misappropriation and breach of trust. The appellant pleaded innocence, and denied misappropriation. The definite case stated by him in his written statement filed in Court, was that on the date of occurrence near the Surveyor General's Office, Calcutta, he was hailed by men in a motor car to read an address on an envelope; as he advanced to do so, he was held down in the motor car by his neck and a rope was fastened round it; he became senseless and he did not remember anything further until his recovery at the hospital. The written statement was filed in Court on 14th September 1933, and it was in consonance with the statement of the appellant made to the police, immediately after the occurence at the hospital, on 25th July 1933. This statement, to which detailed reference has been made by the Magistrate in his judgment, was taken by Inspector Hamid, after he went to the hospital at 5. 10. p. m. on the day of occurrence.

The appellant having taken a substantive defence, to the charge of misappropriation, it was in the cirsumstances of the present case, necessary to make out that defence. The prosecution was required to establish the guilt of the appellant by disproving the defence version of the case, by the production of evidence The statement of the appellant recorded by a responsible police officer, immediately after the occurrence must be given its proper weight, and in that connexion, as observed by the learned Chief Presidency Magistrate, the medical evidence in the case was obviously of the utmost importance. The House Surgeon of the hospital was examined as the first witness on the side of the prosecution. According to the doctor, the accused was under police guard on admission to the hospital on 25th July. A small abrasion was found on the back of his neck on 27th July in the morning; this was shown to Col. Denham White, the superior medical officer at the hospital. A note was kept of that scar; this note however was not produced. The pulse of the accused when he was examined by the doctor was 100. In addition to the doctor's evidence, there is the evidence of the witness Chandan Singh, examined on the side of

the prosecution, in which details were given of the appellant's movements on the day of occurrence.

The appellant appeared to be unconscious, when the witness saw him lying on the road; the appellant's hands and legs were twitching when he first saw him; there was a rope lying beside him, and a man in the crowd said that he had untied the rope, which was tied round the appellant's neck. We have it also from the witness Chandan Singh, that the appellant was unconscious when he was lifted into the ambulance van for the purpose of being taken to the hospital, and that the coat worn by the appellant was found by him in a torn condition when the appellant was seen lying on the road with the coat on. The witness Chandan Singh has been disbelieved by the learned Magistrate, and his evidence has been characterised as false evidence: The reason given is that the witness had been working with the accused for three years and wanted "to help him out." On the evidence before us, we are unable to agree with the learned Magistrate's view of the evidence of Chandan Singh, and, in our opinion, there is nothing on the record to support the learned Magistrat's opinion that the witness wanted to help the appellant. In addition to that, the medical evidence in the case, on which so much stress has been laid by the learned Magistrate, is not wholly inconsistent with the defence version of the case. As has been indicated already, the statement of the appellant to the investigating police officer, giving full details, must be given its proper weight, and that statement is supported in material particulars by the principal witness examined on the side of the prosecution, Chandan Singh, whose testimoney we are unable to hold as altogether untrustworthy. The defence in the case is supported by considerable body of evidence coming from the prosecution; and in the view of that position, it was incumbent upon the prosecution to establish, by definite and clear evidence, that the case for the defence was untrue. This, the prosecution has in our judgment, failed to do.

The case for the prosecution, in view of the statement of the appellant in support of his defence as mentioned by the learned Magistrate, was that the appellant had thought out an absurd story in advance and staged the whole scene. This case was based not on direct evidence, but on indirect or what is known in forensic procedure by the name of circumstantial evidence of a presumptive character, resting on a greater or less degree of probability. In dealing with a case of the present description therefore, depending entirely on circumstantial evidence, mere conjecture cannot be allowed to take the place of legal proof of facts, by the prosecution. At the outset one may be strongly impressed with the truth of a case as a whole, but it is obviously necessary to be on one's guard against approaching the evidence with unconscious bias. It goes without saying, and it must be taken as a proposition which has now been generally accepted that in civil cases, a mere preponderance of probability, due regard being had to the burden of proof, is a sufficient basis of decision; in criminal cases however a higher degree of assurance is demanded. The persuasion of guilt ought to amount to a moral certainty or such a moral certainty as convinces the minds of the tribunals, as reasonable men, beyond all reasonable doubt: see per Parke B. in *R.* v. *Burdett* (1). It may further be noticed that in criminal cases when he appellate Court has any doubt that the conviction is a right one, whatever the original Court has done, the appellate Court should discharge the accused. It may also be taken to be a principle of universal application in cases of circumstantial evidence that in order to justify the inference of guilt, the incriminating facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. Circumstances of strong suspicion without more definite evidence, are not sufficient to justify a conviction, even though the accused offers no explanation of them.

In view of the proposition referred to above, the conviction of the appellant cannot, on the materials before us, be upheld. In the case before us, there may at the most, be suspicions arising against the appellant out of certain improbabilities pointed out to us by the

1. 4 B & Ald 95.

learned counsel for the Crown; but his guilt cannot be taken to be established on the inconsistencies and improbabilities only. As has been noticed already, the defence version of the case finds considerable support from the evidence placed before the Court on the side of the prosecution, and unless we are in a position to discard all the evidence that supports the case for the defence, which we are unable to do, the prosecution must be taken to have failed to bring the offence charged, home to the appellant. We are not on the whole satisfied on the materials before us, that we shall be justified to infer the guilt of the appellant from them.

In our judgment, there are no such inconsistencies or improbabilities, nor such incriminating facts as must be held to be incompatible with the innocence of the appellant. The evidence given on the side of the prosecution might show some inconsistencies or improbabilities, and might lead to some suspicion regarding the defence of the appellant in the case; but without more definite evidence his conviction would not be justified. This is a case in which on a reasonable view of the evidence for the prosecution, it could be said at the most that there was a doubt as to the case for the defence; and we are unable to hold on the materials before us, to which we have given our careful consideration, that the appellant has been rightly convicted.

The appeal is allowed. The conviction of the appellant, and the sentence passed on him are set aside. The appellant now on bail, is discharged from his bail bond.

V.V. *Conviction set aside.*

A. I. R. 1934 Calcutta 409

MUKERJI AND S. K. GHOSE, JJ.

Akhoy Chand Begwani — Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1037 of 1933, Decided on 20th February 1934.

(a) Provincial Insolvency Act (1920), S. 22—First part of S. 22 does not apply to order on creditor's petition—But second part applies to both kinds of petitions.

The provision in first part of S. 22 that the debtor shall on the making of an order admitting the petitions produce all account books is not applicable to a case when an order has been made on a creditor's petition. But the second part of the section applies to both classes of cases, viz., debtor's and creditor's petition and to all stages of the proceedings that follow the order admitting the petition, leaving it to the Court or the Receiver to make the requisition at the appropriate stage: *In re Moir*, (1882) 21 *Ch. D.* 61, *Ref.* [P 410 C 1, 2]

(b) Provincial Insolvency Act (1920), S. 69 (a), (b)—Charge under S. 69 (a)—Conviction cannot be passed under S. 69 (b).

On a charge framed under S. 69 (a) the Court cannot convict an accused under S. 69 (b) as the elements of the offences contemplated by the two clauses are not the same, and so there may be prejudice to the accused if such a procedure is adopted. [P 410 C 2]

(c) Provincial Insolvency Act (1920), S. 69 (a)—Account books must be proved to be in possession or power of debtor.

To fulfil the requirements of the word "wilfully" in S. 69 (a) it will have to be proved that the account books required to be produced were in the possession or power of the debtor. [P 411 C 1]

Santosh Kumar Basu and *Parimal Mukherji*—for Petitioners.

D. N. Bhattacharjee and *Shyama Prosanna Deb*—for the Crown.

Mukerji, J.—The petitioner, Akhoy Chand Begwani and his partners were adjudged insolvents by the District Judge on 26th September 1931, on the application of a creditor, and their properties vested in a Receiver appointed by him. On 21st March 1932 they were ordered by the learned Judge to file the books of account of their businesses at Sherpur and Jhinaigati, but they failed to do so. On 25th April 1932, the learned Judge examined the petitioner and on the next day laid a complaint for his prosecution under S. 69 (a), Provincial Insolvency Act. On this complaint the petitioner was tried by a Deputy Magistrate who convicted him and sentenced him to undergo rigorous imprisonment for two months. He preferred an appeal which was heard and dismissed by the Additional Sessions Judge who held that the petitioner was liable not only under Cl. (a) but also under Cl. (b), S. 69 of the said Act. The charge on which the petitioner was tried was in these words:

"That you, on or about the 26th day of September 1931 were adjudged an insolvent in the Court of the District Judge of Mymensingh, and were subsequently directed to produce your account books relating to the firm Akhoy Chand Prithiraj at Sherpur Town and Jhinaigati, P. S. Sherpur, but you concealed these account books at Sherpur Town and Jhinaigati, and wilfully failed to perform the duties imposed upon you by S. 22, Provincial Insolvency Act, 1920, viz., production of the books of account of the

said firm between 26th September 1931 and 25th April 1932, and thereby committed an offence punishable under S. 69 (a), Provincial Insolvency Act, at Sherpur, Jhinaigati and Mymensingh and within my cognizance. And I hereby direct that you be tried on the said charge."

The first contention urged on behalf of the petitioner is that he never failed to perform any duties cast upon him by S. 22 of the Act. This argument is based upon two propositions: first that S. 22 does not apply to a creditor's petition; and second that it refers to a stage antecedent and not subsequent to an order of adjudication. The section, in my opinion, is badly worded. It is divisible into two parts; the first part saying that the debtor shall on the making of an order admitting the petition produce all books of account; and the second part saying that the debtor shall at any time thereafter, etc., etc., and shall do all such acts and things in relation to his property as may be required by the Court or the Receiver or as may be prescribed. The whole of the section, in its two parts, purports to enumerate the duties of a debtor. The first part of the section relates to one particular stage, namely, "on the making of an order admitting the petition," and the second part to all subsequent stage as the words "at any time thereafter" plainly indicate. From the words "order admitting the petition"—the same words having been used in some of the previous sections indiscriminately and without meaning any difference between an order made on a creditor's petition and an order made on a debtor's petition, the obvious interpretation of the same words as used in S. 22 would be to give it an application in respect of both classes of orders. But I am firmly of opinion that the Legislature could never have intended to make the first part of the section applicable to a case when an order has been made on a creditor's petition. To put such an interpretation would be to make the provision unworkable, for a debtor would hardly have knowledge of his creditor's petition being admitted until he is served with notice of the order admitting it and yet his duty would arise on such order being made. Besides, such a procedure would mean that the debtor would be under an obligation to assist his creditor merely because the latter has succeeded in getting his petition admitted, and before he has established any right to have an inspection of his debtor's books of accounts. My opinion, therefore, is that though owing to the bad drafting of the section the first part of the section may seem to apply to both classes of orders it was never intended to be applicable to the case of an order made on a creditor's petition. But I think the second part of the section applies to both classes of cases and to all stages of the proceedings that follow the order admitting the petition, leaving it to the Court or the Receiver to make the requisition at the appropriate stage.

There can be no question that the order that was made by the District Judge was made after the order of adjudication and so made at a proper stage. The use of the word "debtor" and not the word "insolvent," does not, in my opinion, suggest that the section was meant to be operative only up to the order of adjudication. The expression "generally do all such acts and things in relation to his property as may be required by the Court" is sufficiently wide to include the production of account books in respect of the business: see *Ex parte Moir, In re Moir* (1). The second contention urged on behalf of the petitioner is that the charge was of an embarrassing nature. With this contention I do not agree. I think it may have said less, but what more it has said in excess of what was necessary was clearly for the petitioner's benefit and for that the petitioner can hardly complain. As a branch of this contention it has been urged that on a charge framed under S. 69 (a) the Court cannot convict an accused under S. 69 (b) as the judgment of the Additional Sessions Judge indicates he was prepared to do. In my opinion this contention is sound; the elements of the offences contemplated by the two clauses are not the same, and so there may be prejudice to the accused if such a procedure is adopted.

On the aforesaid two contentions, then, my view is that the petitioner, in the present time, could only be convicted under S. 69 (a), for failure to comply with the order of the Court to produce the account books and thereby failing to perform his duty which is cast upon him by the second part of S. 22. This

1. (1882) 21 Ch D 61=51 L J Ch 931=30 W R 738=47 L T 267.

leads us to consider the third contention of the petitioner, which relates to the merits of his defence. To deal with this contention one has to bear in mind the word "wilfully" used in S. 69, Cl. (a). To fulfil the requirements of this word it will have to be proved that the account books required to be produced were in the possession or power of the petitioner to produce. We have read the whole of the evidence on the record with care and have examined the bearing of the litigations that preceded the proceedings. We feel no hesitation in holding that the aforesaid element which the prosecution has to establish has not been proved. One of the important persons whose absence from the witness-box must affect the case for the prosecution is Dia Mull, who, in our opinion, should have been examined by them. The case has left in our minds an impression that the two parties are trying to get the better of each other through the medium of the Insolvency Court, and in our opinion, it is a matter of grave doubt as to which of the rival cases put forward by them is really true. We accordingly make the Rule absolute and set aside the conviction of and the sentence passed on the petitioner and order that he be discharged from bail.

S. K. Ghose, J.—I agree.

K.S. *Rule made absolute.*

A. I. R. 1934 Calcutta 411

JACK AND NAG, JJ.

Naku Sheik and *others*—Defendants—Appellants.

v,

Harish Chandra Chakravarty and *others*—Plaintiffs—Respondents.

Appeal No. 838 of 1931, Decided on 11th August 1933, from appellate decree of First Class Sub-Judge, Pabna, D/- 23rd August 1930.

Bengal Regulations (11 of 1825), S. 4, Cl. 1—Accretion from bed of the river to tenant's holding—Bed of the river belonging to landlord—Accretion belongs to landlord.

Where the bed of the river belongs to the landlord any accretion therefrom to the tenants holding belongs to the landlord and not to the tenant: 13 *M I A* 467 (*P C*), *Appl.*; *A I R* 1931 *Cal* 565; *A I R* 1932 *Cal* 507 and *A I R* 1922 *Pat* 588, *Foll.* [P 413 C 1]

Rupendra Kumar Mitter and *Krishna Lal Banerjee*—for Appellants.

Bansori Lal Sarkar—for Respondents.

Jack, J.—This appeal has arisen out of a suit for declaration of plaintiffs' title to land which had accreted to their holding, for ejectment of the defendants from the same, and for recovery of mesne profits and damages. The plaintiffs obtained settlement of C. S. Dag No. 471 and a portion of Dag No. 465, and later on a bigha of land accreted to this land and they were in possession of this accretion when (they alleged) the defendants dispossessed them from the land of Sch. (kha) of the plaint. The contesting defendants maintain that they obtained settlement of the land of this schedule of the plaint from the Zemindars. The plaintiffs claim settlement from the Darpartnidar under the same zemindar. The trial Court decreed the suit in part dismissing the plaintiffs' claim to the accreted land and also the claim for mesne profits and damages. The lower appellate Court decreed the suit in its entirety. Hence this second appeal by the defendants.

The land in suit was originally in the bed of the river Ichamati and accreted there from to the holding of the plaintiff. The question at issue in this appeal, is whether the plaintiffs have a right to the accretion under Regn. 11 of 1825. The findings of the lower appellate Court are somewhat confusing in that the learned Subordinate Judge found that the river Ichamati was a big navigable river at the time of the Permanent Settlement. At the same time he finds that the land in suit accreted from its bed was included within Mauza Gangkul, the estate of the defendants' landlord, although no revenue was assessed upon it. Subsequently after the formation of the land, Dearah settlement took place by which a separate estate was created and, settled with the defendants' landlord. The question of right to the accretion depends upon the interpretation of Cl. 4, S. 4, Regulation 11 of 1825.

The appellants rely upon two recent rulings of this Court, viz., *Rahimaddhi Matabbar* v. *Naimaddi Howladar* (1) and *Badulla Howladar* v. *Aminaddi Choukidar* (2), in which it has been held that Cl. 1, S. 4, Regn. 11 of 1825 applies to accretions to public domain only. Therefore in the present case on the finding of the Court below that the bed of the river belonged to the estate

1. A I R 1927 Cal 565=104 I C 517.
2. A I R 1932 Cal 507=138 I C 577.

of the landlord the plaintiffs would not be entitled to jote right in the land under the provisions of Regn. 11 of 1825. This view results from the interpretation of the regulation made by their Lordships of the Privy Council in the case *Felix Lopez* v. *Muddun Mohan Thakoor* (3), Cl. 4, S. 4 is as follows :

"In small and shallow rivers, the beds of which, with the Jalkar right of fishery, may have been heretofore recognized as the property of individuals, any sand-bank or chur, that may be thrown up, shall, as hitherto, belong to the proprietor of the bed of the river, subject to the provision stated in the first clause of the present section."

Clause 1, S 4 runs thus :

"When land may be gained by gradual accession, whether from the recess of a river or of the sea, it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed, whether such land or estate be held immediately from Government by a zemindar or other superior land-holder, or as a subordinate tenure, by any description of under-tenant whatever."

Their Lordships' opinion was that :

"When the words are looked at, not merely of that clause, but of the whole Regulation, it is quite obvious that what the then legislative authority was dealing with, was the gain which an individual proprietor might make in this way from that which was part of the public territory, the public domain not usable in the ordinary sense, that is to say the sea belonging to the State, a public river belonging to the State; this was a gift to an individual whose estate lay upon the river or lay upon the sea."

Adopting that interpretation, it is clear that in the present case where it has been found that the land already belonged to the estate of the zemindar the regulation would have no application. The zeminder has the proprietary right in the land. He was entitled to khas possession of the land as soon as it formed from the river and therefore was entitled to settle it with the defendants. The lower appellate Court followed the view of a Full Bench of the Patna High Court in *Khubi Mahton* v. *Lachmi Das* (4). In that case the learned Judges of the Patna High Court distinguished the Privy Council case on the ground that it was one between neighbouring landlords and not between tenants of the same landlord or a case like the present one, where the tenants on one side hold under the Darpatnidar and on the other under the zemindar direct. Although in my opinion, the view adopted by their Lordships of the Patna High Court appears to be in accordance with the terms of Cl. (1), S. (4) of the Regulation, that view cannot be reconciled with the interpretation given to the Regulation by their lordships of the Privy Council in the case already referred to. The fact that that case was between neighbouring zemindars and the present case is between the tenants under the same landlord, does not alter the effect of their Lordships' decision that Regn. 11 of 1825 only applies when the land is under the public domain. In the Patna case some rulings of this Court were referred to which appeared to support their view. But in the most important of these it is not clear that the bed of the river was private land. We prefer to follow the view adopted in the recent decisions of this Court, viz., *Rahimaddhi Matabbar* v. *Naimaddi Howladar* (1) and *Badulla Howladar* v. *Aminaddi Chaukidar* (2).

It is not necessary to go into this matter in detail as in these cases the matter has been discussed at length. It has been suggested on behalf of the respondents that on the finding that the river was a big navigable river at the time of the Permanent Settlement, we should assume that the land did not belong to the zemindar's estate. But the finding that it actually did belong to the zemindar's estate is a finding of fact which we are bound to accept in second appeal. The trial Court points out that if it was not included within the zemindar's permanently settled estate his cosharers would not have got Malikana at the time of the Dearah settlement from the Government.

The learned Subordinate Judge in appeal seems to think that there is no conflict between the opinion of the learned Judges of this Court in the case of *Rahimaddhi* v. *Naimaddi* (1) and that of the learned Judges of the Patna High Court in *Khubi Mohaton* v. *Lachmi Das* (4). But it is quite clear that the view taken in the Patna case is quite contrary to that adopted in the recent rulings of this Court.

The evidence seems to show that the river was not a navigable river inasmuch as it was fordable, at any rate, during certain parts of the year (as shown in Hunter's Report) as long ago

3. (1869) 13 M I A 467=5 Beng L R 521=14 W R 11 (P C).
4. A I R 1922 Pat 588=67 I C 642=2 Pat 18 (F B).

as 1880 and has been gradually silting up. It is clear therefore that the plaintiffs are not entitled to the accreted land under the provisions of Regn. 11 of 1825. This appeal is therefore allowed, the decree of the lower appellate Court is set aside and that of the trial Court restored and affirmed. We make no order as to costs in this appeal.

Nag, J.—I agree.

B.M. *Appeal allowed.*

A. I. R. 1934 Calcutta 413

MALLICK, J.

Dwarkanath Das Sarkar — Appellant — Opposite Party.

v.

Prasannakumar De — Respondent — Applicant.

Civil Appeal No. 1022 of 1931, Decided on 10th August 1933, against decree of District Judge, Bakarganj, D/- 18th December 1930.

Bengal Tenancy Act, S. 158—Court proceeding under S. 158 has jurisdict on to determine question as to existence of relationship of landlord and tenant—Landlord and Tenant.

In view of the wording of S. 158 (1) (b), a Court proceeding under the section has jurisdiction to determine the question whether the relationship of landlo·d and tenant does exist between the parties: *A I R* 1927 *Cal* 51 *Foll.*; 19 *Cal* 182 *(FB), Dist.* [P 413 C 2]

Surajitchandra Lahiri and *Shaileshchandra Talukdar*—for Appellant.

Jitendranath Ray and *Debendranath Bhattacharjya*—for Respondent.

Judgment.—The only point that arises for consideration in this appeal is whether, in a proceeding under S. 158, Ben. Ten. Act, started at the instance of the landlord, the Court has any jurisdiction to decide a dispute as to the existence of the relationship of landlord and tenant between the parties. On behalf of the appellant, the decision in *Peary Mohun Mukerji* v. *Ali Sheikh* (1) was relied upon. But, in a later decision of this Court, in the case of *Kailash Chandra* v. *Meheruddi Sheikh* (2), it was held that, in an application under S. 158, Ben. Ten. Act, it is open to the Court to determine whether the relationship of landlord and tenant does exist between the parties. Mr. Lahiri for the appellant would have me follow the decision in *Peary Mohun Mukerji* v. *Ali Sheikh* (1), contending that this decision is supported by some observations in the Full Bench decision in *Debendro Kumar Bundopadhya* v. *Bhupendro Narain Dutt* (3). That case appears to me to be clearly distinguishable. In that case the landlords' application under S. 158, Ben. Ten. Act was rejected, among others, on the ground that the petitioners' own assertion was that no tenancy, in fact, existed between themselves and the opposite party at the date of the petition and therefore as on the petitioners' own showing no tenancy existed, it would be absurd to ask the Court to determine the incidents of a tenancy. *Peary Mohun Mukerji* v. *Ali Sheikh* (1) gives some support, no doubt, to the contention raised on behalf of the appellant.

But the decision of the learned Judges in *Peary Mohun Mukerji* v. *Ali Sheikh* (1) would show that the question of relationship of landlord and tenant can sometimes be gone into—gone into collaterally—in a proceeding under S. 158, Ben. Ten. Act. In *Kailash Chandra* v. *Meheruddi Sheikh* (2) which was a decision much later than the decision in *Peary Mohun Mukerji* v. *Ali Sheikh* (1) *Peary Mohun Mukerji* v. *Ali Sheikh* (1) was referred to and the Hon'ble Judges in *Kailash Chandra* v. *Meheruddi Sheikh* (2), in view of the wording of S. 158, sub-S. 1 (b), came to the conclusion that a Court, in a proceeding under S. 158, had jurisdiction to determine the question whether the relationship of landlord and tenant existed between the parties. Having regard therefore to the wording of S. 158, as it is to be found in sub-S. (1), Cl. (b), I am inclined to follow the decision of this Court in *Kailash Chandra* v. *Meheruddi* (2) in preference to the decision in *Peary Mohun Mukerji* v. *Ali Sheikh* (1) and I would, accordingly dismiss the appeal with costs.

R.K. *Appeal dismissed.*

1. (1893) 20 Cal 249.
2. A I R 1927 Cal 51=97 I C 604.
3. (1892) 19 Cal 182 (FB).

A. I. R. 1934 Calcutta 414

MITTER AND HENDERSON, JJ.

Barada Porsad Saha and *another*—Defendants—Appellants.

v.

Krishna Chandra Saha and *others*—Respondents.

Appeal No. 210 of 1929, Decided on 12th June 1933, from original decree of Addl. Sub-Judge, Dacca, D/- 29th July 1929.

(a) Evidence Act (1872), S. 115—Party admitting partition in a previous suit cannot deny it in the subsequent suit—But effect of partition can be canvassed—Estoppel.

Plaintiffs should not be allowed to take up a position inconsistent with that taken up by them in a previous suit. They cannot say at one time that there had been a partition of the joint karbar and at another say that there had been no partition, but they can certainly canvass the question of the effect of the partition. [P 416 C 2]

(b) Evidence Act (1872), S. 114—Party deliberately withholding books—Legitimate inference is that if produced they would destroy their case.

If a party deliberately withholds the books, it would be a legitimate inference to draw that the books if produced would have destroyed his case. [P 417 C 2]

(c) Hindu Law—Joint family — Ancestral business — Distinction between ancestral business and one started after death of ancestor—In former relations result by operation of law and in latter by contractual arrangement.

The distinction between ancestral business and one started after the death of the ancestor is that in one case relations result by operation of law from a succession on the death of an ancestor to an established business with its benefits and obligations, and in the other they rest ultimately on contractual arrangement between the parties. Where the business descends by inheritance it does not lose its character of an inherited business by mere division among coparceners, and cannot be regarded as new business: *AIR* 1922 *P C* 257 and *AIR* 1931 *P C* 136, *Rel. on* and *Foll* [P 418 C 1]

(d) Hindu Law — Debts—Widow—Ancestral business—Power to charge inheritance by borrowing for ancestral business is same as that of manager—There must be necessity.

The ability of a Hindu widow to charge the inheritance by borrowing for the ancestral business so as to affect it in the hands of reversioners is judged by the same principles as are applicable to a charge by manager. As in the case of manager so in relation to a widow, the touchstone is necessity: 21 *All* 71 (*P C*), *Expl*; 6 *Cal* 843 (*P C*) and *AIR* 1927 *P C* 121, *Foll* [P 419 C 2]

(e) Hindu Law—Debt—Widow—Legal necessity—Money borrowed to carry on family business cannot be said to be not for necessity.

A trade or business belonging to the husband is heritable by the widow and she is entitled to carry it on. Where she carries it on successfully for years and when ultimately it becomes necessary for her to borrow certain sums of money for carrying on the business, it could not be said that the borrowing was not for necessity. [P 419 C 2]

(f) Practice — New point—Final appeal—Point not raised in Courts below, neither taken in the grounds of final appeal—Court should be very chary to entertain argument on it.

It is a principle of wisdom and prudence that Courts of final appeal should be very chary of entertaining an argument which has not been sifted in the Courts below on a point which has not been raised in the Courts below, nor any issue joined on it nor was it taken in the grounds of final appeal. [P 420 C 1]

Rupendra K. Mitter and *Navadvip Chandra Saha*—for Appellants.

Gopal Chandra Das, *Bhuban Mohan Saha* and *Jitendra Kumar Sen Gupta*—for Respondents.

Mitter, J.—The suit in which this appeal arises was brought by the plaintiffs, now respondents, for declaration of their right and title to hold possession on the basis of their purchase in execution of a decree on the original side of the High Court of the properties mentioned in Ka, Kha and Gha Schedules to the plaint after setting aside an order of the first Court of the Subordinate Judge of Dacca passed under O. 21, R. 100, Civil P. C., on 16th February 1927. The plaintiffs further prayed that they may be put in possession of all the properties except property No. 4 of Ka Schedule of which they were in possession at the date of the plaint and in case they were dispossessed pending suit they prayed for recovery of possession of the said property also. The suit was contested by defendants 1 and 4. The Additional Subordinate Judge of Dacca has decreed the suit on contest against defendants 1 and 4 and ex parte against defendants 2 and 3, by declaring plaintiff's title to the lands described in Schedules Ka, Kha and Ga of the plaint and by directing that they do get possession of the same. Hence the present appeal by defendants 1 and 4.

The material facts have been so fully dealt with in the judgment of the Subordinate Judge that it is unnecessary to recapitulate them except in the barest outline. It appears that Motilal Saha,

an inhabitant of Sabhar died leaving him surviving three sons, Iswar, Adhar and Mohesh. These brothers lived as members of a Hindu joint family after their father's death and carried on seven joint businesses under different names including a money lending business in the name of Motilal Iswar Chandra, Adhar Chandra, Mohesh Chandra Saha at 2, Jorabagan Street, in the town of Calcutta. Iswar died in Aswin 1296 B. S. corresponding to October 1889, being survived by his widow Basanta Kumari and his married daughter Kadambini. Kadambini was married to Bhabani and defendants 1 to 4 are their four sons. Basanta Kumari succeeded to the seven joint businesses after her husband's death as also to the other movable and immovable properties left by her husband and she possessed a Hindu widow's estate in the inheritance. The businesses were jointly conducted for nearly two and half years after her husband's death. The properties were divided by arbitrators who published their award on 14th Bhadra 1302 B. S. (1895). The money lending business at 2, Jorabagan Street, was divided in three equal shares and Basanta Kumari commenced a separate business on 1st Baisakh 1299 B. S., out of the assets received by her from one third share of Iswar Chandra in the joint business on partition. This business was named Iswar Chandra Basanta Kumari and was managed by her son-in-law Bhawani. This firm used to borrow when necessary from the firm of Kalicharan Girish Chandra Ray Chaudhury (defendant 6) owned by defendant 8 (who is a relation of defendants 1 to 4) and his cosharers as also from Gosta Behary Roy, the maternal cousin of Bhawani Prasad.

The firm of Kalicharan Girish Chandra obtained a decree on the original side of this Court for Rs. 24,000 in 1921 and Susen, son of Gosta, obtained a decree for Rs. 8,900 against the firm of Iswar Chandra Basanta Kumari. The former decree was transferred to Dacca Subordinate Judge's Court for execution, and the plaintiffs purchased the properties described in Schedules Ka, Kha and Gha of the plaint along with other properties on 17th June 1922. It may be mentioned here that plaintiffs 1 and 2, that is Krishna Chandra and Ramlal, are the sons of Mohesh, plaintiff 3, Priyabala is the executor to the estate of Rakhal, son of Adhar and plaintiff 4, Hiralal is another executor appointed by Rakhal's will. The plaintiffs claim that they purchased not simply the Hindu widow's estate possessed by Basanta Kumari at the Court sale but the absolute interest in the properties in suit. Basanta Kumari died on 3rd June 1923 after making an application under O. 21, R. 90 of the Code for setting aside the sale and died pending such application which was never prosecuted to the end by her defendants 1 to 4 with the result that the sale was confirmed. Plaintiffs obtained delivery of symbolical possession and when they went to take actual possession, proceedings under O. 21, R. 100 of the Code were started by defendants 1 to 4 alleging that the decree was a personal decree against Basanta Kumari and did not bind the reversioners. The defendants were successful in retaining possession although the Court held that the decree was not a personal decree against Basanta Kumari. The plaintiffs have accordingly brought the present suit praying for the relief above stated. It may be mentioned here that in para. 12 of the plaint, the plaintiffs alleged that Ka schedule properties were "of the time of the husband of Basanta Kumari Dasya" and Kha schedule properties were purchased with the profits of the Ijmali Karbar carried on by Basanta Kumari with her husband's brothers, and the Ga schedule properties were purchased with the profits of her separate Karbar, that is, Iswar Chandra Basanta Kumari firm.

The contesting defendants Barada and Pranoda filed a joint written statement. The material defences were: (1) Money-lending Karbar which was carried on at Premises No. 2, Jorabagan Street, was never partitioned in equal shares, but that Basanta Kumari got from the Ijmali Kabar certain sums with which she started a new Karbar at No. 2, Jorabagan Street, as also other new Karbars and that the new Karbars were not in any sense, a continuation of the "family Karbar left by her husband;" (2) that there was no necessity for borrowing any money for the purpose of the firm of Basanta Kumari Dasya at Jorabagan (3) that the decree obtained by the firm

of Kali Charan Girish Chandra was a personal decree against Basanta Kumari and that the decree-holders had no right to sell "the absolute right, title and interest in the properties;" (4) that the properties described in Schs. Kha and Ga to the plaint have been acquired with the moneys left by Iswarchandra Saha and they were not acquired with moneys of the Karbar started by the late Basanta Kumari Dasi.

The issues which are material for the purposes of the present appeal are issues 1, 2 and 3 which really constitute one issue, viz., whether the decree was a personal decree against Basanta Kumari and if so, can it bind the estate in their hands absolutely? and issue 5 which runs as follows: Was the business named Iswar Chandra Basanta Kumari in Calcutta a continuation of the original family business or was it a new business started by Basanta Kumari Dassya. All these issues have been found in favour of the plaintiffs by the Subordinate Judge, who, as already stated, has decreed plaintiffs' suit.

On appeal against that decree by defendants 1 and 4, the following contentions have been raised. The first point taken is that the Subordinate Judge should have held that Iswar Chandra Basanta Kumari was really a new business and not a continuation of the old business. The second ground urged is that even if it is not a new business, the respondents are estopped from contending that it is a new business. Thirdly it is said that even if it is regarded as a continuation of the old business, the borrowing from the firms of Kalicharan was not for legitimate family purposes. The fourth ground on which the decision of the Subordinate Judge is challenged is that as Basanta Kumari lost very heavily in respect of businesses in Jute and Chilli started by herself, the reversio ers are not liable as it has not been shown from which fund the losses were met, and lastly it has been urged that even if all the four above recited grounds fail, plaintiffs can hold the assets of the Iswar Chandra Basanta Kumari firm liable and not the other properties. In other words it is said that on the face of the plaint (Ka) schedule properties are not liable.

The second ground, namely that of estoppel, may be disposed of first. This ground is based on the proceedings in a suit which was started by Basanta Kumari in 1917 against the present plaintiffs for dissolution of partnership and account and for partition of innumerable properties. The claim was laid at four lakhs of rupees. The suit was ultimately numbered as Suit No. 487 of 1920 of the Sub-Judge, Sixth Court, Dacca. It is said that in that suit the plaintiffs (who were defendants) took the plea:

> "that it was decided by the arbitrators that the old Lahana business would be wound up and new businesses on the line would be started by the parties both at Calcutta and Savar: (see Paperbook Part II, marked B, p. 149—line 30);"

and issue 23 was to the effect "whether the money-lending business closed at the end of 1298 B. S. and the business distributed according to their shares between the parties in the course of their being wound up as is alleged in the written statement." It is said that on this plea the suit of Basanta Kumari was dismissed, it being found that:

> "All the parties thought it necessary to have Lahana Tahvils at Savar and Calcutta. So it was found convenient to wind up the old Karbars and to allow the parties to start new Karbars in both the places."

It is argued that after having got Basanta Kumari's suit dismissed on this ground, the plaintiffs cannot now turn back in this suit and plead that the Iswar Chandra Basanta Kumari business is a continuation of the old business. They cannot, it is argued, approbate and reprobate. Whether this decision operates as res judicata or not, it is clear that the plaintiffs should not be allowed to take up a position inconsistent with that taken up in the Suit No. 487/20. At any rate that decision is very strong evidence to show that there had been a partition of the old business and Basanta Kumari got one-third share of the Calcutta money-lending business. The plaintiffs should not be allowed to go back on the position that there had been a dissolution of all the old joint Karbars: but the question as to whether notwithstanding the dissolution of the old Karbars or rather the division of Jorabagan Karbar into three shares had the effect of making the new Karbar in Basanta Kumari's name:

> "not a continuation of her inherited Karbar in the sense that it was an altogether new venture was not in issue in this suit of Basanta Kumari."

On the other hand, the following passage in the judgment of that case at p. 174, line 30 of the Paperbook Part II marked B that:

"the entries together with the note made apparently on the representation of the parties concerned clearly go to show that the old firm of Matilal Iswar went into liquidation and the two separate firms of Adhar Mohesh and Iswar Basanta Kumari rose out of the ashes of the firm,"

would rather seem to suggest that the new Karbar of Basanta Kumari was regarded as a relic of the old joint business. The estoppel available against plaintiffs is available to the extent of preventing them from urging that there had been no partition of the Karbars and does not preclude them from urging that the effect of the division is not to make it a new karbar which had no connexion with the past—one of Basanta Kumari's own creation. It is a well accepted principle that a party cannot both approbate and reprobate. He cannot at the same time blow hot and cold. The plaintiffs cannot say at one time that there had been a partition of the joint karbar and at another say that there had been no partition, but they can certainly canvass the question of the effect of the partition.

I will now deal with the first ground taken, namely, that the firm of Basanta Kumari, Iswar Chandra was really a new business. In support of this contention apart from the finding in the judgment of suit No. 487/20 to which I have already referred, it has been strenuously contended by Mr. Mitter that the admitted fact that the business of the new Iswar Chandra Basanta Kumari was being carried on side by side in the same house at Jorabagan with the old joint karbar shows beyond doubt that the former was a new business, that there has been a cessation of continuity of the old business and if money was necessary for carrying on this business, the reversioners are not liable. Reference has also been made to the letters Exs. 2, 3 and 4 (Paperbook Part 2, marked B, p. 43) as supporting the case that Durga Charan was to collect the debts of the old firm and distribute the same to the partners. The first letter Ex. 2 is dated 26th Chaitra, 1298 and stress is laid in particular on the deposition of one of the plaintiffs Krista Chandra to show that Basanta Kumari got about a lac of rupees in 1298 and 1299 from the money-lending business at Shabar and Jorabagan, see paperbook marked A, p. 35, lines 17 to 20, to show that with this money she started the new money-lending business. It is argued for the respondent that this deposition is not to be construed to mean that Basanta Kumari got a lakh in cash, she got it from the debtors who were allotted to her share on division and the respondent has referred to certain entries in the books of debtors of the joint firm to show this allotment of one-third of the debts due from debtors of the firm to Basanta Kumari on the one hand and two-thirds to her husband's brothers on the other. Reference has been made in support of this fact to Exs. 14 (a) and 14 (b), a book of the firm of Nilmohan Kailas Chandra Shaha paperbook marked (B, pp. 55: 56 and 57) and to Ex. 45 (b), book of another firm Radhikamohan Shaha regarding a debt of Rs. 8,079-10-0 and to 45 X (a), p. 1-A Book C and Book D, p. 19 (Ex. 6-E). Krishnachandra says further :

" The arbitrators prepared a list about the allotment of Paikars, Beparis and debtors. I do not know where the list is."

It is argued that the plaintiffs have been considerably handicapped by the non-production of the books of the year 1299 by the defendants which would have shown that the sum of one lakh was received by Basanta Kumari not in cash but by the allotment of one third of the debts of debtors of the firm from whom the sums were realized. The deliberate withholding of the books by the defendants makes us suspect that the books if produced would have supported plaintiffs case; indeed it would be a legitimate inference to draw that the books if produced would have destroyed defendante case. Much reliance has been placed on behalf of the appellant on the previous deposition of plaintiff Kristo Chandra, Ex. K, p. 139, Book B. line 40 where he stated

" the plaintiff (Basanta Kumari) also started separate karbar of hers at Calcutta;"

and again

" the old Lahana Tahabil was entirely stopped and on realization of its dues, one-third was given to the plaintiff and two-thirds to Adhar and Mohesh,"

but this witness says in the very next line

" the old Lahana Karbar at Calcutta was stopped, one-third of the Paikars was given to the

plaintiff and two-thirds being given to Adhar and Mohesh: (p. 140, Book B.)"

So the effect of the evidence of this kind is to my mind this: that the old karbar was divided and out of the nucleus of the old karbar, the present Iswar Chandra Basanta Kumari business was started. The evidence of Chandmohan in the previous suit No. 487/20 (Ex. H), Book B, p. 126, has been relied on to show that both the karbars, namely, Ijmali firm and Iswar Chandra Basanta Kumari new firm were in the same Gadi. That is not exactly what he says. He first refers to the new Lahana firm of Basanta Kumari and the new Lahana firm of Adhar and Mohesh and then says :

" Both the karbars were carried on the same premises No. 2, Jorabagan, and from the same Gadi, the two firms were in two sides of the same Gadi. The old ijmali Lahana Tahbil was in the same Gadi."

This evidence does not mean that the old ijmali Lahana firm was continuing; it has been wound up and with a view to winding up an office had still to be kept. The net result of the evidence is that this ijmali money-lending business was divided into two money-lending businesses. The business does not cease to be an inherited business merely because of the division of the business into two parts. The distinction between an ancestral business and a new business is pointed out by Sir Lawrence Jenkins when delivering the judgment of their Lordships of the Judicial Committee in the case of *Sanyasi Charan* v. *Kristodhan* (1). In that case, the appellant, a minor and his four adult brothers formed a joint Hindu family governed by the Dayabhaga. The family owned two ancestral businesses. The adult brothers started and carried on a new business and were declared insolvents under the Provincial Insolvency Act, and it was held that the Karta of a joint family cannot impose on a minor member of it the risk and liability of a new business started by himself and other adult members. Sir Lawrence Jenkins said this :

" The distinction between an ancestral business and one started like the present after the death of the ancestor as a source of partnership is patent. In the one case these relations result by operation of law from a succession on the death of an ancestor to an established business with its benefits and obligations. In the other, they rest ultimately on contractual arrangement between the parties."

Applying this principle to the present case, it appears clear that the business descended to Basanta Kumari by inheritance and did not lose the character of an inherited business by mere division among the cosharers. This business cannot be regarded as a new business. In a later case where the facts are slightly different, it was pointed out by their Lordships of the Judicial Committee, after adverting to the fact that one of the partners retried from the partnership business that

" nor did the fact that Kalyan Mal had ceased to be a partner with the joint Hindu family in the business, and that the name was changed, have the effect of converting the business which theretofore had been carried on for the benefit of the joint family into a new business : *Ramkrishna Murarji* v. *Ratan Chand* (2) at p. 183 (of 58 *I. A.*)

and again their Lordships said :

" that is another way of stating the dissolution of partnership which occurred when Kalyanmal retired from the partnership, which consisted of the two partners Kalyanmal and the joint Hindu family. It did not necessarily mean that the business carried on in the name of the old partnership came to an end (p. 183 *of* 58 *I A*)."

There was no break of continuity in the business. Instead of the business being carried on by Adhar, Mohesh and Basanta Kumari together, the first two carried on the business to the extent of two thirds and Basanta Kumari dealt with the remaining one-third of the business. This disposes of the first ground and we are of opinion that this ground must fail, and we agree with the conclusion of the Subordinate Judge on this point'

The third and fourth grounds are taken up together. It is argued that even if it is a continuation of the old business, the plaintiffs must show that the borrowing was for legitimate purposes and was necessary to carry on the business. It is pointed out that Basanta Kumari started two new businesses, one in chillis at Karimganj and the other in jute and both wers speculative businesses and she lost heavily in these businesses and debited the loss to the money-lending business, and the inherited business was depleted of its funds, and if in such circumstances, the money-lending business had to borrow,

1, A I R 1922 P C 237=67 I C 124=49 I A 108=49 Cal 560 (P C).

2. A I R 1931 P C 136=132 I C 613=58 I A 173=53 All 190 (P C).

such borrowings cannot affect the reversionary estate. It is argued that even in the case of an inherited business it is not any loan or commitment which would be binding on the estate, that it must be shown that the debts were not improperly incurred and that it is for the purchaser to show either that there was pressing necessity for the loan or that there was inquiry by the lender about the legitimate purposes of the loan. It is said that there is no evidence in this case that any such inquiry was made. It is argued that a distinction has been drawn between the powers of a Hindu widow and the manager of a joint family to bind the estate by borrowing for trade purposes and reference is made to the following passage in Lord Davey's judgment in the case of *Sham Sundar* v. *Achan Kunwar* (3), at p. 189 *of* 25 *I. A.*):

"The position of a Hindu widow or daughter is not by any means the same as that of the head of an undivided family."

I am of opinion with regard to this point that by these observations it was not intended to disturb the principle laid down in the case of *Kameswar Pershad* v. *Run Bahadur Singh* (4) that the ability of a widow to charge the inheritance so as to affect it in the hands of reversioners is judged by the same principles as are applicable to a charge by manager for as Sir Lawrence Jenkins points out in *Sakrabhai* v. *Magan Lal* (5) (at p. 249) that it appears from the rest of the judgment that as in the case of a manager so in relation to a widow the touchstone is necessity. The borrowings in this case by Basanta Kumari, were made through her Ammuktar and Manager the son-in-law, as will appear from the entries in the books of Kalicharan Roy Chowdhury pp. 67, Book B, pp. 81-95, Book B. It is settled now that the managing member of a joint family business has authority to raise money not only for the payment of debts incurred in the course of such business but also for the purpose of carrying on the business. As Sir John Wallis delivering the judgment of the Judicial Committee in the case of *Niamat Rai* v. *Dindayal* (6) (at p. 214 *of* 54 *I. A.*) observed, after adverting to the rule that the onus was on the purchasers to show that the sale by a managing member of a joint family business was justified:

"that it is within the powers of the managing member in a proper case to sell immovable as well as moveable property for the purpose of discharging such debts in enabling the business to be carried on."

The Subordinate Judge has given very cogent reasons for holding that the debts of business incurred by Basanta Kumari were properly incurred and with those reasons we entirely agree. The nature of the money-lending business was such that money used to be borrowed at small rates of interest from capitalists and lent at higher rates and in this way large profits used to be made. The condition of the business was indeed very good till 1315 B. S. and out of these profits defendants 1 to 4 and their father used to be maintained. The business declined after 1315 and had to be closed in 1322 or 1323 B. S. The deliberate withholding of the books by the defendants had made it impossible for the Court to come to a conclusion on the question as to how the condition of the business changed for the worse. At the time when Basanta Kumari inherited this business it was in a flourishing condition and its condition improved with the good management of the father of the contesting defendants. It was in these circumstances not obligatory on Basanta Kumari to close the old joint family business. It is now settled beyond controversy that a trade or business belonging to the husband is heritable by the widow and she is entitled to carry it on: see *Pahalwan Singh* v. *Jiwan Das* (7). She carried it on successfully for years and when ultimately it became necessary for her to borrow certain sums of money for carrying on the business, it cannot be said that the borrowing was not for necessity. As pointed out by the Subordinate Judge, the accounts show that Rs. 1,62,000 were taken in several instalments from the business in 1301 and Rs. 150,000 were repaid in several instalments in the same year, that moneys were taken and repaid in several thousands year after year that the balance of debt in 1315 amounted almost to a negligible sum, that the amount of debt rose to more than Rs. 15,000 in 1318 B. S. and 1319

3. (1898) 21 All 71=25 I A 183 (P C).
4. (1881) 6 Cal 843=8 I A 8=4 Sar 210 (P C).
5. (1902) 26 Bom 206=3 Bom L R 738.
6. AIR 1927 P C 121=101 I C 373=54 I A 211 =8 Lah 597 (P C).
7. AIR 1920 All 345=59 I C 162=42 All 109.

and the transactions were stopped in 1321. In these circumstances, it cannot be said that the borrowing was not for necessity and was not prudently incurred. For these and other reasons given by the Subordinate Judge, we are of opinion that the conclusion arrived at by the Subordinate Judge is rightand these two grounds of appeal must fail.

In support of the fifth and the last ground it has been said that as the plaint distinctly states in para. 12 that ka schedule properties were the properties which descended independently of the money-lending business from Iswar, the sale of ka properties cannot be justified for they do not constitute assets of the Iswar Basanta Kumari business and reliance has been placed on two decisions *Sakher Bai's* case (5) and *Pahlawan Singh* v. *Jivan Das* (7) in support of the proposition that trade debts properly incurred by the widow on the credit of the assets inherited by her from her husband are recoverable after her death out of the assets of the business as against the reversioners who have succeeded thereto even in the absence of a specific charge on the estate. This point was not raised in the Court below, no issue was joined on it and it has not even been taken in the grounds of appeal in this Court. Speaking for myself, I consider it a principle of wisdom and prudence that Courts of final appeal should be very chary of entertaining an argument which has not been sifted in the Court below on the question more particularly when there is no complete uniformity of opinion in all the Courts in India. The learned advocate for the respondents has referred to a decision of the Madras High Court reported in the unauthorized reports *Maniyam Kuppanna Gounden* v. *Kuppana Goundan* (8) where it has been held that the liability is not limited to the assets of the business but binds the entire reversionary estate. It seems also that in *Sakrabhai* v. *Maganlal* (5), Sir Lawrence Jenkins was careful enough to say,

"that his answer to the reference is more qualified than the question proposed, but that is because before us the case has been argued on the basis that what is stated in the answer is sufficient for the purposes of the case."

The question proposed was whether in the absence of a specific charge, the trade debts properly incurred by a Hindu widow for the purposes of a business to which she has succeeded as the heiress of her deceased husband are recoverable after her death out of the family property, or any part thereof, as against the reversioners who have succeeded thereto. And the answer was in the qualified form as stated by Sir Lawrence Jenkins because it was not necessary to answer the larger question in the circumstances of that case. The Allahabad case merely follows the Bombay decision, and here again all thatwas necessary to be considered was the question of resale of property not inherited from her husband but purchased by her in the course of business. Mr. Mitter has argued that the Madras decision is wrong. I cannot say that I have found this point free from difficulty or that my mind has not been in suspense during a considerable part of the argument as to whether this point should be allowed to prevail but after giving the best consideration to the matter, I am of opinion that the point should not be entertained not having been submitted to the Court below and not having been raised in the grounds of appeal here specially as there is conflict of opinion on the point and the Bombay case does not really touch the present question as the answer to the larger question was in the qualified form. Besides it appears from the evidence that Iswar had immovable property only of the value of Rs. 125 and it may be that this property ka was acquired out of the profits of the joint money-lending business of Iswar and his brother which descended to the widow. The facts I have not been investigated and the argument on this point suffers from the infirmity that necessarily attaches to a belated plea advanced for the first time when the stage for investigating the necessary facts had passed. The defendants have trusted too much to the abstract doctrine of the burden of proof which is on the plaintiffs and have not produced the documents in their possession which would have thrown fuller light on the questions at issue in this case. The result is that all the points raised by this appeal fail and the appeal must be dismissed with costs.

Henderson, J.—I agree and would only add a few words regarding the very

8. (1915) 29 I C 195.

difficult question raised with regard to the Sch. ka properties. As at present advised I should be inclined to hold that the decision of the learned Subordinate Judge on this point was correct. But in my view it is not necessary to decide the point in this case. While the properties in Sch. ka are said to have been acquired out of the business during the lifetime of Basanta Kumar's husband, the other properties were acquired during the management of Basanta Kumari herself. If I have understood the argument of the respondent's advocate this distinction correctly was made by the plaintiffs not because they have any doubt as to the liability of the properties in Sch. Ka but because they wanted to argue that even if it be held that Basanta Kumari started a new business, all the properties in Sch. Ka would still be liable. As we have come to the conclusion that Basanta Kumari did not start a new business, I do not think the question arises.

R.K. *Appeal dismissed.*

A. I. R. 1934 Calcutta 421

RANKIN, C. J. AND MITTER, J.

Rajani Kanta Ghosh and *others*—Defendants—Appellants.

v.

Sourendra Nath Mitter and *others*—Plaintiffs—Respondents.

Appeal No. 155 of 1929, Decided on 17th June 1932, from decree of Third Court Sub-Judge, Hooghly, D/- 28th February 1929.

(a) Receiver—As party to suit.

Speaking generally it is a wrong thing to make Receivers parties in a case unless there are special reasons. [P 422 C 2]

(b) Mortgage — Mortgagee is entitled to contractual dues up to expiry of period of grace.

Prima facie it is the right of the mortgagee to get his contractual dues and to get them not only up to the date of the suit, but up to the expiry of the period of grace. [P 423 C 1]

(c) Mortgage—Mortgage by one cosharer—of his share—Subsequent mortgage of all shares by all cosharers—Mortgagee obtaining decree in first mortgage and purchasing share himself--He is not debarred from bringing suit on second mortgage.

Where one of cosharers executes a mortgage on his share and subsequently all the cosharers execute a mortgage of all the shares to the same mortgagee and the mortgagee obtains a decree on the first mortgage and purchases the share himself in execution, he is entitled to bring another suit on the second mortgage as they are two different claims : 24 *All* 429, *Dist.* [P 423 C 1]

(d) Transfer of Property Act (1882), S. 82—Mortgage by several persons of their shares in different properties—Some of mortgagors assigning their equity of redemption—Mortgagee knowing this only when it is too late to sue assignee—Mortgagee is entitled to recover whole debt out of one or all properties.

Where several persons have executed a mortgage of their shares in different properties but some of them subsequently assign their equity of redemption and this is not known to the mortgagee till it is too late to sue the assignees, the mortgagee is entitled to recover the whole debt out of one or all the properties which he is able to reach. And the mortgagee cannot be in such cases considered guilty of negligence or laches as it is no part of his duty to keep an account of what the mortgagor himself is doing with his equity of redemption: 33 *Cal* 613, *AIR* 1920 *Bom* 306, *Dist.*; 6 *IC* 842, *Ref.* [P 424 C 2]

(e) Transfer of Property Act (1882), S. 82 — Mortgage by several persons of their shares in different properties cannot be treated as separate mortgages.

A mortgage executed by several persons of their shares in different properties cannot be treated as so many entirely separate mortgages under S. 82 either before or after amendment of 1929, [P 424 C 2]

Pugh, *Radhabinod Pal*, *Bhupendra Kumar Ghose*, *Bhupendra Kishore Bose* and *Paramananda Lahiri*—for Appellants.

Sarat Chandra Basak, *Sitaram Banerji* and *Nando Gopal Banerjee*—for Respendents.

Rankin, C. J.—This appeal is brought by certain defendants in a suit for enforcement of a mortgage dated 10th August 1908. The mortgage was for a small sum of Rs. 3,800. It would appear that it contained a provision for interest at two per cent. per mensem compound interest with monthly rests. The suit was brought on 15th March 1920 by which time notwithstanding that a small sum of Rs. 2,045 had been paid to the mortgagee no less than Rs. 45,819 was due according to the mortgage bond. It appears that the suit was decreed ex parte in September 1920. The defendants however appear to have established that service upon them was not correct and after no less than six years, namely on 16th August 1926, the ex parte decree was set aside and the suit was restored. On 27th February 1929 the learned Subordinate Judge passed a preliminary decree. He passed a preliminary decree for six-sevenths only of the amount due on the bond but the amount notwithstanding had by

this time grown to the extraordinary figure of Rs. 3,31,699. A great many defences were taken by the mortgagors which have since been abandoned as to the validity of the mortgage, as to whether the mortgage was obtained by undue influence and questions of like character. In the present appeal Mr. Pugh, the learned counsel for the appellants has taken four definite points and to those points I shall confine myself.

The first point is this: When the mortgage was executed it was executed in favour of one Bepin but it turns out that two other persons were joint with him. When the suit was brought it was brought by Bepin's sons, by plaintiff 3 Khoka and by the administratrix to the estate of one Charu. Khoka it seems died on 7th April 1928 and the first point taken is that the suit abated within ninety days of that date and the plaintiffs had 60 days thereafter in which to set aside the abatement; that brings us to the month of September in the year 1928. An application on behalf of two persons was made on 4th February 1929 saying that there had been an order (apparently on 6th November 1925) appointing them receivers to the estate of the mortgagees and it said that the Receivers after their appointment had been acting in the suit, had made an application for amendment of the plaint and had been making other applications and that that being so the Receivers ought to be formally made parties Objection was taken to this contention on the ground that Khoka had died about a year before and that the Receivers could not be made parties because the suit had abated. The view taken by the learned Judge was that the order making the Receivers parties was a purely formal order, that in fact they had been prosecuting the suit, that the defendants had treated the Receivers as proper persons to have notice of the application for restoration, that the Receivers had been allowed to make an application to get defendants 11 to 14 on to the record and so forth.

That being so he made an order appointing these two persons to represent the plaintiffs in the suit. Mr. Pugh points out that strictly speaking if the suit had become defective and had abated as regards Khoka it was not satisfactory to make the Receivers parties to the suit, and he criticizes the view adopted by the learned Subordinate Judge upon technical grounds. He says that O. 22, R. 10, Civil P. C., does not really cover the substitution that was made in the present case. In my judgment there is much to be said for the view urged by Mr. Pugh. Speaking generally it is a wrong thing to make Receivers parties in a case unless there are special reasons and if the suit had abated against Khoka then that was a formidable difficulty which the learned Judge ought to have tackled in a more technical way. But actually the position is today that we have the right under S. 5, Lim. Act, to do justice in the matter. If at the time this application was allowed by the order of 5th February 1929 the learned Judge had been asked in the alternative to overlook the fact that substitution of Khoka had not been made a few months before and to overlook that in view of the excuse that the Receivers had been allowed to act on the part of the plaintiffs I do not think that the learned Judge would have met with any difficulty in extending the time under S. 5, Lim. Act. In my view, that is the proper and correct course to be adopted and if it were necessary I should be prepared to make any order upon that basis. It is not necessary that the plaintiffs' suit should fail on this ground. Moreover, in a suit upon this mortgage only Bepin's representatives are necessary plaintiffs.

The next point taken by Mr. Pugh is that the language of the judgment is not properly carried out by the language of the formal decree. He says that the ordering portion of the judgment directed that the suit should be decreed to the extent of six-sevenths share of the claim with interest on the principal at the bond rate from the date of suit till the expiry of the period of grace but that the decree gives the figure of Rs. 3,31,699 and that that amount is really arrived at by carrying forward the figure of Rs. 45,819 which was due for principal and compound interest at the date of the suit. Mr. Pugh's contention is that in addition to the figure of Rs. 45,819 all that should have been allowed is simple interest at two per cent. on Rs. 3,800. In my judgment, the language of the learned Judge in the judgment is correctly carried out by the

terms of the decree. In any case, even if we have any doubt upon that matter, prima facie it is the right of the plaintiff to get his contractual dues and to get them not only up to the date of the suit but up to the expiry of the period of grace. We have put it to Mr. Pugh whether or not there is any case which he can make why the ordinary rights of the mortgagees as regards the period pending suit should not be given to them. Mr. Pugh does not make any such case before us but only says that the order made by the learned Judge at the end of his judgment does not mean the same thing as the formal decree that has been afterwards drawn up. In my judgment, the order of the learned Judge does mean exactly what has been drawn up in the decree and that disposes of the contention.

The third contention put forward by Mr. Pugh is this : One of the seven mortgagors, namely Ashutosh had incurred a previous debt to the mortgagee Bepin and for that debt he had given a first mortgage of his one-seventh share. Shortly before the present suit was brought the mortgagee had brought another suit on the first mortgage against Ashutosh and he brought his one-seventh interest to sale and purchased that himself. Mr Pugh contends that for some reason that circumstance is fatal altogether to the present suit. I have been entirely unable to see why it should be fatal to the present suit. In my judgment, these are two entirely different debts. In one case there was a first mortgage of Ashutosh's one-seventh share, in the other case there was a mortgage of the shares of seven people including Ashutosh although in Ashutosh's case it was a second mortgage. I see no reason why separate suits should not be brought for these two different claims. It does not appear to me that the circumstance that the first mortgagee got a decree in the suit against Ashutosh has any effect at all to discharge the cause of action when he brings a suit against Ashutosh and the other mortgagors on an entirely different transaction. I do not think it can be at all successfully contended that the case of *Sri Gopal* v. *Pirthi Singh* (1), is any authority for the proposition advanced by Mr. Pugh.

1. (1902) 24 All 429=29 I A 118 (P C).

The fourth point taken by Mr. Pugh is this : It seems that two of the mortgagors, Ashutosh and Arun, got into difficulty with the result that their shares in the property which they had mortgaged in 1908 to these mortgagees were sold in January 1916 and September 1916 to certain people whom I may call the Paikpara defendants. When the plaintiffs brought their suit in March 1920 there is no reason to suppose that they were aware of the fact that the interest in the equity of redemption had as regards Ashutosh and Arun passed to the Paikpara defendants. No written statement was filed at that time. Indeed it does not appear that there was any written statement filed until January 1927 after the suit had been restored and the ex parte decree set aside. When the written statement was filed setting out these transactions the plaintiffs moved the Court and had these Paikpara defendants added as defendants 11 to 14. Thereupon these defendants came in and stated that they had, acquired the shares of Ashutosh and Arun. Apart from the objection taken by the main defendants that the suit was not properly constituted in the absence of the Paikpara defendants, no issue arising out of these purchases by the Paikpara defendants was taken before the learned Judge. It was not suggested that to the extent of the interest acquired by the Paikpara defendants, the mortgage debt was unenforceable. No proof was given as to the plaintiffs' knowledge of the transactions by which the Paikpara defendants took any interest in the equity of redemption in 1916. The learned Judge finding that the mortgage was of 1908 had no difficulty in saying that the plaintiff had sued their original mortgagors in good time when they sued them in 1920, but he took the view that the statute of limitation must be applied as at 1927 to the Paikpara defendants and that therefore the Paikpara defendants had a complete defence so far as the suit was concerned on the plea of limitation, the mortgage being more than 12 years before that date and there being no payment by anybody within 12 years of 1927. Mr. Pugh contends that the learned Judge was quite right in dismissing the Paikpara defendants from the suit; but the effect of that is, he says, that not only must the

plaintiffs give up one-seventh belonging to Ashutosh in view of the plaintiffs' suit as first mortgagees and sale thereunder, but that they must also give up two more sevenths by reason that the Paikpara defendants cannot be sued and they are interested in two more sevenths.

The facts as to the interest of the Paikpara defendants were not properly examined or disclosed. It appears that Ashu and Arun had two-sevenths share in certain properties, but it is not at all certain that the Paikpara defendants had acquired the whole of the share of Ashu and Arun. Still less can can I find how the share of Ashu can be omitted twice so as to make three-seventh to be given up. The question therefore before this Court is this:

The mortgagees within 12 years of their mortgage bring their suit against the mortgagors to enforce their mortgage. They cannot be presumed to know what the mortgagors have been doing in the meantime with their equity of redemption. They may have assigned it a hundred times or they may not. The mortgagees bring their suit against the mortgagors. Seven years afterwards, by which time it is much later than 12 years from the date of the mortgage, the mortgagors announce that a long time before two of them had assigned their interests in the equity of redemption; and it turns out that the assignees cannot by reason of the statute of limitation be impleaded in the suit. What is the effect of that? Does that mean that the other mortgagors are only answerable for their proportion of the mortgage debt, or can the mortgagee recover his total debt out of all or any of the properties of the mortgagors who had been properly made the defendants? I do not think that there is any authority for saying that a mortgagee in circumstances such as the present is debarred from realizing the whole of his debt from all or any of the mortgaged properties belonging to the defendants in the suit. There is a certain amount of doctrine, particularly in the case of *Imam Ali* v. *Baij Nath Ram Sahu* (2) and *Budhmal Kevalchand* v. *Ramavalad Yesu* (2), to the effect that a mortgagee with the knowledge that different fragments of the equity of redemption have gone to different purchasers cannot by his own conduct, e. g., by realising one of the properties mortgaged, increase the burden upon others of the properties.

It seems to me however that the present case is well outside these decisions. It seems to me that it is fundamentally erroneous to talk of a mortgagee who is out of time in discovering that the equity of redemption has been assigned as a person who has been guilty of negligence or laches. As far as I know it is no part of the duty of a mortgagee to keep an account of what the mortgagor himself was doing with his equity of redemption. If he does not come to know of the assignment till it is too late to sue the assignee that is not a question of negligence or laches. Where a mortgagee is guilty of laches or negligence in the sense of a breach of a real duty the matter possibly may come within the decisions of the cases cited above. In the same way where a mortgagee having notice of the rights of other persons deliberately releases certain portions of the property, it may or may not be that in order to prevent him from increasing the burden upon any portion of the property he would be treated as though he had himself acquired the property which has been released. The mortgage in such circumstances, it may be, is split up by reason of the mortgagee's own conduct. I do not propose to discuss cases of this character but I may observe that cases in the Madras Court and in this Court are not in consonance. For the present purpose it is enough to say that that is not the case before us. There is no proof of negligence. All that had happened was that the plaintiffs had not found out that the equity had been assigned as regards certain fragments of it until a time when they were unable to implead the assignees.

In these circumstances it is impossible to accede to the argument advanced before us by Mr. Pugh unless we are prepared to agree with him upon the interpretation of S. 82, T. P. Act. S. 82, T. P. Act, whether in its present form or in the form, that is important for our purpose, which obtained between 1882 and 1929, is not in my judgment to be construed as meaning that any mortgage by seven persons of their shares in different properties is to be treated as

2. (1906) 33 Cal 613=3 C L J 576=10 C W N 551.
3. AIR 1920 Bom 306=55 I C 327=44 Bom 223.

seven entirely separate mortgages. The very contrary is implied by it. In my judgment it is open to a mortgagee to recover the whole of his money from any one of these properties. He is entitled, unless he has done something to disentitle himself, to treat the mortgage as one mortgage. This is not a case, in my judgment, where the mortgagors can compel the mortgagees to apportion their debt and proceed against each property exclusively for the satisfaction of a particular portion. I have no doubt that for certain purposes a mortgagor may claim that his property is only liable pro rata. That is the position between one mortgagor and another, and in certain circumstances it may be that the mortgagee must have regard to it.

But I know of no authority for the proposition that where without any default of his own it turns out that a mortgagee is unable to have recourse to a part of the mortgaged property by reason of it having been assigned by the mortgagor, the mortgagee cannot recover the whole of his debt out of one or all the properties which he is able to reach. I do not admit that the mortgagee owes a duty to each mortgagor to sue all the other mortgagors or their assignees in good time. It is open to a mortgagor to pay off his mortgagee whenever he likes. If he wants to do that to protect himself he can do it even if it is not his duty to do it. Some of the dicta in *Imam Ali's* case (2) may require further consideration, but in any event they must be taken together with what was said in *Mir Eusuff* v. *Panchanan* (4). On the facts of the present case I am satisfied that there is no sound proposition of law which entitles us to hold that because the Paikpara defendants did not come to the plaintiffs' knowledge till after 12 years from the date of the mortgage the plaintiffs must forgo the proportion of the mortgage debt represented by their interest. That being so, this appeal fails and must be dismissed with costs. The cross-objection not being pressed is dismissed without costs.

Mitter, J.—I agree.

K.S. *Appeal dismissed.*

4. (1911) 6 I C 842.

A. I. R. 1934 Calcutta 425

MUKERJI AND S. K. GHOSE, JJ.

Bolai Chandra Khara — Accused — Petitioner.

v.

Bishnu Bejoy Srimani—Complainant —Opposite Party.

Criminal Revn. No. 1221 of 1933, Decided on 2nd February 1934.

(a) Criminal Trial—Onus to prove all elements of offence is always on prosecution.

In criminal cases it is settled law, that the onus remains always on the prosecution to prove its case in its entirety and it does not change merely because the prosecution has succeeded in proving one part of its case. [P 426 C 1]

(b) Penal Code (1860), S. 408—Elements.

Proof of non-payment of money collected must be given by prosecution. [P 426 C 1]

K. N. Chaudhury and *Hiralal Ganguly*—for Petitioner.

Probodh Chandra Chatterjee — for Opposite Party.

Judgment.—We are of opinion that the case has been dealt with by the learned Magistrate from an entirely erroneous point of view. The prosecution case was that out of a gross amount of Rs. 2,500 odd which the accused had collected as the Gomastha in the complainant's estate a sum of Rs. 1,900 odd only was credited by him to the sherishtha of the estate and the prosecution put forward three items, namely Rs. 75, Rs. 31-6-0 and Rs. 18-9-6 making up a total of Rs. 124-15-6 as the sums in respect of which criminal breach of trust had been committed by the accused. The learned Magistrate in two places in his judgment and also in the explanation which he has submitted in answer to this Rule has indicated very definitely that he has dealt with the case on the footing that once the prosecution succeeded in proving that the accused had collected the said three items of money, it was for him to prove that he had paid those amounts into the complainant's sherista. At one place in his judgment he has said:

"The accused says he paid the amounts duly into the serista but has not adduced any evidence to prove this payment."

Again at another place in his judgment he has said. "He (the accused) has failed to discharge the onus." In the explanation also the learned Magistrate has emphasised the fact that the accused had failed to prove the payments either by any eye-witness or by documentary evidence. It is settled law

that the onus remains always on the prosecution to prove its case in its entirety and it does not change merely because the prosecution has succeeded in proving one part of its case. All the elements making up the offence have to be proved by the prosecution. In order to establish in the affirmative that the accused had committed criminal breach of trust in respect of these amounts, the prosecution had to give evidence as regards the actual procedure that used to be adopted by the accused for the purpose of paying in such realizations as he used to make and for that purpose it was necessary for the prosecution to go into details to produce and prove not merely the pucca books of the estate which had been produced in this case and the four challans which had been proved for the purpose of showing that the sum of Rs. 1,900 odd was deposited by the accused, but the entire book of challans in order to prove that no other amounts were neither in fact paid nor could possibly have been paid by the accused (paid into the sherista). The case has not been tried from that point of view, and presumably for the reason that the learned Magistrate as also perhaps those who are in charge of the prosecution were of opinion that when the accused set up a definite case of having made the payments it was for him to establish that case by oral or documentary evidence.

There is a further mistake which appears to have been made with reference to the evidence of the defence witness No. 3. In the explanation which the learned Magistrate has submitted as also in his judgment he has said that that witness admitted that the accused used to keep duplicate challans of amounts paid in the sherista and the learned Magistrate has also referred to the fact that none of such challans is forthcoming. Presumably, he thought that when such was the practice non-production of the duplicate challans by the accused was a fact which would give rise to an inference adverse to the accused. On an examination of the record of the case, however it appears that D. W. 3 said that during the time he, that is to say the witness, was the khajanchi, he, that is to say the witness, used to keep with him one duplicate of the challan. On the materials such as they are before us it is not possible to say that a case of criminal breach of trust has been proved as against the accused. We accordingly make the Rule absolute, set aside the conviction of the accused under S. 408, I. P. C., and also the sentence passed on him. He will be acquitted and released from his bail.

V.V. *Conviction set aside.*

A. I. R. 1934 Calcutta 426

MALLIK AND JACK, JJ.

Profulla Nath Tagore—Petitioner.

v.

Asia Khatun and *others*—Opposite Parties.

Civil Rules Nos. 711 and 712 of 1933, Decided on 29th November 1933, from order of 1st Court Sub-Judge, Barisal, D/- 6th March 1933.

(a) Civil P.C. (1908), O. 38, R. 10—Attachment before judgment—Subsequent attachment by another in execution of decree—Attachment before judgment does not prevail over latter attachment.

Under O. 38, R. 10 attachment before judgment shall not bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree. The effect of attachment before judgment is to prevent alienation of the property by the judgment-debtor and does not confer any priority of title on the attaching creditor over an attachment in execution of a decree : *A I R* 1915 *All* 275, *Rel on.* [P 427 C 2]

(b) Civil P. C. (1908), O. 34, R. 6—Before order is passed under O. 34, R. 6 property ordered to be sold must be sold first and balance legally recoverable must be left unpaid.

Before an order under O. 34, R. 6 can be passed, it is necessary that the property which is ordered to be sold in execution of the decree should be sold first and balance which is legally recoverable is left unpaid. [P 427 C 2]

Hiralal Chakraburty—for Petitioner.

Gunada Charan Sen and *Promode Kishore Ray*—for Opposite Parties.

Jack, J.—This Rule, No. 711 of 1933, was issued on the opposite party to show cause why an order of the Subordinate Judge, First Court, Backergunj, passed in Mortgage Suit No. 163 of 1931 should not be set aside and a similar Rule No. 712 was issued in connexion with Execution Cases Nos. 13 and 16 of 1931 pending in the same Court. The salient facts of the case are as follows : Opposite party 8 sued opposite parties 1 and 7 on a mortgage of 56 items of property and obtained a decree for sale. She subsequently put her decree into execution and at a sale held in execution of that decree purchased the pro-

perties on 19th February 1930. In order to have the sale set aside opposite parties 2 to 7 deposited in Court in March 1930 sums of Rs. 500 and Rs. 11,740 under O. 21, R. 89, Civil P. C. The sale was set aside on 26th May 1930. On appeal this order was reversed and the sale was confirmed on 14th April 1932. Meantime on 18th March 1930 opposite parties 1 to 5 and 7 had mortgaged the 56 items of property together with another 51 items of property to opposite parties 9 and 10 and a sum of Rs. 12,000 was advanced to the said opposite parties on the mortgage out of which amount Rs. 11,240 was deposited in Court by the mortgagors. Subsequently, opposite parties 9 and 10 brought a suit on this mortgage on 26th June 1931 and this deposit of Rs. 11,240 was attached before judgment in that suit.

Thereafter the petitioner in this case withdrew Rs. 3,749 from the deposit in execution of a decree obtained by him against the opposite parties having previously attached this deposit of Rupees 11,240. Opposite parties 9 and 10 having obtained two decrees in the suits brought by them put up the 51 items of properties to sale in execution of the decrees obtained by them and it was ordered by the Court below that if the decretal amount be not satisfied out of the sale proceeds of the properties, the balance, if any, would be recovered out of the attached money in deposit. This order was passed on 26th November 1932. Previous to the passing of this order the petitioner had already withdrawn Rs. 3,749 from the deposit. The order complained of, was passed on 6th March 1933 directing the petitioner to refund this money. The order was that the plaintiff's prayer for refund of the money by the petitioner would be rejected on the petitioner undertaking within ten days of the sale to refund the same and that if this undertaking be not given within the time allowed he would be liable to deposit the amount at once. In the Court below the learned Subordinate Judge was of opinion that the opposite parties 9 and 10 were entitled to the benefit of S. 68, T. P. Act, as the 56 items of property must be deemed to have been destroyed by the sale in execution of a previous mortgage and he therefore held that opposite parties 9 and 10 were entitled to hold the compensation money as his substituted security. He also held that the decree under which the decree-holder had attached this money had not the force of a rent decree and so the attachment before judgment obtained in the mortgage suit No. 163 of 1931 must prevail over the attachment under execution. He therefore passed the order referred to for refund and also ordered that

"the decree-holder's prayer for withdrawing his dues under the present decree cannot be granted until the sale is held in execution of the final decree in suit No. 163 of 1931."

It is admitted that the money which was deposited cannot be regarded as a substituted security. Before opposite parties 9 and 10 had obtained their decree these properties had already been sold in execution of another decree. Under O. 38, R. 10, Civil P C., attachment before judgment shall not bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree. The order therefore to the effect that attachment before judgment shall prevail over attachment in execution of the decree obtained by the petitioner is contrary to law. The effect of attachment before judgment is to prevent alienation of the property by the judgment-debtor and does not confer any priority of title on the attaching creditor. This view is expressed in the case of *Bisheswar Das* v. *Ambika Prosad* (1). Under O. 34, R. 6 if the proceeds of a sale held in execution of a decree are found insufficient to pay the amount due to the plaintiff the Court may, on application by the plaintiff if the balance is legally recoverable from the defendant otherwise than out of the property sold, pass a decree for such balance. In the present case before the property could be disposed of in execution of the decree it would be necessary under O. 34, R. 6 that the 51 items of property which were ordered to be sold in execution of the decree should be sold first and then if any balance is left unpaid it would be necessary for the opposite party to obtain an order under O. 34, R. 6 for recovery of the balance from the deposit or otherwise. The Rules are therefore made absolute. The order directing refund of the amount already withdrawn by the petitioner in execution of the

1. AIR 1915 All 275 = 29 I C 622 = 37 All 575.

decree as also the order rejecting the decree-holder's prayer for withdrawing his dues under the decree are set aside and the learned Subordinate Judge is directed to pass proper orders according to law in the proceedings in connexion with which Rule No. 712 was issued. The petitioner will get his costs in both the rules the hearing-fee being assessed at one gold mohur in each case.

Mallik, J.—I agree.

K.S. *Rules made absolute.*

* A. I. R. 1934 Calcutta 428

GUHA AND NASIM ALI, JJ.

Nagen Kundu and *another*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 732 of 1933, Decided on 14th February 1934, from order of Asst. Sess. Judge, Khulna.

(a) Criminal P. C. (1898), S. 282—Discharge of jury for misconduct of juror—Decision of Judge is not open to review.

It is entirely for the Judge to determine, and it is entirely within his discretion to determine, whether there is such misconduct on the part of a juror as necessitates a discharge of the jury, and the decision given by the Judge on the question is not open to review: *Reg.* v. *Word*, (1867), 10 *Cox C C* 573, *Ref.* [P 429 C 1]

*** (b) Criminal P. C. (1898), S. 282—Court has inherent power to discharge jury even after verdict, for misconduct of juror.**

Where the question of misconduct on the part of jury or other similar sufficient cause arises, the Sessions Judge has inherent power to discharge a jury and empanel another and this power can be exercised even after the verdict has been recorded. [P 429 C 2]

(c) Criminal P. C. (1898)—Scope — Code must be deemed to be exhaustive on points specifically dealt with—On matters not so specifically dealt with, Court has inherent power to pass such order as justice requires—Criminal trial.

So far as it deals with any point specifically, the Criminal Procedure Code must be deemed to be exhaustive, and the law must be ascertained by reference to its provision, but where a cases arises which demands interference and it is not within those for which the Code specifically provides, it would not be reasonable to say that the Court had not the power to make such order as the ends of justice require. [P 429 C 2]

(d) Criminal Trial — Principle of justice under English law can be applied where it is not contrary to Indian statute.

In the absence of any provision to the contrary in the Indian Statute relating to procedure, a rule recognized under the English law, which is not a mere rule of practice and procedure, but a rule embodying a principle of justice, may safely be applied: *AIR* 1924 *Cal* 323 and *AIR* 1925 *Cal* 501, *Ref.* [P 429 C 2]

Nalini Kumar Mukherji, S. C. Talukdar and *Nakuleswar Som*—for Appellants.

Khundkar, Sidheswar Chakraburty and *Hamidul Haq Chaudhury*—for the Crown.

Judgment.—The appellants were tried for having committed an offence under S. 395, I. P. C., by the learned Assistant Sessions Judge, Khulna, and a jury twice, and, at the second trial, were on the unanimous verdict of the jury, recorded by the Judge on 27th July 1933, convicted and sentenced to five years' rigorous imprisonment each. At the first trial, at which the jurors empanelled unanimously brought in a verdict of not guilty, on 30th June 1933, after the verdict was recorded by the Judge, the Public Prosecutor filed a petition stating that after the charge to the jury, when the jury retired for deliberation for their verdict, one of the jurors had without leave of the Court separated from the rest of the jury, and went to say his Jumma prayer, and was away from the retiring room of the jurors for about an hour, and the Public Prosecutor urged that the trial was vitiated on account of the same. The Judge recorded in the order sheet that the juror in question was especially enjoined by him and by the Public Prosecutor, in clear terms, not to leave the retiring room without the special leave of the Court, and that he was also told that if he had any necessity for that, he would have to take the direction and instruction of the Court. It appears that the juror concerned was questioned by the Judge and the pleaders on both sides were heard on the question that arose for consideration. The Judge then held that the facts admitted by the juror were sufficient to vitiate the entire trial; and that the only course open to the Court under the circumstances was to discharge the jury, and to commence the proceedings afresh. It was stated by the Judge in his order recorded on 30th June 1933, that it was a great misfortune that so much time of the Court had been wasted for the act of a juror in spite of clear injunctions by the Court to the contrary. The jury were accordingly discharged, and direction was given by the Judge for the postponment of the trial to 17th July 1933. It was at this second trial, that the appel-

lants have been convicted and sentenced as mentioned already.

The main ground urged in support of this appeal was that the second trial was ultra vires, illegal and improper; the conviction of the appellants and the sentences passed on them could not therefore be sustained. It was argued that regard being had to the fact that the jury returned a verdict of not guilty at the first trial, the Judge ought to have accepted the verdict and acquitted the appellants. It was further contended in support of this appeal that the Judge acted without jurisdiction and with material irregularity in discharging the jury on 30th June 1933, and that the procedure followed by the Judge was in contravention of the law, operating to the serious prejudice of the accused. It may be stated at the outset that there can be no question that it was entirely for the Judge to determine, and it was entirely within his direction to determine, whether there was such misconduct on the part of a juror as necessitated a discharge of the jury, and the decision given by the Judge on the question is not open to review: see in this connexion *Reg.* v. *Word* (1), in which case one of the jurors left the box without the leave of the Judge. The Assistant Sessions Judge had in the case before us used the discretionary power, after he had satisfied himself by an inquiry which in the circumstances of the case he thought necessary to adopt, that reasonable grounds existed for exercising the same. He came to the decision that in the circumstances brought to his notice and on the facts before him, there was no other course open to him but to discharge the jury. We are not prepared on the materials before us, to go behind the Judge's order relating to the discharge of the jury, passed on 30th June 1933, and the appellants did not, at any stage before this, challenge the propriety of the order discharging the jury.

The point on which there does not appear to be any authority of decided cases, by any of the High Courts in this country and which was submitted for our consideration, was whether the Judge had the power under the law, to discharge a jury after a verdict had been recorded. The argument proceeded on the basis that the procedure followed by the Judge of discharging a jury after the verdict of the jury had been recorded was not prescribed by the Criminal Procedure Code, and that S. 282 of the Code was exhaustive, as regards the discharge of a jury by a Judge. It appears to us that where the question of misconduct on the part of the jury or other similar sufficient cause arises, the Sessions Judge has inherent power to discharge a jury and empanel another. This power is not covered by any provision of the Criminal Procedure Code, the matter being one for the Judge's discretion. It is to be noticed that so far as it deals with any point specifically, the Criminal Procedure Code must be deemed to be exhaustive, and the law must be ascertained by reference to its provision, but where a case arises which demands interference and it is not within those for which the Code specifically provides it would not be reasonable to say that the Court had not the power to make such order as the ends of justice require.

In the above view of the question for consideration before us, which is in accordance with the considered opinion expressed by two learned Judges of this Court in their judgment in the case of *Rahim Shaikh* v. *Emperor* (2), a case in which the jury were discharged by the Judge, before the verdict; but which opinion, in our judgment, applies with equal force to a case where the jury are discharged by the Sessions Judge in circumstances other than those specially provided by the Criminal Procedure Code, either before or after verdict, before the trial terminates in the Court of Sessions. As indicated already, in England the Judge has the power to discharge the jury, if necessity arises, before or after the verdict, and in the absence of any provision to the contrary in the Indian statute relating to procedure, a rule recognized under the English law, which is not a mere rule of practice and procedure, but a rule embodying a principle of justice, may safely be applied: see in this connexion *R.* v. *Fowler* (3) referred to in *Mamfru*

1. (1867) 10 Cox C C 573.

2. AIR 1923 Cal 724=73 I C 773=24 Cr L J 677=50 Cal 872.

3. (1821) 4 B & Ald 273.

Chaudhury v. *Emperor* (4) and *T. G. Singleton* v. *Emperor* (5).

In our judgment, there is no force in the contention urged in support of this appeal, that the trial at which the appellants were convicted was ultra vires, inasmuch as the procedure followed by the Assistant Sessions Judge in discharging the jury, who gave a verdict of not guilty on 30th June 1933, in favour of the appellants, was in contravention of law. We are unable also to give effect to the argument in support of the appeal that the verdict of not guilty should have been accepted by the Judge and the appellants acquitted on that verdict and the further argument that the conviction of and sentences passed on the appellants at the subsequent trial were illegal.

It remains now to deal with the question raised in the appeal upon the Assistant Sessions Judge's charge to the jury, at the second trial. Certain passages in the Judge's charge to the jury were pointed out to us, with a view to make out that there were misdirections in the charge. Exception was taken to that part of the Judge's statement to the jury where it was said that the jury were to decide whether it was likely that a false case was started against the accused placed on their trial, and it was also urged that the jury were not properly directed on the question of some of the accused having absconded and not having been found, when the attempt was made to arrest them. The summary by the Judge of the evidence bearing upon the question of identification of the individual accused persons was referred to before us, and it was urged that the Judge's charge in this behalf was not a fair and proper one. We have given our careful consideration to the Judge's charge to the jury bearing on the points mentioned above, and generally to the method followed by him in summarizing the evidence and in putting the material points arising for consideration in the case, and we are unable to hold that there was any such misdirection or non-direction by the Judge which could properly have resulted in an erroneous verdict of the jury.

4. AIR 1924 Cal 323=81 I C 364=25 Cr L J 776=51 Cal 418.
5. AIR 1925 Cal 501=26 Cr L J 662.

All the points raised in support of this appeal have to be overruled for the reasons set forth above. The conviction of the appellants and the sentences passed on them are affirmed. The appeal is dismissed.

K.S. *Appeal dismissed.*

A. I. R. 1934 Calcutta 430

C. C. GHOSE, AG. C. J. AND COSTELLO, J.

Abdul Sobhan—Appellant.

v.

Benimadhab Kshettri—Respondent.

Appeal No. 15 of 1933, Decided on 16th June 1933, from Original Suit No. 1510 of 1932.

(a) Civil P. C. (1908), S. 11—Section is not exhaustive of circumstances in which issue may be res judicata.

Section 11 is not exhaustive of the circumstances in which an issue may be res judicata. The plea of res judicata rests upon the principle that there should be finality to litigation, and the plea still remains apart from the limited provisions of the Code: 6 *All* 229; (*P C*) and *AIR* 1916-*PC* 78, *Ref.* [P 432 C 1]

(b) Civil P. C. (1908), S. 11—To operate as res judicata finding must be material and necessary.

To operate as res judicata finding must be material and necessary. Any finding which was not required cannot have the effect of res judicata. [P 432 C 2]

Page and *S. K. Dutta*—for Appellant.

Pugh and *H. Banerjee*—for Respondent.

C. C. Ghose, Ag. C. J.—The facts involved in this appeal are as follows: The plaintiffs alleged that, on various dates between 25th September 1930 and 5th November 1930, they advanced to the defendants Abdul Razak and Abdul Sobhan a sum of Rs. 10,000 which the latter undertook to repay with interest at the rate of 12 per cent per annum. The plaintiffs further alleged that both the defendants, who are father and son, carried on business in co-partnership. Defendant 2, Abdul Sohhan, in his written statement denied that he carried on business in co-partnership with Abdul Razak, and further contended that the plaintiffs' suit was barred by the principle of res judicata. He also added as follows:

" The defendant denies that the plaintiffs lent and advanced to this defendant in the defendants' businesses mentioned in the cause title to the plaint the sum of Rs. 10,000 with interest at the rate of 12 per cent per annum on the various dates given in the particulars of para. 1 of the plaint. This defendant had nothing to do

with the business referred to above, and if any sum was lent this defendant is not liable to pay the same."

The suit came on for hearing before my learned brother Buckland, J. Defendant 1 did not deny the loan; and his defence to the suit having been previously disposed of, a decree had been made against him. As regards the defendant Abdul Sobhan, Buckland, J's. attention was drawn to the judgment of Ameer Ali, J., given in the Insolvency Jurisdiction of this Court, whereon it was contended on behalf of this defendant that the suit was barred by the principle of res judicata; but Buckland, J., was of opinion, for the reasons given by him, that the present suit was not barred by the principle of res judicata. On the question whether or not Abdul Sobhan was a partner with his father Abdul Razak in the businesses, for which the money was borrowed, Buckland, J., after considering the evidence, came to the conclusion that the defendant Abdul Sobhan was a partner at all material times with Abdul Razak and that he must be held liable with him for the monies claimed in the present suit. He accordingly passed judgment against Abdul Sobhan for the amount claimed.

It is against this judgment that Abdul Sobhan has preferred the present appeal. At the hearing before us, the learned counsel on behalf of the appellant did not seriously dispute the correctness of the finding of Buckland, J., on the facts whether or not Abdul Sobhan was a partner with his father Abdul Razak. After going through the evidence on record, we intimated to the learned counsel for the appellant that we were not prepared to take a different view on the facts. The learned counsel for the appellant thereupon intimated that he relied most strongly on the judgment of Ameer Ali, J., in the Insolvency Jurisdiction of this Court and contended that the conclusion of Buckland, J., on the question of law, namely, whether the present suit was or was not barred by the principle of res judicata was unsustainable. Before we go further into the question on the point of res judicata it may be useful to summarise very briefly what the position was before Ameer Ali, J., in the insolvency case. The matter came on before Ameer Ali, J., on an application by six creditors to adjudicate two persons, namely, Abdul Razak and Abdul Sobhan described as carrying on business in co-partnership under the name, style and firm of Abdul Razak and Abdul Sobhan and Company. Among the six creditors were the present plaintiffs. Ameer Ali, J., held definitely that neither Abdul Razak nor Abdul Sobhan had committed any available act of bankruptcy. The father, Abdul Razak, had not committed any act of bankruptcy, and it appeared that the only allegation against Abdul Sobhan was that he was affected by Abdul Razak's bankruptcy in the circumstances stated, assuming the Court found Abdul Razak had committed an act of bankruptcy. The learned Judge observed as follows:

"In a petition like this where two individuals are sought to be adjudicated on a joint petition it is necessary to establish: (1) that the persons in question are partners; (2) that the debt is a joint debt and (3) that there is either a joint act of insolvency of the two persons or (4) that each person has committed some act of insolvency. With regard to Abdul Sobhan, the difficulties are as follows: In the petition, beyond the mere statement that Abdul Razak and Abdul Sobhan are sole proprietors, there is no evidence as to this. The affidavits in opposition in dealing with the prosecution of Abdul Razak in the police Court (referred to in para. 10 of the petition) give details, from which I think it is to be inferred that, during the prosecution, the hundi creditors, including the petitioning creditors, regarded Razak as the sole proprietor of the firm. Benimadhab Kshettri, in more than one place, alleges that Razak when drawing the hundi represented that he was doing so on behalf of the firm in question, but this, in the circumstances, I do not credit. In reply, there are affidavits directly to the effect that Abdul Sobhan is a partner. There is further a reference to a suit brought by a firm of Abdul Razak Abdul Sobhan. As regards the latter, it would appear to indicate that there must be business relationship of some kind or other between the father and son and as what, if any explanation could be given, is a matter with which I am not concerned. Having regard to Razak's denial, the fact may be used to discredit his evidence. The fact remains that, in this application, it must be established that Sobhan is a partner in the firm of Razak. In my view, that has not been satisfactorily established. Apart from this, I am not satisfied with the evidence of either of the acts (b) and (c). With regard to (b), the mortgage, for which no date was given, was apparently of 11th August 1931. With regard to (c), there is the fact which always appears to me anomalous that the petitioning creditors had no difficulty in serving (in this case on Razak only) the notice personally. Further, in some of the affidavits or in one of the affidavits in reply, it is stated 'that both may be found almost daily in their place of business.' I am not satisfied with

this class of evidence on those points and therefore the petition as against Sobhan must be dismissed."

Buckland, J., held that S. 11, Civil P. C., did not refer to a case, application, matter or other proceedings, but it only referred to a suit and therefore the judgment of Ameer Ali, J., in the proceedings before him, could not operate as res judicata. Dealing further with the argument that the Civil Procedure Code was not exhaustive and that the general principles of res judicata applied in this case, Buckland, J., was inclined to take the view that the question of partnership never arose in the earlier proceedings before Ameer Ali, J., and that his judgment on this point was superfluous, because, until it was held that there had been an act of insolvency, the question of partnership was immaterial. Buckland, J., ovserved as follows:

"Where there are two or more issues and any one of which would dispose of the suit, it may well be said that a decision on any one of them will be res judicata, but that is by no means the case here, and in my judgment the suit is not barred by the principles of res judicata.

I am not in agreement with Buckland, J.,in the view he took of the scope of S. 11, Civil P. C., referred to in the opening sentence of the previous paragraph. S. 11, Civil P. C., is not exhaustive of the circumstances in which an issue may be res judicata. The plea of res judicata rests on the principle that there should be finality in litigation and the plea still remains apart from the limited provisions of the Code of Civil Procedure. See the cases of *Ram Kirpal* v. *Rup Kuari* (1), *Sheoparsan Singh* v. *Ramnandan Prasad Singh* (2), *Hook* v. *Administrator-General of Bengal* (3). *Kalipada De* v. *Dwijapada Das* (4). I am however in agreement with Buckland, J., in the view he took in the concluding words of the previous paragraph. In the insolvency case before Ameer Ali, J., the main question for decision was whether the two persons before him or either of them had committed an available act of bankruptcy. The Judge's finding was that neither the two together nor either of them had committed an available act of bankruptcy. That really had the effect of finishing the matter of the application for adjudication before Ameer Ali, J. It was not necessary to go into the question of the partnership between the two persons. Any finding which was not required cannot have the effect of operating as res judicata. In other words, to operate as res judicata, the finding must be material and necessary. In this view of the matter the present appeal is without any substance and must be dismissed with costs.

Costello, J.—I agree.

R.K. *Appeal dismissed.*

1. (1884) 6 All 269=11 I.A. 37 (P C).
2. AIR 1916 P C 78=33 I C 914=43 I A 91=43 Cal 694 (P C).
3. AIR 1921 P C 11=60 I C 631=48 I A 187=48 Cal 499 (PC).
4. AIR 1930 P C 22=121 I C 200=57 I A 24 (P C).

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MUKERJI AND BARTLEY, JJ.

Dharanidhar Mandal—Accused.

v.

Emperor—Opposite Party.

Jury Ref. No. 27 of 1933, Decided on 23rd November 1933, from order of Sess. Judge, Birbhum.

Criminal P. C. (1898), S. 307—Jury's verdict — Jurors influenced by their private knowledge obtained outside Court — Indications in trial that jurors were biased in favour of prosecution—Verdict cannot be sustained.

Where in a trial by jury the jurors are influenced by their private knowledge based on what they had heard outside Court and there are indications in the course of the trial that the jurors are biased in favour of the prosecution, their verdict cannot be sustained. [P 433 C 2]

Narendra Kumar Basu, *Probodh Chandra Chatterjee* and *Pramatha Nath Mitra*—for Accused.

Khundkar and *Fanindra Mohan Sanyal*—for the Crown.

Order. — The accused Dharanidhar Mandal was tried by the Sessions Judge of Birbhum with the aid of a jury on charges in the alternative under Ss. 304/201 and Ss. 325/201, I. P. C. The jury unanimously found the accused guilty under the latter charge. The learned Judge was of opinion that the verdict was perverse and that the accused is entitled to an acquittal. He has accordingly made this reference under S. 307, Criminal P. C. Quite apart from the merits of the case, it is impossible to uphold the trial that was held, because of the opinion which the learned Judge has so strongly expressed as regards the atmosphere of bias and prejudice in which it took place. He has observed that there were strong ru-

mours in the town of Rampurhat and a certain amount of feeling about the case, the main plank in the prosecution case being an allegation that a true and genuine case of murder or at least killing of an innocent woman by a wealthy Marwari had been hushed up by the Police Officers and the Doctor by submitting false reports. The jury appear to have been so much carried away by their convictions that they gave it as part of their verdict that one Ratan Chand, who was not on his trial and not before the Court was guilty of the offence under S. 325, I. P. C. As regards the jury the learned Judge has observed thus:

"It appears to me that the jurors were prejudiced from the very beginning against the accused in this case and this prejudice as well as certain rumours which the jury appear to have heard outside the Court influenced their unjustifiable verdict in this case. There were allegations against the conduct and honesty of Police Officers on behalf of the prosecution, and the notorious and widespread prejudice and suspicion against the conduct of the Police in general also seemed to have influenced the jurors."

He has also referred to two specific instances, one a question which the jurors put to the Sub-Inspector, P. W. 20, which showed that they were influenced by their private knowledge based on what they had heard outside Court; and the other a remark which they made while the defence arguments were being heard and which showed that they were prepared to make an assumption against the accused without any evidence to support it. He has also said:

Apart from these two definite instances there were other indications noticed by me in the course of the trial that the jurors were biassed in favour of the prosecution."

A verdict obtained on a trial such as this cannot possibly be sustained. And the only question that we have had to consider seriously is whether we should order a fresh trial of the case to be held under proper conditions. We have therefore considered the case on its merits, and having done so we have been able to come most unhesitatingly to the conclusion that it would not be right or fair to make such an order. We are prepared to concede that there are circumstances which should disincline us to accept too readily the case which the defence put forward, namely that the woman committed suicide by hanging. That position however is a long way off from holding that a prima facie case against the accused calling for a trial has been made out. The post mortem report of the Doctor and the inquest report of the Police have both to be thrown overboard if one is to accept the account of the injuries on the deceased now given by the prosecution witnesses. The delay in disclosing the story such as the more important of the prosecution witnesses are guilty of, the unreliable character of their testimony in view of the different statements they have made at different times, the rather extraordinary circumstances under which the evidence came to light or was elicited, the conflicts and contradictions in the evidence which are obvious and irreconcilable and the palpable falsity of some of the more vital statements made by the witnesses are matters which cannot be too lightly overlooked in this case. It is clear to us that there were agencies at work, well intentioned though they may have been, whose influence is discernible in the evidence that came before the Court. The more important of the eye-witnesses are no better than accomplices whose evidence, even though uncorroborated, would have to be largely relied on for a conviction. And if upon materials such as they are at present a fair summing up has to be made it would be more or less in the same strain, namely one of acquittal, in which the present summing up and the letter of reference are couched. No useful purpose, in our opinion, would be served by putting the accused up for a fresh trial. We accordingly accept the reference and setting aside the verdict of the jury order that the accused be set at liberty.

K S. *Reference accepted.*

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* A. I. R. 1934 Calcutta 433

MUKERJI AND S. K. GHOSE, JJ.

Bhagaban Das Mahesri—Appellant.

v.

Prosanna Dev Raikot and *others*—Respondents.

Appeal No. 35 of 1933, Decided on 9th August 1933, from order of Sub-Judge, Jalpaiguri, D/- 30th August 1932.

*** (a) Civil P.C. (1908), O. 23, R. 1 (3)—Suit for possession against tenants at will — Suit withdrawn for want of proper notice without permission of fresh suit — Subsequent suit after proper notice is not barred under O. 23, R. 1 (3).**

Where a suit for possession from tenants-at-will has been withdrawn without permission to bring fresh suit as, no notice had been served to

the heirs of one tenant, who had been served with notice, but had died before the institution of the suit, a subsequent suit for same relief after proper notice to all the parties is not barred under O. 23, R. 1 (3): *A I R* 1917 *Mad* 512 (*FB*); *A I R* 1923 *Mad* 3 and *A I R* 1917 *Bom* 10, *Foll.* [P 435 C 1 ; P 437 C 1]

(b) Practice — Remand — All evidence adduced and no complaint of evidence being shut out—Appellate Court should dispose of case, and not remand it.

Where evidence has been adduced by the parties with regard to all the issues which have been framed, and there is no complaint that any evidence was shut out, an appellate Court should not make an order of remand but should dispose of the case on the evidence already on record. [P 437 C 1]

Nakuleswar Mukherjee and *Benode Lal Ghose*—for Appellant.

Gunada Charan Sen, *Prosanta Bhusan Gupta*—for Respondents.

Bireswar Chatterjee — for Deputy Registrar.

Judgment.—This appeal has been preferred by defendant 4 in a suit which was instituted against him and some other defendants for recovery of khas possession of certain lands, it being alleged in the suit that the other defendants were tenants-at-will under the plaintiff and that defendant 4 was a sub-tenant under them. The order from which this appeal has been preferred is an order passed by the Subordinate Judge of Jalpaiguti by which the learned Judge, having set aside the decision of the Munsif dismissing the suit has remanded the suit for decision on the merits on the evidence in the record and on such further evidence which the parties might like to produce in the suit. The Subordinate Judge has also given a direction that if an opportunity was asked for by any of the parties to adduce any further evidence the trial Court should give him that opportunity. In order to understand the contentions which have been put forward in this appeal it is necessary to set out a few facts.

In 1922, the plaintiff of the present suit had instituted another suit against the present defendants or rather against three of them and the predecessors of the others. That suit was instituted on service of notice on all the defendants who were made parties to the suit, with the exception of the heirs of one Kissen Chand, who had been served with notice but had died before the suit has been instituted. On this defect being found, application was made for withdrawing the suit with liberty to institute a fresh one. This application was granted sometime in July 1923, when an order was made and permission to withdraw with liberty to institute a fresh suit was given on condition that the plaintiff would pay the costs of the defendant within 15 days from the date when such costs would be notified in the order sheet. It was further ordered that on default of such payment the suit would be considered as dismissed with costs. On 14th July 1923, it was noted in the order sheet and notified to the parties that the costs of defendant 3 amounted to Rupees 16-11-6. On 28th July 1923, the plaintiff deposited Rs. 16-9-3 ; that is to say, the amount deposited was short by 2 annas 3 pies. Thereafter, the plaintiff in July 1927 served fresh notices upon the defendants and on the basis of those notices instituted the present suit on 25th April 1929. The reliefs claimed in both the suits were the same, namely, the relief in the shape of recovery of khas possession. One of the grounds taken in defence in the present suit was that by reason of the order which the Court had made in the previous suit and which was not fully complied with as stated above, the present suit was not maintainable. This matter formed the subject of an issue, namely, issue 2 which however was worded in these words : "Is the suit barred by res judicata ?" Upon the other points that were taken, several other issues were framed.

The Munsif dismissed the suit holding that it failed on the ground that the condition upon which liberty was reserved to the plaintiff to institute a fresh suit after his withdrawal of the previous one not having been complied with, the previous suit must be regarded as having been dismissed without any liberty reserved and that consequently the present suit was not maintainable. The Munsif did not consider it necessary to deal with the other issues which had been framed. The plaintiff thereupon preferred an appeal. The Subordinate Judge who dealt with that appeal held that the dismissal of the previous suit was no bar to the institution of the present one and overruling the decision of the Munsif on issue 2 as stated above, he set aside the decree which the Munsif

had made and remanded the case for trial by the Munsif with the directions to which we have already referred. From this decision, as already stated, defendant 4 has preferred the present appeal.

The principal question which has been raised on behalf of the appellant in this appeal depends upon a construction of O. 23, R. 1, sub-R. 3 of the Code, and it is really upon the meaning that is to be attached to this sub-rule that we have to decide the question as to whether the present suit is barred or not. There can be no dispute that the order which was passed by the trial Court in the previous suit allowing the plaintiff to withdraw from the suit with liberty to institute a fresh one on condition that the plaintiff should pay the costs of defendant 3 within 15 days, such costs being notified in the order sheet and there having been a further order made by that Court to the effect that in case of default in the payment of such costs within the time aforesaid, the suit should be considered as dismissed, we think it must be held that upon the default which has occurred on the part of the plaintiff in not putting in the whole amount of the costs even though the amount which was deposited was short only by 2 annas and 3 pies, must operate as amounting to a dismissal of the suit without any liberty reserved. But then the other question will arise and that is this, whether by reason of the dismissal of the previous suit in the circumstances to which reference has been made, the present suit, which has been started on issuing fresh notices on the defendants and upon the cause of action which, it is said, arose on the service of such notices, should be regarded as being not maintainable by reason of the dismissal of the previous suit. In determining this question one has to consider what is the meaning of the word, "subject-matter" which is to be found in O. 23, sub-R. (3), R. 1, O. 23 of the present Code corresponds to S. 373 of the Code of 1882. S. 373 of the Code of 1882 consisted of three paragraphs. The first of those paragraphs is reproduced in the first two sub-rules of R. 1, O. 23. There is not much difference between the contents of para. 1, S. 373 and of the first two sub-rules of R. 1, O. 23 The wording has been recast, but what is to be found in the said paragraph is substantially reproduced in these two sub-rules. Para. 2, S. 373 contained these words,

"was to be precluded from bringing a fresh suit for the same matter or in respect of the same part."

Sub-R. 11, R. 1 (3) says,

"shall be precluded from instituting a fresh suit in respect of such subject-matter or such part of the claim."

So, the material difference between the two provisions of the law consists in this that whereas in para. 2, S. 373 the word "matter" was used in sub-R. (3), R. 1 we find the expression "subject-matter." Now, it has been held in a number of cases to which specific reference need not be made that this alteration has been made only with the object of securing uniformity of expression, for, in S. 373 in para. 1 the word "subject-matter" was used and in the other the word "matter" was used. The law, therefore, practically remains the same now as it was under the Code of 1882. Now, S. 373 of the Code of 1882 was interpreted in two different phases by the Courts. In the cases of *Kamini Kanta* v. *Ram Nath* (1) and *Gopal Chandra Banerjee* v. *Purna Chandra Banerjee* (2), this Court expressed the view that the word "matter" used in S. 373 did not mean the property concerned in the suit but that it had reference to the right in that property which the plaintiff was seeking to enforce in it. A very different view was taken by the Madras High Court in the case of *Achuta Menon* v. *Achutan Nayer* (3). In that case, the learned Judges referring to Anderson's Dictionary of law held that the term "matter" in a context like that in S. 373 means,

"the subject of legal action, consideration, complaint or defence or the fact or facts constituting the whole or a part of a ground of action or defence."

The logical result of accepting this definition was that even though the plaintiff's suit had been dismissed by reason of the fact that he had failed to comply with the condition under which liberty was reserved to him for the institution of a fresh suit, a fresh suit upon a different cause of action or upon a different title subsequently acquired but for the same property would have

1. (1894) 21 Cal 265.
2. (1906) 4 C W N 110.
3. (1898) 21 Mad 35.

to be held as not maintainable. Indeed, in that case, what happened was that the plaintiff had tried to eject the defendant in the earlier suit upon a title derived in the year 1880, and subsequent to the dismissal of that suit under the aforesaid circumstances he derived a fresh title in 1892, and it was held that the fresh suit in which the title subsequently acquired was litigated upon was barred by reason of the dismissal of the previous suit. This view of the Madras High Court was adhered to in several decisions of that Court amongst which reference may be made to the cases of *Machana Uajhala* v. *Gorugantulu Yaggamma* (4) and *Sennava Reddiar* v. *Venkatachala* (5). Subsequently, however, there was a reference to a Full Bench in the year 1916, and the Full Bench in the case of *Singa Reddi* v. *Subba Reddi* (6) overruled the decision in the case of *Achuta Menon* v. *Achutan Nayer* (3), and the other cases which had followed it and agreeing with the view taken by this Court held that,

"without attempting an exhaustive definition of all that may be included in the term "subject-matter," it should be held that where the cause of action and the relief claimed in the second suit are not the same as the cause of action and the relief claimed in the first suit, the second suit cannot be considered to have been brought in respect of the same subject-matter as the first suit within the meaning of O. 23, R. 1, sub-R. (3), Civil P. C."

There are two other decisions, one of the Madras High Court and other of the Bombay High Court to which reference is also necessary. In the Madras High Court in the case of *Chenchuram Naidu* v. *Bahavuddin Sahib* (7) which was a case in which the plaintiff as landlord had instituted a suit in ejectment against a tenant but the suit was allowed to be withdrawn on the ground that there was absence of the requisite notice to quit but no liberty was reserved to the plaintiff to institute a fresh suit and thereafter the plaintiff instituted another suit after having given the necessary notice, it was held that the second suit was not a suit in respect of the same subject matter because the word "subject-matter" in O. 23, R. 1 means,

"the series of acts or transactions alleged to exist giving rise to the relief claimed."

The learned Judges purported to follow the decision of the Bombay High Court in the case of *Rakhmabai* v. *Mahadeo Narayan* (8). In the case last mentioned, Scott, C. J., has explained the meaning of the word "subject matter" in these words:

"The question is whether the previous suit was a suit for the same "subject-matter" within the meaning of O. 23, R. 1. We are of opinion that "subject-matter" means, to use the word of O. 1, R. 1, the series of acts or transactions alleged to exist giving rise to the relief claimed. Obviously, the first series of acts or transactions which formed the basis of the first suit was incomplete, or the plaintiff would have been able to prosecute his suit to decree. It was incomplete because there was no notice to quit. The second series of acts of transactions is complete because the notice to quit has been given, and therefore, the two suits are not in respect of the same "subject-matter."

It may be pointed out that the case of *Rakhmabai* v. *Mahadeo Narayan* (8) also was a case in which the first suit was withdrawn upon the ground that the notice which had been served was defective and, therefore, the cause of action was incomplete. It has been argued by Mr. Mukherjee appearing on behalf of the appellant that these cases are distinguishable because although if a suit is instituted without service of notice upon the defendant and thereby the cause of action becomes incomplete and therefore the suit is allowed to be withdrawn, in a case where notice has been given and nothing is decided as to whether the notice is sufficient in law or not the principle laid down in the Madras and Bombay High Courts to which reference has been made should not be held to apply. It is not necessary for our present purposes to go into a discussion of this question because as a matter of fact in the present case the notices that were served before the institution of the first suit were defective by reason of the fact that one of the persons who had been so served was dead and the suit had been instituted against his heirs who were persons on whom no notice had been served. We are of opinion, that there is no room for the contention that the decision in

4. (1910) 8 I C 1066.
5. (1915) 28 I C 91.
6. A I R 1917 Mad 512=35 I C 185=39 Mad 987 (F B).
7. A I R 1933 Mad 3=139 I C 475=56 Mad 163.
8. A I R 1917 Bom 10=43 I C 752=42 Bom 155.

the last-mentioned case is not applicable to the present case. We hold, therefore, that the Subordinate Judge was right in holding that the suit should not have been dismissed for the reason that the previous suit had been withdrawn without any liberty being reserved to the plaintiff.

A second contention has been put forward on behalf of the appellant and that turns upon the directions that had been given by the Subordinate Judge in the order of remand. The Subordinate Judge, as we have already stated, has sent the case back on remand to the trial Court and has given a further direction that that Court should give the parties an opportunity to produce such further evidence as they might desire. We are of opinion that the learned Subordinate Judge was not right in making such an order of remand in the present case. In the first place, evidence had been adduced by the parties with regard to all the issues which had been framed and there was no complaint before the learned Judge nor is there any complaint before us to the effect that any evidence was shut out. In these circumstances, the learned Subordinate Judge instead of sending the case back to the trial Court should have dealt with and disposed of the case on the merits and upon such evidence as there was already on the record. Of course, if on a consideration of that evidence the Subordidate Judge came to the conclusion that fresh evidence on a particular point was necessary there was nothing to prevent him from calling for such evidence in the exercise of the powers which an appellate Court always has. There is no reason, however, why a fresh lease of life to the case would be given by sending the case to the Munsiff and then tying up his hand with a direction that the parties will be at liberty to produce such fresh evidence. The result is that although we disagree with the appellant in his main contention which he has put forward as regards the maintainability of the present suit, we uphold his second contention and order that the order of the Subordinate Judge will be modified and that an order will be recorded that the case be sent back to the Subordinate Judge who will proceed to deal with the appeal on the merits as an appellate Court would ordinarily do. There will be no order for costs in this appeal.

R.K. *Order modified.*

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MALLIK AND JACK, JJ.

Hiralal Ray Choudhury and *another* —Plaintiffs—Appellants.

v.

Satya Priya Ghosal — Defendant—Respondent.

Appeal No. 3065 of 1931, Decided on 30th November 1933, from appellate decree of Addl. Sub-Judge Bakargunge, D/- 11th July 1931.

Landlord and Tenant—Lessor must give good title to lessee.

The obligation of a lessor is the same as that of a vendor sofar as regards the duty to give a good title though the obligatiou to give disclosure or to furnish proof thereof may be different: *A I R* 1930 *Cal* 561, *Rel on.* [P 438 C 1]

The defendant advertised for settlement of 47 bighas of asli reformed land alleging that it appertained to his zamindary and belonged to him. The plaintiff obtained settlement by paying Rs. 1600 as selami and when the land was subsequently measured it was found to be only 47 bighas in area and that out of 47 bighas of land 2·57 acres only was asli reformed land of the defendant's zamindary and the rest was dearah land of which the defendant had not obtained even any dearah settlement.

[P 437 C 1]

Held : that the plaintiff was entitled to a proportionate refund of the selami paid.

[P 438 C 1]

Gunada Charan Sen and *Radhicaranjan Guho*—for Appellants.

Rupendra Kumar Mitter — for Respondent.

Mallik, J.—This appeal arises out of a suit for the refund of a portion of selami money paid by the plaintiffs to the defendant on account of a lease of some land. The allegations on which the suit was brought were that the defendant advertised for settlement of 74 bighas of asli reformed land alleging that it appertained to his zamindary and belonged to him, that the plaintiff obtained settlement by paying Rs. 1600 as selami and that when the land was subsequently measured it was found to be only 47 bighas in area and that out of the 47 bighas of land 2·57 acres only was asli reformed land of the defendant's zamindary and the rest was dearah land of which the defendant had not obtained even any dearah settlement. On these allegations the plaintiff asked for a decree for refund of Rs. 1200 odd out of Rs. 1600 paid as

selami presumably on the ground that except for 2·57 acres the defendant had no title to the land demised and had no right to settle the same with the plaintiffs. The defence inter alia was that the area settled with the plaintiffs was not 74 but 47 bighas and that the allegation that only 2·57 acres appertained to the defendants zamindary was not true. The Court of first instance found that only 47 bighas had been settled with the plaintiffs. But inasmuch as out of these 47 bighas only 10 bighas appertained to the plaintiff's zamindary as being asli reformed land and the rest as dearah the first Court gave a decree to the plaintiffs for a proportionate refund of the selami. On appeal this decision was reversed—the learned Subordinate Judge holding that as the plaintiff's possession had not been in any way disturbed and as in the case of a lease there was no warranty of title in the lessor the plaintiffs were not entitled to any refund of the selami. Against this decision the plaintiffs have appealed to this Court.

The main ground on which the lower appellate Court reversed the decision of of the trial Judge, namely, that in the case of a lease there was no warranty of title in the lessor does not appear to me to be tenable in the present case. The plaintiffs asked for proportionate refund of the selami on the ground that the defendant had no title to the land except in 10 bighas only and if they could show that the defendant had no title to the remaining 37 bighas they were on equitable grounds alone entitled to proportionate refund. The obligation of a lessor is the same as that of a vendor so far as regards the duty to give a good title though the obligation to give disclosure or to furnish proof thereof may be different (see the judgment of Rankin, C. J. in the case of *Jotiprosad Singh Deo* v. *H. V. Low & Co.* (1). In the present case the established fact was that the defendant had no title to 37 out of 47 bighas of land settled with the plaintiff.

For the reasons recorded above I would allow the appeal set aside the decree of the lower appellate Court and restore that of the Court of first instance with costs to the plaintiffs in proportion in the first Court and full costs in this Court and in the lower appellate Court.

Jack, J.:—I agree.

K.S. *Appeal allowed.*

1. A I R 1920 Cal 561=128 I C 321=57 Cal 1189.

A. I. R. 1934 Calcutta 438

C. C. GHOSE, AG. C. J. AND MALLIK, J.

Nippon Yusen Kaisha — Plaintiff—Appellant.

v.

"*Marienfels*" — Defendant — Respondent.

Appeal No. 14 of 1933, Decided on 28th June 1933.

(a) Practise — Appellate Court will not interfere with the lower Court's discretion except upon very strong grounds.

A Court of appeal will not interfere with the Judge's discretion except upon very strong grounds. Where the Judge has proceeded upon no incorrect principles, the Court of appeal will not and ought not to interfere with his discretion : *The Kashmir* (1923), *p.* 85, and *James Westoll* (1923), *p.* 94, *Ref to.* [P 440 C 1 2]

(b) Practice—Parties—Plaintiff negligent in bringing suit in time cannot ask for extension on ground that defendants have been negligent.

Negligent plaintiffs cannot be allowed to say that in as much as the defendants have been late in coming to Court, although within the statutory period of limitalion, extension of time should be allowed to them (plaintiffs). [P 441 C 2]

A. K. Roy and *Isaacs*—for Appellants.

S. M. Bose and *Clough*—for Respondents.

C. C. Ghose, Ag. C. J.—This appeal arises out of an application made by the plaintiffs in Suit No. 2 of 1932 in the Admiralty Jurisdiction of this Court and the facts which gave rise to that applicatlon, shortly stated, are as follows: It appears that, on 16th March 1930, two steamships, namely, the "Marienfels", belonging to the Hansa line, and the "Malacca Maru," belonging to the Nippon Yusen Kaisha, were proceeding down the Hooghly and that, at a point named Pukuria Point, where, it is alleged, that the waters are of a shallow character, a collision took place between the "Marienfels" and the "Malacca Maru,". The "Marienfels" was in charge of Mr. King as pilot and the "Malacca Maru" was in charge of another pilot named Mr. Halford. The collision having taken place on 16th March 1930, the "Marienfels" alleged that the "Malacca Maru" was to blame. The "Malacca Maru," on the other hand, alleged that

the "Marienfels" was to blame. On 7th May 1930, the owners of the "Malacca Maru" wrote to the owners of the "Marienfels" asking for admission of liability for damages. On 9th May 1930, the "Marienfels" replied denying liability and holding the "Malacca Maru" responsible for damages caused as the result of the collision. On 15th May 1930, the "Malacca Maru" suggested that the parties should go to arbitration. On 24th May 1930, the "Marienfels" stated that their underwriters were not prepared to admit liability or to do anything whatsoever until the Marine Court of Enquiry had been held and had reported. It appears that the Marine Court of Inquiry reported on the matter on 16th November 1930, and it is said that the finding of the Marine Court of Inquiry was not communicated to the parties till some some time in June 1931. On 7th July 1931, the "Marienfels" wrote to the "Malacca Maru" putting forward their claim for damages to the "Marienfels" as a result of the collision.

On 5th August 1931, the "Malacca Maru" wrote to the "Marienfels" stating that that the owners of the former did not agree with the findings of the Marine Court of Inquiry and suggesting a settlement on the basis that both the vessels were equally to blame and that both should pay their own damages. On 10th August 1931, the "Marienfels" wrote to the "Malacca Maru" asking for payment of their claim for damages in full. On 18th August 1931, the "Malacca Maru" refused to admit the claim of the "Marienfels" for damages and renewed their suggestion that, inasmuch as, in their view, both parties were equally to blame, both sides should pay their own damages. On 20th August 1931, the "Marienfels" stated in reply to the last communication of the "Malacca Maru" that they were not prepared to agree to have the matter disposed of on the basis suggested by the "Malacca Maru," that both sides were to blame and that both sides should pay their own damages and they threatened legal proceedings. On 24th August 1931 the "Malacca Maru" said that they were referring to their underwriters the question raised by the Marienfels." On 6th November 1931, Dr. Reinhard Reme, representing the reinsurers, wrote to the underwriters of the "Marienfels" offering settlement, but, at the same time, stating that, if the Hansa line took legal proceedings, the owners of the "Malacca Maru" would put forward a claim for damages. On 12th November 1931, there was a very important letter from the underwriters of the "Marienfels" to Dr. Reinhard Reme representing the re-insurers of the "Malacca Maru" and it was in these terms:

With reference to the above, I herewith confirm, with thanks, receipt of your letter of 6th instant. I note from your letter that the insurers of the "Malacca Maru" did not see their way to accept the offer of compromise made by us. I have informed the Deutsche Dampfschiffahrts-gesellschaft "Hansa" of this, who have then given instructions to institute legal proceedings in Calcutta immediatcly. I thought it appropriate to advise you of this."

It appears that nothing further was done and that, ultimately, on 12th March 1932, a bill in the Admirtlay Jurisdiction of this Court was filed by the owners of the "Marienfels," being Admirtlay Suit No. 1 of 1932, in which the owners of the "Marienfels" claimed recovery of a sum of Rs 64,870-1-11 as damages caused to the "Marienfels" by the "Malacca Maru" during the collision in the river Hooghly on the date referred to above. The writ of summons, we are informed, was served some time about 23rd March 1932, and thereafter on 25th April 1932, a second bill in the Admiralty Jurisdiction of this Court, being Suit No. 2 of 1932, was filed by the owners of the "Malacca Maru," claiming damages to the extent of £6,000 against the owners of the "Marienfels" for damages to their vessel on the occasion of the collision referred to above. The bill was filed, as stated above, on 25th April 1932, and the answer of the "Marienfels" was filed on 15th June 1932. One of the points taken in the answer of the "Marienfels" was that Suit No. 2 of 1932 filed by the "Malacca Maru" was out of time, having regard to the provisions of S. 8, Maritime Conventions Act, 1911 (1 & 2 Geo. V, C. 57). The section relied upon by the "Marienfels" runs as follows :

" No action shall be maintainable to enforce any claim or lien against a vessel or her owners in respect of any damage or loss to another vessel, her cargo or freight, or any property on board her, or damages for loss of life or personal injuries suffered by any person on board her, caused by the fault of the former vessel, whether such vessel be wholly or partly in fault, or

in respect of any salvage services, unless proceedings therein are commenced within two years from the date when the damage or loss or injury was caused or the salvage services were rendered, and an action shall not be maintainable under this Act to enforce any contribution in respect of an overpaid proportion of any damages for loss of life or personal injuries unless proceedings therein are commenced within one year from the date of payment: Provided that any Court having jurisdiction to deal with an action to which this section relates may, in accordance with the rules of Court, extend any such period, to such extent and on such conditions as it thinks fit, and shall, if satisfied that there has not during such period been any reasonable opportunity of arresting the defendant vessel within the jurisdiction of the Court, or within the territorial waters of the country to which the plaintiff's ship belongs or in which the plaintiff resides or has his principal place of business, extend any such period to an extent sufficient to give such reasonable opportunity."

Thereafter the answer of the "Marienfels," having been filed on the 15th June 1932, a summons was taken out by the "Malacca Maru" dated 28th July 1932, giving notice of an application to be brought on Friday, 29th July 1932, on the part of the Nippon Yusen Kaisha for an order that

" this Court may be pleased to give them leave in accordance with the provisions of S. 8, Maritime Conventions Act, 1911, to maintain the suit herein by extending the time for the filing of the said suit until some date after the filing of the plaint herein."

It appears that, although summons had been taken out on 28th July 1932, the matter, apparently, was not brought on for decision before the learned Judge on the Original Side till 5th December 1932. Lort-Williams, J., who heard the application, went into the matter of the correspondence which had preceded the filing of the said Suit No. 1 of 1932 and finally came to the conclusion that, in the circumstances disclosed, no case had been made out for exercising the discretion referred to in S. 8, Maritime Conventions Act, 1911, in favour of the applicants, the Nippon Yusen Kaisha, and he thereupon dismissed the application. The present appeal is from that order.

Before I go into the facts and dispose of this appeal, it may be desirable, at the outset, to state that, according to the law, as settled in England, the Court of appeal will not interfere with the Judge's discretion except upon very strong grounds. Where the Judge has proceeded upon no incorrect principle, the Court of appeal will not and ought not to interfere with his discretion. See in this connecxion *The Kashmir* (1): To the same effect is the decision of Lord Sumner in the case of *James Westoll* (2), decided on 31st October 1913. Bearing these principles in mind, we have got to consider in this case whether the discretion vested in the learned Judge by the proviso to S. 8, Maritime Conventions Act, 1911, has been exercised on correct principles and whether there is any justification whatsoever for the Nippon Yusen Kaisha coming to this Court and asking that that discretion should be reviewed and that time should be extended in the circumstances which have happened. I have set out briefly —almost too briefly—the effect of the correspondence between the parties subsequent to 16th March 1930, when the collision in question took place. It is said that considerable time was wasted by reason of the report of the Marine Court of inquiry being not made till some time in December 1930, and by the finding of the Marine Court of inquiry being not made available to the parties till some time in June 1931.

It is well-known that the Marine Court of inquiry is only concerned with the question, whenever there is a case of collision, as to which of the two pilots in charge of the two ships, between which the collision takes place, is to blame. But, be that as it may, there was plenty of time between June 1931, and 15th March 1932, when the time expired according to S. 8, Maritime Conventions Act, 1911, for the Nippon Yusen Kaisha to come to a conclusion, one way or the other, as to whether they should prosecute their claim for damages by filing a suit or bill in the Admiralty Jurisdiction of this Court. It is said however that correspondence went on down to November 1931, and that, in view of that correspondence, it was not considered wise or desirable on behalf of the Nippon Yusen Kaisha to start legal proceedings. Assuming that time was consumed till 12th November 1931, but not admitting that time was profitably consumed, there was plenty of time from 12th November 1931, to 15th March 1932, for the Nippon Yusen

1. (1923) P 85=92 L J 113=128 L T 681=39 T L R 197=16 Asp M L C 81.
2. (1923) P 94.

Kaisha to put a plaint on the file in the Admiralty Jurisdiction of this Court. It is alleged however that the "Marienfels" had tricked the "Malacca Maru" and the position ultimately in which the "Malacca Maru" found herself in was that time had expired and they had to come to this Court for extension of time. I regret the observation that the "Marienfels" had done anything in the nature of a trick. As far as I can see from the correspondence, they had all along repudiated their liability for damages to the "Malacca Maru," they had insisted consistently that damages had ensued to the "Marienfels" by reason of negligent navigation on the part of the "Malacca Maru" and that they were taking steps to enforce their claim for damages. The "Marienfels" had further refused to recognize the justice of any claim to go to arbitration, such as was put forward on behalf of the "Malacca Maru," or the justice of the claim put forward an behalf of the "Malacca Maru" that both sides should be agreeable to dispose of the matter on the basis that both sides were to blame and that both sides should pay their respective damages.

The "Marienfels," having taken up this attitude consistently, a final intimation was given by the underwriter of the "Marienfels" that nothing could be done in the matter of adjusting the differences that had arisen between the owners of the two steamships and that the "Marienfels" were about to take legal proceedings immediately. Now, the word "immediately" must be considered having regard to the date of the letter and the date of the letter was 12th November 1931. It is further alleged that, although they had said they were going to take legal proceedings immediately, they waited till 12th March 1932, in order to put their plaint on the file. It is impossible to allow the Nippon Yusen Kaisha to make a virtue of the time taken by the "Marienfels" to put their plaint on the file on 12th March 1932. Supposing the "Marienfels" had not put in their plaint, then the result either would have been that the "Malacca Maru" would have to come to Court within the time limited by S. 8, Maritime Conventions Act, 1911, or to waive giving effect altogether to their claim for damages against the "Marienfels." But it is impossible to allow negligent plaintiffs to turn round and say that, inasmuch as the defendants have been late in coming to Court, although within the statutory period of limitation, extension of time should be allowed to them, namely, to the negligent plaintiffs, in order that they may prosecute their claim whatsoever. No doubt the widest discretion has been given to the Court in applications for extension of time under S. 8, Maritime Conventions Act, 1911, but I am not satisfied that the learned Judge on the Original Side has exercised his discretion on wrong principles; nor am I satisfied that the merits of the case is such that we ought to consider it our bounden duty to review the discretion exercised by the learned Judge and come to a different conclusion. It is said further that no prejudice will be caused to the defendants. That is an argument which is always put forward on behalf of a negligent plaintiff whenever there is any application for extension of time either under the provisions of the Indian Limitation Act or under any other statute of limitation. The four months' delay from 12th November 1931, is just as good as four years' delay and there is a very high authority in support of the statement which I have just made.

In this view of the matter, taking into consideration all the circumstances, we do not think there is any substance whatsoever in this present appeal and as such it must be dismissed with costs.

Mallik, J.—I agree.

R.K. *Appeal dismissed.*

A. I. R. 1934 Calcutta 441

AMEER ALI, J.

T. A. Hurst—Plaintiff.

v.

Shyamsundarlal Khandelwal—Defendant.

Original Suit No. 321 of 1933, Decided on 26th July 1933.

(a) Accounts— "Accounts stated" — Four kinds are (1) Mere account rendered having no legal effect. (2) Unilateral "account stated" being claim made by one party and admitted by other (3) Cross accounts stated constituting binding contracts at law. (4) Account stated for good consideration.

There are four positions of "accounts stated" (1) Mere account rendered, which is not any kind of "accounts stated" at law and is of no more effect than any other admission. (2) Uni-

lateral "accounts stated" which consist of a claim made by one party and admitted by the other to be correct. This is something more than an admission but is still subject to the equitable doctrine of surcharging or re-opening settled accounts. (3) Cross accounts stated, which constitute binding contracts at law and can only be challenged upon grounds such as mistake, fraud, etc. (4) Accounts stated for good consideration which might consist of a reduction of the claim, consent to wait for payment, or any other matter involving a consideration for the agreement to pay. [P 443 C 2]

(b) Accounts—"Accounts stated" — Party merely asked to correct mistake in rate and amount of interest and not reduction in amount—Held no good consideration for settled accounts.

Where a party submitting an account is merely asked to correct a mistake in the rate and amount of interest but not to reduce the amount of his claim as a condition of its acceptance and after correction the account is accepted by the other party, there is no good consideration for the settled accounts but it is a case of "cross account stated." [P 444 C 1]

(c) Evidence Act (1872), S. 115 — Suit on accounts submitted—Act must be referable to representation—Accounts.

In a case for money on accounts submitted, no estoppel arises unless the acts of the plaintiff in consequence of the accounts submitted are necessarily referable to the representation made by the defendant. [P 443 C 1]

(d) Accounts — "Accounts stated"—Re-opening—Fraud is ground.

As a fundamental mistake is a ground for re-opening settled accounts so also is fraud. [P 444 C 1]

Isaacs and *S. N. Banerjee (Jr)* — for Plaintiff.

Pugh and *Sudhis Ray*—for Defendant.

Judgment.—This matter is before me on a further hearing under the following circumstances: This was a suit against a share broker for damages for conversion of certain shares left with that broker as security for the amounts standing to the debit of the plaintiff's account with him. I held that there was such conversion and that the plaintiff would be entitled to damages for conversion on a certain basis. The shares however being pledged shares, it was common ground that, as between the plaintiff and the defendant, the defendant would have to be credited with the amount due to him on the account, that is to say, the plaintiff would only be entitled to the value of the shares less what he owed to the defendant. Now, at the hearing, Mr. Isaacs for the plaintiff sought to prove that the amount due to the defendant was a certain sum of, I think, Rs. 1,400 odd, which sum, if credited to the defendant, would entitle the plaintiff to the balance of the value of the shares, which would be a considerable amount. This amount, alleged to be due to the defendant, is mentioned in the plaint (para. 5); in point of fact, no estoppel or account stated is pleaded in the plaint. In the written statement the defendant has denied that this is the correct figure, and has alleged in para. (8):

"that on an account being taken of the transactions between the plaintiff and the defendant there would be due to the defendant a sum of Rs. 2,306."

In argument, Mr. Isaacs, for the purpose of establishing the amount set up by the plaintiff, relied upon a certain letter and an amended account, which, although submitted by a man called Tanden, I have held to be in effect the documents and accounts of the defendant firm. This being so, he relied upon the principle of estoppel or account stated in some form or other. Mr. Pugh, on behalf of the defendant, in point of fact did not challenge, in detail, the account which I have referred to. To the evidence on this point I will refer again. Mr. Pugh contended that the matter would have to go to a reference and the defendant would prove this account there. On the materials before me I was unable there and then to accept the argument of Mr. Isaacs on estoppel or account stated. What I did was to say that the matter must proceed before me as if the account was being taken by me on a further hearing, and upon such hearing I would hear Mr. Isaacs further on the points (1) of estoppel and (2) of an account stated, whatever that might include. That was the position, and on those points I have heard further arguments. I also put certain questions to the defendant with a view to discovering whether, if Mr. Isaacs should not succeed, I could here and now proceed with taking the account. The result was that I came to the conclusion I could not. I will now deal with Mr. Isaacs' points. Before I do so, I should point out that the difficulty of the position has been enhanced by the fact that there are no proper pleadings on points which do require pleadings. Normally, there should be claim to an account, a defence of "account stated" together with a statement of the nature of the "stated account." This I will explain further. Then there should be a reply stating how the plain-

tiff seeks to deal with the "account stated," whether to re-open or to vary it. That we have not got here.

Taking first the point of estoppel. If the documents referred to coupled with the conduct of the parties constitute an estoppel, there is no question of accounting, at any rate as regards the period prior to November 1930. Mr. Isaacs points out that there has been a representation. I agree. The plaintiff has relied upon that representation. I agree again. He has acted in a particular way by making certain payments in 1931. Again that is so. But the point is, are those acts (I will not say caused or induced, although that, I think, is the word used in S. 115, Evidence Act) necessarily referable to the representation? Mr. Isaacs quite rightly relies upon two cases in England—*Skyring* v. *Greenwood* (1) and *Holt* v. *Markham* (2). In the last case I think a military officer was actually paid by his army agent at a certain rate. It was held that when the mistake was discovered the agent could not recover, and Scrutton, L. J., described it as a case of estoppel. In *Skyring* v. *Greenwood* (1), I think it was a case of crediting the account in a certain way. The customer had drawn against that account. It was held on the principle of estoppel that the army agent could not reverse the credits, could not debit the account with the amounts wrongly credited. The customer was 'induced' to spend upon a certain basis; he did so.

Now, in this case, although I would have preferred to have ended the matter here and now, I do not think I should be right in holding that an estoppel arises. He acted but, so far as I can see, the act was not referable to the representation. I come then to the question of 'account stated.' This is a more difficult problem. So far as I recollect, the precise implication of the comforting words 'account stated' had never been subjected to analysis in this Court. I am indebted to Mr. Isaacs for the reference to the case *Camillo Tank Steamship Co. Ltd.* v. *Alexandria Engineering Works* (3), which appears to have been omitted from the latest edition of Leake on Contracts. In this case, everything that can be said about 'account stated' has been said in the various speeches in the House of Lords. Lord Shaw remarks that the law upon this topic "has not arrived at a condition which can be described as either well understood or satisfactorily clear." He was speaking of the law of England in contrast with the more civilized law of Scotland. In the speeches of Lord Finlay and Lord Shaw which should be read in full the various meanings of 'account stated,' the various situations which can be described in those terms and the legal effect of those situations are analyzed.

Roughly speaking there are four positions: see p. 145: (1) Mere account rendered which is not any kind of account stated" at law and has no legal effect. (2) Account stated of the first class, consisting of a claim to payment made by one party and admitted by the other party to be correct. Unilateral account stated. (3) Cross account stated. (4) Account stated for good consideration. 2, 3 and 4 above constitute the three varieties of account stated known to the English law. The first variety is of no more effect than any other admission. The second variety is something more than an admission but is still subject to the equitable doctrine of surcharging or reopening settled accounts. The third variety, constitutes binding contracts at law which can only be challenged, or, in the words of the Scotch law, 'reduced' upon grounds such as mistake, fraud, etc. Mr. Isaacs contended that the facts of this case would constitute an account stated of the third variety. For this point he relies upon the circumstances that the account submitted in November 1930, was challenged, as to the rate of interest, by the plaintiff, was returned to the defendant, and re-submitted with the necessary corrections, and thereafter accepted by him. I agree that acceptance by conduct is sufficient. I am prepared to infer that the implied admission by the defendant was accepted by the plaintiff. The difficulty, to my mind, is this, was there good consideration for settled accounts of the nature indicated in the *Alexandria Engineering Co.'s* case (3)? It was pointed out there that the consideration might consist of

1. (1825) 4 B & C 281=6 D & R 401=1 Carr & P 517.
2. (1923) 1 K B 504=92 L J K B 406=128 L T 719=67 S J 314.
3. (1921) 38 T L R 134.

"a reduction of the claim, consent to wait for payment, or any other matter involving a consideration for the agreement to pay."

In this case, in my view, there was no reduction in the amount of the claim in the sense in which the words are there used. According to the plaintiff, there was a mistake in the rate and amount of interest and that was corrected. The defendant was giving up no part of his claim. He was merely asked to correct his bill. Had the defendant been asked as a condition of acceptance, to reduce the amount of his claim, I think this case might have come within the *Alexandria Engineering* case (3). It appears however to me that this is a case of account stated of the second variety; cross-account stated. The remaining question is whether the defendant should be allowed either to reopen, or surcharge and falsify: As to this see Story on Equity, Ss. 523, 524 and 525 and also Leake on Contracts, 83 to 86. This brings me back to the defendants' evidence with regard to the account submitted (questions 401 to 424). Mr. Pugh does not appear to have asked him questions directed to show that the account was wrong. I think that should have been done. I appear to have asked him and in answner to me he said that the account was wrong as regards the balance Rs. 577, stating that there would be a far larger sum due, and also that a great many items had been left out. There was also evidence that one lot of shares was wrongly stated to be held. There was also some evidence from which it was to be inferred that Tanden, who submitted the account, had been acting in fraud of his employer, possibly also with fraudulent intent as against the plaintiff. I have not had time to consider whether fraud of, or connected with, the plaintiff is sufficient to allow of equitable relief, re-opening settled accounts. But there is the case of *Bank of England* v. *Vagliano Brothers* (4), and if I remember rightly, that is some authority. The fraud there, I think, was not fraud which was connected with the party against whom the account was sought to be reopened. In any event, it appears to me that if a fundamental mistake is a ground for reopening, fraud of the nature suggested must also be a ground. On the other hand, it appears to me, in the circumstances of this case, to be sufficient to give leave to surcharge and falsify, treating the account of November 1930, coupled with the amended account of January 1931, as settled account.

The result is this. There must be an order for an account. The defendant will have to prove what is due to him from the plaintiff. In the account, all sums paid by the plaintiff to Tanden must be given credit for, whether received by the defendant or not; also the price of all shares mentioned in the letter of November 1930, must be given credit for at the rates indicated in the early part of this judgment. The plaintiff elects for the rate on 5th October 1932. Unless the rates are agreed, these will be proved before the referee. The account of November/January 1931, will be taken as cross-account stated, the defendant having leave to surcharge and falsify; the account after that date—November 1930 to be taken in the ordinary way. The defendant must give a statement of facts in the form of a detailed account giving details of all the items in respect of which he seeks to surcharge or falsify the November 1930/1931 account. There is one other matter, and that is this. The suit is not a suit by a principal against his agent for accounts. The account I have ordered is to discover whether the plaintiff is entitled to damages or not after giving credit for what is due by him. I have not ordered accounts upon which the defendant can claim a decree against the plaintiff. That matter has not been considered. The plaintiff will be entitled to the costs including the costs of the hearing, with the exception of one day's costs, which will be reserved. I do this, because, roughly, one day has been taken up in considering this question of estoppel and account stated.

R.K. *Order accordingly.*

4. (1891) A C 107=60 L J Q B 145=39 W R 657=55 J P 676=64 L T 353.

A. I. R. 1934 Calcutta 444

MITTER AND MCNAIR, JJ.

Radha Kanta Pal—Plaintiff—Appellant.

v.

Benode Behari Pal and *others*—Defendants—Respondents.

Appeal No. 291 of 1933, Decided on 19th December 1933.

(a) Hindu Law — Joint family business—Strangers having definite shares do not form joint family business.

Where two persons not connected with each other as members of a joint family are carrying on a partnership business, each having a particular share in the business, it is not a joint family business but a case of partnership. [P 445 C 2]

(b) Civil P. C. (1908), O. 40, R. 1—Selection of receiver—Partnership at will—Plaintiff's title to share admitted—Suit operating as dissolution—One party should not be appointed receiver without consent of other—Partnership.

Where the partnership is a partnership at will and the institution of the suit operates as a dissolution of the partnership and the plaintiff's share in the partnership is admitted, then a party to the suit should not be appointed as a receiver except with the consent of the other party. [P 446 C 1, 2]

(c) Civil P. C. (1908), O. 40, R. 1—Partnership—Order appointing receiver for proper management is wrong—Partnership.

In all cases of partnership, a receiver is appointed only for realizing the assets of the partnership with a view of its winding up and to carry on business only in so far as it is incidental to the winding up. An order appointing a receiver to carry on the proper management of the business is wrong. [P 446 C 1]

(d) Civil P. C. (1908), O. 40, R. 1—Selection of Receiver—Partner should not be appointed Receiver when prima facie case of suspicion of dishonesty has been made against him.

When in the suit for dissolution of a partnership a prima facie case has been made out that there is some ground for the plaintiff partners suspecting the honesty of defendant partner, Court should not appoint the defendant partner as receiver of the firm. [P 447 C 2]

N. N. Sarkar, S N. Banerji, Nirmal Chandra Chakrabarti and *Nikunja Behari Roy*—for Appellant.

Brojolal Chakravarty, Rupendara Kumar Mitter and *Khitindra Kumar Mitter*—for Respondents.

Mitter, J.—This is an appeal by the plaintiff against an order of the Subordinate Judge of Bakargunge, dated 2nd June 1933, by which he appointed defendant 2 as receiver in a suit commenced by the plaintiff for dissolution of partnership. The writ which was issued in pursuance of the order appointing the receiver is in the following terms:

"Whereas it has been found necessary that a receiver should be appointed in this case for the proper management of the Firms mentioned in the schedule below, you are hereby appointed receiver of the said property under O. 40, Civil P. C., 1908, with full powers under the provisions of that order."

We shall have to say something hereafter with regard to the form of the writ which was issued on the receiver. The plaintiff made an application for the appointment of a receiver on 3rd May 1933 having filed his plaint on 10th April 1933. The Subordinate Judge was of opinion that a case had been made out for the appointment of a receiver and that it was just and convenient in the interests of the Firms, the dissolution of which was sought for in the suit, that a receiver should be appointed for the realisation of the assets and for management of the Firms and for protection of the properties and that the receiver should be one of the partners of the Firm, namely defendant 2. This order has been challenged in appeal by the learned Advocate General who appears for the plaintiff and he contends that the order appointing one of the parties to the suit without the consent of the other parties and in particular of his client the plaintiff, is contrary to the principles on which the jurisdiction of the Court to appoint a receiver is founded. He contends that on the face of the plaint the partnership, the dissolution of which is sought for is a partnership-at-will and that the very institution of the suit operates as dissolution. In support of this contention he refers to para. 1 of the plaint from which it appears that the plaintiff is an outsider and has no connection with the family of the defendants, his case being that there was a karbar in the name of Ganga Prosad Pal, predecessor-in-interest of the principal defendants and of Sonatan Pal, the predecessor-in-interest of the plaintiff in Jhalakati popularly called Maharajganj Bandar and he contends that in appointing defendant 2 as receiver for the purpose of carrying on the business of the Firms, the Subordinate Judge evidently missed sight of the fact that this was a partnership-at-will and that the institution of the suit operated as its dissolution. As against this contention Mr. Chakrabarti, who appears for the respondents, contends that this was really a joint family business and as such could not be regarded as a partnership-at-will.

There is, however no foundation for this contention, in view of the case which is made in the plaint from which it appears clear that Ganga Prosad Pal and Sonatan Pal were two persons not connected with each other as members of a joint Hindu family but were carrying on the karbar separately, each hav-

ing a share to the extent of nine annas and seven annas respectively in the said business. If this fact had been brought to the attention of the Subordinate Judge or if he had noted the true implication of this statement in the plaint he would not have proceeded to pass the order in the form in which the writ was drawn up and which is in accordance with the portion of the order which has already been quoted that the receiver was to carry on the business or the management of the Firms. In all cases of partnership the true rule is that a receiver is generally appointed for the purpose of realising the assets of the karbar with a view to its winding up and for such purpose, namely, with a view to the winding up of such business to carry on the business in so far as is necessary as incidental to such winding up. There is no warrant whatever for an order in the form in which it has been made by the Subordinate Judge, namely, that the receiver was to carry on the proper management of the firms mentioned in the schedules to the plaint.

The Court does not interfere for the management of a partnership except as incidental to the object of the action to wind up the concern and divide the assets, for, as was observed by Lord Eldon in an early case if the Court were not to adopt such a rule, it might be called upon to make itself the manager of every trade in the kingdom: *Goodman* v. *Whitcomb* (1). It may be mentioned here that besides his firm at Jhalkate there are several other branch firms in respect of which dissolution has been sought for. The effect of the order appealed against has been that defendant 2 has been actually purchasing commodities with the sum realized from the assets of the karbar. If one refers to p. 146 of the paper book one will find from the entry with reference to Rs. 6,000 that the sum of Rs. 6,000 which was sent to Calcutta was used for the purpose of purchasing commodities for Jhalakati Firm.

It is next contended by the learned Advocate-General that the ordinary rule that no party is appointed as a receiver except by consent has been departed from only in exceptional cases, as for instance, in a case of partnership where there are no allegations of fraud and where the carrying on of the business depends on the personal credit of one of the members of the firm, as for instance, a firm of brokers, and he has referred us as an illustration of this position to the case of *Sargant* v. *Read* (2), where in those circumstances, namely, that there being no charge of fraud and the business being the business of a broker one of the partners of the business was appointed a receiver. He contends that the present case does not fall within the exception. Mr. Chakrabarti has drawn our attention to an unreported decision of this Court in the case of *Mathura Chakrabarti* v. *Lal Mohan Chakrabarti* (3), where this Court set aside the order of the Subordinate Judge appointing two strangers in respect of partnership business and appointed one of the partners as the receiver and his contention is that in partnership cases in order that the business might not be ruined it is extremely convenient that one of the partners should be appointed a receiver. This argument takes no note of the fact that this is a partnership at will and the institution of the suit operates as a dissolution of the karbar. If the facts of the unreported case, which was cited by Mr. Chakrabarti, are examined it will be found that there was a dispute with regard to the plaintiffs' title in the partnership. That was a matter in issue and in such a case where plaintiff's title to the partnership sought to be dissolved is challenged it is easy to understand why a partner should more conveniently be appointed a receiver if the contention of such partner is that he wants to carry on the business which may eventually be determined to belong to him and not to the plaintiff as the final result of the suit. But we are not confronted with such a position in the present case. Apparently the plaintiff's title to a 7-annas share of the karbar or to a share of the karbar, whatever the extent of that may be, (for Mr. Chakrabarti in the course of his argument said that his contention was that it was 4-annas and odd gandas) is admitted.

The next contention of the learned Advocate-General was that from the events which happened subsequent to the passing of the order appointing the

1. Jac & Walk 592.

2. (1875) 1 Ch D 600=45 L J Ch 206.

3. Appeal No. 64 of 1927.

receiver it is clear that defendant 2 cannot be trusted and that the plaintiff has lost all confidence in him. As a matter of fact, the Subordinate Judge's finding is, as we read it, that defendant 2 is guilty of misconduct but he is not guilty of such misconduct as to have rendered it unsafe to trust him. Our attention has been drawn to the sharp practice of defendant 2 in that he went on 8th June to the Court and got his security accepted ex parte in the absence of the present plaintiff. It further appears that there is prima facie evidence subsequent to the date of the order of appointment from which inference follows that the conduct of defendant 2 is not above board. It appears that he did really secrete two books which contained entries of sums of money which have been entered as having been received on behalf of the Ejmali Firm in the said books but which have not been entered, at any rate not shown to have been entered, in the ordinary jamakharach book of the firm. At any rate, this is the allegation which the plaintiff has made. The books are not before us. They have not been sent to us by the learned Subordinate Judge on the objection raised on behalf of the defendants and it is not possible for us to determine the truth of the allegation made by the plaintiff in this behalf. The fact remains that when the Pleader Commissioner went on the 20th June and made inventory he found the following state of things as appears from his report dated 30th June 1933 which is to be found at p. 134 of the paper-book. The Commissioner says this:

"On 20th June 1933 from 7-30 a. m. I commenced making inventory of the papers found in the iron safe of the first floor of the joint Gadighar of the parties. At 9-30 a. m. on the suggestion of the parties and their pleaders I went to the ground floor and the parties opened the double locks of the iron almirah. Some khatas and papers were found in the drawers of the iron almirah."

The Commissioner proceeds further and says thus:

"I beg further to add that the above two khatas contain some items of daily cash money obtained by selling articles of Krishna Chandra Sonatan Mohim Chandra Rajani Kanta Paul of Maharajganj and various other cash money received from the branch firm as well as miscellaneous income which have not been entered in other account books of the Tahabil."

Apparently the defendant did not like this remark made by the Commissioner against him and in the subsequent petition the defendant alleged that the Commissioner was rather partial. We have however before us this report of the Receiver for the purpose of the present proceedings, namely, whether a stranger Receiver should or should not be appointed, it will be sufficient to proceed on the report made by the Commissioner and the defendant admits in his petition dated, 15th July 1933, in para. 5 that the whole of the amount of money of the two khatas referred to in paras. 6 and 7 of the plaintiff's petition is, in fact, the additional income of the Ijmali Karbar belonging to the plaintiff and the defendants. He proceeds on to explain that the same money is invested in the karbar of the plaintiff and the defendants for their own interest, on crediting the same for some reasons in this khata and in some places on debiting the said money which is the money of the said Tehbil in the names of the plaintiff and the defendants and in the names of their relatives and kinsmen and of fictitious persons in consultation with the executors under the will of the plaintiff's father. . . . . The learned Advocate-General has argued with great force that this really gives us an indication of the unscrupulousness of the defendant. He does not scruple to prepare fictitious entries in the name of fictitious persons. We are of opinion that a prima facie case has been made out which would go to show that there is some ground for the plaintiff's suspecting the honesty of defendant 2. That is a question which requires to be considered in determining whether one of the partners should be appointed a Receiver or not. Defendant 2 has apparently forfeited the confidence of the present plaintiff and in such circumstances the order of the Subordinate Judge appointing defendant 2 as Receiver must be set aside.

We direct that the Subordinate Judge should proceed to appoint one pleader of his own Court whom he may consider fit as Receiver for the purpose of winding up the several businesses mentioned in schedule ka of the plaint except Firms Nos. 5, 9 and 10 and for collecting the assets of the said firms. The Receiver will be put in possession of all the firms of schedule ka of the plaint except Firms Nos. 5, 9 and 10. The re-

muneration and establishment expenses of the Receiver must be determined by the Subordinate Judge in view of all the circumstances of the case. Let the records be sent down to the lower Court as speedily as possible. On receipt of the records the Subordinate Judge will proceed to appoint a pleader Receiver expeditiously. After it is done the present Receiver, namely, defendant 2, will make over possession to the Receiver who will be so appointed and he will have his accounts passed later. The appeal is allowed accordingly. There will be no order as to costs.

McNair, J.—I agree.

R.K. *Appeal allowed.*

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Full Bench

MUKERJI, COSTELLO, MALLIK, JACK AND S. K. GHOSE, JJ.

Narayangunj Central Co-operative Sale and Supply Society Ltd.—Defendant 1—Petitioner.

v.

Mafizuddin Ahmed and *another*—Plaintiff and Defendent 2—Opposite Parties.

Civil Revn. Nos. 28 and 29 of 1933, Decided on 21st February 1934, from order of 1st Sub-Judge of Dacca, D/- 16th December 1932.

Civil P. C. (1908), O. 7, R. 11 (b)—Rule controls Court-fees Act, S. 7, Sub-S. 4.

In suits to obtain a declaratory decree or order where consequential relief is prayed for, and in suits to obtain an injunction, where the Court finds the relief claimed as undervalued, it is under O. 7, R. 11 (b), entitled to require the plaintiff to correct the valuation stated by him in accordance with the provisions of S. 7, Court-fees Act. But so long as there are no rules framed under S. 9, Suits Valuation Act (7 of 1887), the Court would have no standard before it on which it may regard the plaintiff's valuation as an under-valuation, and its powers of correction would have to be exercised on that footing: 11 *C. W. N.* 705 *held correctly decided so far as the power of Court to revise valuation made by the plaintiff*: *A I R* 1930 *Cal* 686; 118 *I C* 357; *A I R* 1920 *Bom* 105, *not Foll*; *A I R* 1918 *P C* 135, *Expl.*; 10 *Mad* 187; 33 *Cal* 1133 *Critised*; *A I R* 1930 *Cal* 473 and 35 *Cal* 202 (*PC*), *Foll.* [P 451 C 1,2]

Atul Chandra Gupta and *Nagendra Nath Bose*—for Petitioner.

Abul Hossein—for Opposite Parties.

Mukerji, J.—The two revision cases in connexion with which this Reference has been made have arisen out of a suit, the facts of which, so far as they are necessary at the present stage, are the following: On the 10th January 1930, the Naravangunj Central Co-operative Sale and Supply Society Ltd. obtained an arbitration award under the provisions of Act 2 of 1912 against two persons, Moulvi Mafizuddin Ahmed and Jowad Ali Khondkar. The award was for an amount of Rs. 11,400. The company went into liquidation, and thereafter the award was put into execution. After failing in certain objections that were taken to the execution of the award, the former of the said defendants brought a suit in the Munsif's Court at Narayangunj to set aside the award on a declaration that it had been fraudulently obtained and also praying for a permanent injunction to restrain the liquidator from proceeding with the execution. He valued the suit at Rs. 49 and paid court-fees on the plaint according to such valuation. The Munsiff held that as the plaintiff wanted to get rid of a document creating a liability for Rs. 11,400 the suit was prima facie undervalued, that the court-fee paid was insufficient, and that his Court had no jurisdiction to entertain the suit. He accordingly returned the plaint to the plaintiff for presentation to the proper Court and dismissed the prayer for a temporary injunction which the plaintiff had also made. On appeals being preferred by the plaintiff from the said orders of the Munsif, the Subordinate Judge held that as the case fell within S. 7 (iv), Cls. (c) and (d), Court-fees Act (7 of 1870), the plaintiff was entitled to put his own valuation on the suit and the Court had no jurisdiction to revise such valuation. He held also that in the circumstances of the case the plaintiff was entitled to the temporary injunction he had prayed for. He accordingly made the following order:

"It is therefore ordered that the appeals be allowed. The plaint shall be returned to the appellant for filing the same in the lower Court where it will be registered as a suit, and trial thereon shall proceed, and it is ordered that the respondent defendants be forbidden from executing the decree till the disposal of the suit, which must be expedited by the plaintiff."

Against this order, which really consists of two orders, two applications in revision have been made to this Court. The validity of the orders complained of in these applications depends on two questions which have been formulated in the order of reference in these words:

(1) Whether in suits to obtain a declaratory decree or order where consequential relief is prayed for and in suits to obtain an injunction, where the Court finds the relief claimed as undervalued, it is entitled under O. 7, R. 11 (b), Civil P. C., to require the plaintiff to correct the valuation stated by him in accordance with the provisions of S. 7, Court-fees Act, (2) Whether the case of *Mt. Wmatul Batul* v. *Nanji Koer*(1), was correctly decidod? The conflict of judicial authority that exists on question (1) aforesaid has been pointed out in the order of reference, and in it some of the more important decisions bearing upon the question have been noticed. One of these decisions in which the matter was elaborately discussed is the case of *Mt. Umatul Batul* v. *Mt. Nanji Koer* (1). In that case Mookerjee, J., set out in detail the history of the change made in 1891 in S. 7 (iv), Court-fees Act (7 of 1870), by the Repealing and Amending Act (12 of 1891), and on comparing the wordings of the section as it had stood when the Codes of 1859, 1877 and 1882 respectively were in force, and on an exhaustive review of the decisions then existing, adopted the view which had been previously taken by this Court in the case of *Baidya Nath* v. *Makhan Lal* (2) and observed thus :

"In cases falling under S. 7. sub-S.(iv), Court-fees Act, although the plaintiff is to state the amount at which he values the relief sought the legislature never intended that the plaintiff should be at liberty to assign any arbitrary value and thus be free to choose the Court in which he should bring his suit. The learned Judges relied upon Ss. 7, 8 and 11, Suits Valuation Act (7 of 1887), as clearly indicating that this could not have been the intention of the Legislature. In our opinion, the view is unquestionably well founded and, as has been shown above, it is supported by the history of the section."

In my opinion, the conclusions summarized in these observations are correct and they should be affirmed. I think, therefore, that it should be held that though O. 7, R. 11 which in its clause (b) gives the Court power in a case of undervaluation of a relief to require the plaintiff to correct the valuation given by him in his plaint and to reject the plaint in case the plaintiff fails to do so, appears in a procedural code, while nothing as to such correction is stated in the taxing statute itself namely the Court Fees Act (7 of 1870), yet the two enactments have to be read together and simultaneously given effect to when there is nothing in neither enactment expressly indicating any contrary intention. In S. 7, sub-S. (4), all that is said is that the amount of fee in suits falling within that sub-section shall be computed

"according to the amount at which the relief sought is valued in the plaint or memorandum of appeal,"

and also that

"in all such suits the plaintiff shall state the amount at which he values the relief sought."

The sub-section does not say that the fee shall be computed according to the amount at which the plaintiff values the relief in his plaint or memorandum of appeal or that the plaintiff's valuation is to be regarded as final. Indeed the provisions of Ss. 7, 8 and 11 of the Suits Valuation Act (7 of 1887) would, it seems to me, militate against such a view. I am of opinion therefore that S. 7 sub-S. (4), Court-fees Act (7 of 1870) should be read as controlled by O. 7, R. 11, Cl. (b) of the Code. But I am clearly of opinion that upon the existing state of things it is not always possible for the Court to exercise this power in a case falling under the sub-section. In his decision *In the matter of Kali Pado Mukherjee* (3), Rankin, C. J., while not purporting to express any decisive opinion, has made the following observations.

"The provision in the Civil Procedure Code is certainly a provision which is intended to apply to cases under sub-S. (4), S. 7. The present case is a very good example of the necessity of that. * * * But it is another thing altogether to say that because the words used are 'if the plaintiff's claim is undervalued' they mean that the Court in the special class of cases where the plaintiff is allowed to put his own valuation has a right to revise the valuation. I do not think that Mukerjee, J., in coming to the conclusion to which he did in *Umatul's* case (1), gave sufficient weight to the circumstance that the cases dealt with in sub-S. (4) are cases where no real objective basis of valuation will in general be possible. They are cases which are not easily valued and in many cases not capable of being valued in money terms on any precise principle. It does not strike me as being at all incredible that with regard to that limited class of cases the legislature should have thought it right to give to the plaintiff a certain amount of option as to the value which has to be put upon the claim especially as I find that in certain cases the legislature has thought

1. (1907) 6 C L J 427=11 C W N 705.
2. (1890) 17 Cal 680.
3. AIR 1930 Cal 686=131 I C 587=58 Cal 281.

fit to allow people to pay a small fixed court-fee in respect of a relief claimed."

Kali Pado Mukherji's case (3) was one in which in a suit to obtain a declaration and also a consequential relief in the shape of an injunction and so falling under S. 7 (4) (c) of the Act, but the plaintiff instead of valuing the suit for a single sum of his own choice had erroneously valued the suit in parts, that is to say the declaration at a certain figure as under Art. 17 (3), Sch. 2 and the injunction at another figure as in a suit under S. 7 (4) (d) and he had put a third valuation for the purposes of jurisdiction under the Suits Valuation Act. it was held that the valuation was not in accordance with law and so it might be corrected by the Court by adopting the procedure prescribed in O. 7, R. 11 of the Code. But I do not think it would be correct to say that the powers of the Court are confined only to such cases of undervaluation as may be illegal, palpably absurd, manifestly illogical or arithmetically wrong. The history of the legislation bearing on the question, in my opinion, leaves no room for doubt that the power extends to all cases falling under the clause. I respectfully agree that in cases of suits falling within sub-S. (4) of S. 7 there must be having regard to their very nature, a certain amount of option in the plaintiff because the value of the relief he claims therein would depend not on its intrinsic value but on its value so far as he is concerned. I also agree that in many such suits no real objective standard would be possible or, even if possible, would be altogether satisfactory. But such provisions as to valuation as there already are in the Act do not also disclose any very definite principle on which they may seem to have proceeded, except presumably the principle that the standards fixed are not unreasonably high. And though it is true, that in suits of various descriptions no standard at all would be possible, yet it cannot be disputed that reasonable standards may with safety be laid down giving the plaintiff all legitimate option that he may be reasonably entitled to and proceeding on the lines indicated by the legislature in such standards as they themselves have laid down. But I am clearly of opinion that until such standards are laid down by appropriate rules framed under S. 9, Suits Valuation Act (7 of 1887), it would not be possible for the Court to exercise this power except in those classes of cases falling under the clause in which the valuation made by the plaintiff is illegal palpably absurd, manifestly illogical or arithmetically wrong. The two Acts are linked togother, as regards valuation of relief, for the purposes of jurisdiction and of court-fees payable in respect of plaints. In the decision in the case of *Panna Lal* v. *Abdul Gani* (4) to which I was a party, it was said:

"If the plaintiff's valuation of the relief may at times appear arbitrary or too low the assessment of the real value is often no less arbitrary and almost an impossibility. A plaintiff no doubt ought not to be permitted to have his relief without paying adequate court-fees, but the remedy lies not in nullifying the words of the Act, but in the rule making power of the High Court conferred on it by S. 9, Suits Valuation Act. Till such rules are framed a plaintiff in a suit coming under sub-Cl. (c) sub-Cl. (d) of Cl. (4), S 7, Court-fees Act, may justly say that his valuation of the relief is what he has to pay for."

I adhere to the view I expressed in the above observations. One other matter I desire to mention. In the decision of this Court in the case of the *Official Trustee of Bengal* v. *Gobardhan Guchait* (5) as also in the decision of the Bombay High Court in the case of *Bal Krishna Narain* v. *Jankibai Sitaram* (6) the decision of the Judicial Committee in the case of *Sunder Bai* v. *Collector of Belgaum* (7) has been understood as meaning that in that case their Lordships of the Judicial Committee affirmed the proposition that in suits of this character plaintiffs are entitled to put their own valuation and that it is not open to the Court to revise it. On a careful perusal of their Lordships' judgment however I have come to the conclusion that the point was not before their Lordships and no decision on it was, in fact, passed; what appears in the report is only a recital of the facts in that case.

It has been argued before us on behalf of the petitioners that while in a vast majority of cases it may not be possible to say that the plaintiff's valuation is an undervaluation, in *Umatul's* case (1)

4. AIR 1930 Cal 473=127 I C 665.
5. (1928) 118 I C 357.
6. A I R 1920 Bom 105=56 I C 340=44 Bom 331.
7. A I R 1918 P C 135=52 I C 897=46 I A 15=43 Bom 376 (P C).

as also in the present case, the position is very different, because in both these cases the valuation appears to have been manifestly low. So far as *Umatul's* case (1) is concerned the plaintiff was seeking to set aside a decree for Rupees 10,000 in execution of which the plaintiff's property valued at Rs. 80,000 was about to be sold, and it was held that the value of the relief sought was the sum sought to be realized under the decree. Reliance for this proposition was placed upon the cases of *Venkappa* v. *Narasimha* (8) and *Jagatdhar* v. *Brown* (9). I do not see why the valuation should necessarily be made on this basis, so long as there is nothing which makes such valuation obligatory. But assuming that what was done in that case was not unreasonable that standard can scarcely be applied to this case in which we are not aware to what extent the plaintiff will be injured if the award against him stands. There may be cases in which a decree may have been obtained for a very large amount to be executed against a very inconsiderable property belonging to the defendant, and if in such cases the latter institutes a suit to get rid of the decree the real value of the relief to him as plaintiff can hardly be the value of the decree. I think I am fortified in the view I take by what was said by the Judicial Committee in the case of *Phul Kumari* v. *Ghanshyam Misser* (10). In the case while dealing with a contention that in a suit instituted to set aside a summary decision under S. 283 of the Code of 1882, which had been put into execution, the value of the suit should be the value of the execution debt, their Lordships observed :

"What they have done is simply to take the sum in the execution decree. This is plainly a fallacious proceeding. The value of the action must mean the value to the plaintiff. But the value of the property might quite well be Rs. 1,000 while the execution debt was Rs. 10,000. It is only if the execution debt is less than the value of the property that its amount affects the value of the suit."

For these reasons I am of opinion that the questions should be answered thus: Q. 1. Yes. But so long as there are no Rules framed under S. 9, Suits Valuation Act (7 of 1887), the Court would have no standard before it on which it may regard the plaintiff's valuation as an undervaluation, and its powers of correction would have to be exercised on that footing. Q. 2. The case was correctly decided in so far as it laid down that it is within the power of the Court to revise the plaintiff's valuation; but the valuation made by the Court, though it may have not been unreasonable, was not a valuation made in accordance with a standard having the force of law. As the reference has been made in Civil Revision Cases, the cases under the Rules of Court, are open to us for consideration in their entirety. I am of opinion that the order made by the Subordinate Judge is correct and that the Rules therefore should be discharged with costs, 3 gold mohurs, for the hearing before the Division Bench, and 5 gold mohurs, for the hearing before the Full Bench, in favour of the opposite party.

Costello, J.—I agree generally with the judgment which has just been delivered by Mukerji, J., but I desire to add one or two obervations. It seems to me perfectly clear that the Legislature never could have intended that a plaintiff should be at liberty to assign any arbitrary value he chooses to his suit and thus be free to select the Court in which that suit should be brought. Unless it is held that the Court has jurisdiction to revise the valuation, it is obvious that an unscrupulous litigant would be in a position to defraud the Government and moreover to oust the jurisdiction of a Court competent to adjudicate the matters at issue between the parties. If it were not open to the Court to revise the valuation put by the plaintiff on his suit, then obviously he would be in a position to under-value the relief which he seeks and if he chooses to institute his suit in the lowest Court, that is to say the Court having the lowest pecuniary jurisdiction. He could, in fact, either go to the lower Court in the ordinary way or to any higher Court at his own option. It is therefore, in my opinion, abundantly clear that it was intended that the Court should be in a position to exercise a certain amount of control over the valuation made by the plaintiff. At the same time however I do recognize that there are practical difficulties in the way of the Court interfering unless and until

8. (1887) 10 Mad 187.
9. (1906) 33 Cal 1133.
10. (1908) 35 Cal 202=35 I A 22 (P C).

appropriate rules are made under the powers conferred by S. 9, Suits Valuation Act. In some circumstances however, and I am not at all sure whether the present case is not one of them, it would appear that the Court might not unreasonably say that the valuation given by the plaintiff is so obviously absurd that it ought to be revised. It is to be remembered that in the present proceedings the plaintiff was taking action in order to avoid the effect of a decree for no less than Rs. 11,400, yet he nevertheless valued the proceedings at the absurdly low sum of Rs. 49. I am disposed to think, in circumstances such as these, that it might be possible for the Court to assign something more nearly approaching the real value of the suit.

Having regard to the unsatisfactory position which, in my opinion, exists in matters of this kind and having regard to the necessity for the framing of some kind of rules which will serve as a criterion of valuing the suits, it seems to be highly desirable that the attention of the Legislature should be called to this matter and the Legislature ought to declare what they really intended to be done in cases such as in the present. Although I am of opinion that in this particular case it might be possible for the Court to put a more accurate value on the plaintiff's proceedings, I do not propose to dissent from the view expressed by Mukerji, J.

Mallik, J.—I agree with my learned brother Mukerji, J., in the judgment delivered by him for the reasons given therein.

Jack, J.—I agree with the view which has been adopted by my learned brother Costello, J., that as a general rule the Court is entitled to correct the valuation under O. 7, R. 11, Civil P. C. There may be cases in which the valuation is perfectly obvious on the face of it and in that case it would be open to the Court to correct a clearly wrong valuation even before the framing of the rules. Otherwise until rules are framed under S. 9, Suits Valuation Act, the Court would be in a practical difficulty and unable to take necessary action.

S. K. Ghose, J.—I agree with my learned brother Mukerji, J.

R.K. *Reference answered.*

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C. C. GHOSE, AG. C. J. AND MALLIK, J.

Nolin Behari Bosu—Plaintiff—Appellant.

v.

Hari Pada Bhuia and *others*—Defendants—Respondents.

Appeals Nos. 1241 to 1329 of 1931, and cross-objection No. 1242 of 1931, Decided on 13th July 1933, from appellate decrees of Dist. Judge, Midnapore, D/- 16th December 1930.

(a) Custom—Immemorial — Custom dating from Regulating Act of 1773 or Permanent Settlement of Bengal (1793) is immemorial.

A custom dating from the Regulating Act of 1773 or even from the time of the permanent Settlement of Bengal (1793) has been taken to be immemorial. [P 453 C 1, 2]

(b) Custom—Reasonableness — Hajabad is not unreasonable where true source of wealth is land which is liable to inundations and which is used for agriculture.

Where the true source of the real wealth is often sapped because of the inundations which the lands are subject to and the land is mainly agricultural, the custom of Hajabad is not unreasonable. [P 453 C 2]

(c) Bengal Land Revenue Sales Act (11 of 1859); S. 37—Custom of Hajabad is not incumbrance.

The custom of Hajabad is not an incumbrance within the meaning of S. 37 of Act 11 of 1859. [P 454 C 1]

(d) Bengal Tenancy Act (1885), S. 153—Question of enhancement of rent and of amount of rent at issue—Second appeal is not barred.

Where questions relating to enhancement of rent and of the amount of rent are in issue and those questions are determined by the trial Court, second appeals are competent in such cases. [P 453 C 1]

Bijan Kumar Mukherji and *Kumud Bandhu Bagchi*—for Appellant.

Bankim Chunder Roy and *Ramendra Chunder Roy*—for Respondents.

Judgment.—We have listened to a very interesting and in some portions very illuminating argument in this group of cases from Dr. Bijan Kumar Mukherji; but, after giving to his submissions our very best attention, we are of opinion that these appeals must be dismissed. A preliminary objection has been taken by Mr. Bankim Chunder Roy, learned Advocate for the respondents in 58 out of these 89 appeals. His case is that, leaving aside six appeals which are above Rs. 100 in value, in the remaining 52 appeals the value of the suits was under Rs. 100 and that having regard to the language of S. 153, Ben. Ten. Act, these second appeals are incompetent. Dr. Mukherji has pointed out

that in all these cases questions relating to enhancement of rent and of the amount of rent were in issue and those questions were determined by the trial Court. We are satisfied that those questions did come within the ambit of the matters in controversy between the parties in these 52 cases and that there is no substance whatsoever in the preliminary point sought to be raised on behalf of the respondents in these 52 appeals. The preliminary point is therefore negatived.

We now turn to decide the real questions in controversy in these 89 appeals. These appeals are by the plaintiff and they arise out of a group of suits for recovery of arrears of rent. The tenants allege that by reason of the operation of a custom of "Hajabad" in the four mouzahs in suit and there having been inundation in 1333 and 1335 there were no crops in the years 1334 and 1336 and that therefore the tenants should not be made liable to pay rents during those years. The question of the existence of this custom of "Hajabad" has been gone into by the Courts below and the finding of fact by the lower appellate Court is that the tenants have been able to prove the existence of this custom from time immemorial and that there is no evidence on the plaintiff's side to rebut this. In essence this is a mixed question of law and fact and no doubt the finding of the lower Appellate Court bends itself easily to a very plausible argument on behalf of the plaintiff landlord. But it is impossible to shut one's eyes to the fact that the lower appellate Court on full consideration of the evidence has come to the conclusion that the tenants have shown that this custom has always existed; in other words, that this custom has been in existence from time immemorial. What is the exact meaning of the term "time immemorial" in this country has been the subject of debate in many cases.

In England the matter is not full of difficulties because of the recognition that the period of the commencement of time immemorial has by statute and also by common law been definitely fixed for centuries past. The time immemorial would for all practical purposes, and has indeed in several instances for all practical purposes, been taken to be something which was in existence at the time of Pitt's India Act ordinarily called the Regulating Act of 1773. If it be taken that time immemorial would carry one back to 1773 or if it be taken that time immemorial would carry one back to 1793, when the Permanent Settlement of Bengal was made, it would from a practical point of view amount to the same thing, namely that for all these long series of years the custom has been recognized and has been in existence. If that is so, then there is nothing to wonder that in the record-of-rights mention of the existence of this custom finds a place. It is undeniable that the existence of this custom in the localities concerned forms one of the incidents of tenancy and the fact that this custom is recognized and given effect to is easily provable by the production of the entries in the record of rights. Therefore we start with this, that the custom in question has been proved by the tenants, it has been proved to have been in existence for a long series of years compendiously described as time immemorial and the only question that need detain us is whether or not this custom is a reasonable one. Dr. Mukherji has addressed us a vigorous argument combating the proposition that it is a reasonable custom; but we are unable to hold that having regard to the character of the lands let out, having regard to the fact that the true source of the real wealth of the tenants is often sapped because of the inundation which the lands are subject to and the tenants are left without their wherewithal to pay the rent due to their landlord that the custom is in any sense of the word an unreasonable one.

The character of the land mainly is agricultural. This is not the case of a town with manufacturing industries in it. Agriculture is the source of the living of the tenants, though we are not unmindful of the fact that homestead lands in some parts of these mouzahs are also to be found. But having regard to the character of the occupation of the tenants and the character of the lands on the tilling of which the occupation of the tenants can be made profitable it would require a very strong set of circumstances to induce us to hold that the custom referred to above would be considered to be unreasonable. Therefore, our conclusion is that the custom

in question has been proved to have been in existence for a long time, in other words the custom is an ancient one and it is a reasonable one and we are unable further to say that the custom is in any way a variable one. That being so, on the question of the custom raised by the tenants our conclusion must be in favour of the tenants.

The next question that has been argued is that it is an encumbrance within the meaning of S. 37 of Act 11 of 1859 and that the landlord who is a recent purchaser at a revenue sale is entitled to treat the custom as an encumbrance and to disregard the existence thereof. The answer to this question depends upon the fact as to whether or not this custom in question is at all an encumbrance. It is argued that the undoubted right of the landlord is to receive rent from the tenants in respect of the lands let out and if between the tenants and the landlord a custom like this intervenes and a portion of the landlord's rent is cut off because of the existence of this custom, then it is something which is in derogation of the landlord's rights and it is something which the tenants are allowed to appropriate to themselves to the prejudice of the landlord. But if however the position be that the landlord has let out lands out of which, owing to the circumstances referred to above, namely the loss of crops owing to inundation the tenants are unable to make anything, in other words, to put it shortly, if the lands do not yield anything, from a practical point of view can it be said that the landlord is still entitled to his rent although he has not provided the tenants either with lands capable of yielding or has not taken care to prevent inundation by erection of suitable works as have been adopted in various European countries. If the position be what we have tried to sketch however imperfectly we may have done—then it is in consonance with notions of natural justice that a custom like this should not be held to be an encumbrance. We are aware that on this question of encumbrance there has been spent much learning and much has been written in various text-books; but each case has got to depend on its own facts, and on the facts of these cases we have come to the conclusion that the custom in question cannot be treated as an encumbrance.

If these are our true conclusions on the two questions raised above, there is not much to discuss any further in this group of cases. The result therefore is that this group of appeals must in our view be dismissed with costs, i. e. one set of costs in the 58 appeals in which the learned Advocate Mr. Roy appears. There will be no order as to costs as regards the other appeals.

R.K. *Appeals dismissed.*

A. I. R. 1934 Calcutta 454

MUKERJI AND S. K. GHOSE, JJ.

Nagendra Nath Sinha and *others*—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Nos. 1051 and 1186 of 1933, Decided on 26th January 1934.

(a) Penal Code (1860), S. 403—Stay order by appellate Court—In absence of communication of such order party taking delivery in pursuance of lower Court's order for restoration—Disposal of the property in such a way as to make it impossible of being returned to other party if appellate Court would so order—No offence under S. 403 held committed.

Order was passed by appellate Court staying delivery of certain property to complainant. This order was by mistake not communicated to the lower Court. In pursuance of the lower Court's order, complainant was served with notice by the police that he should take delivery or the property would be forfeited to Government. The complainant took delivery though knowing of the stay order and afterwards disposed of it in such a way as to make it impossible of being returned to the other party if the appellate Court would so order return.

Held: that the action of the complainant did not amount to an offence under S. 403.

[P 456 C 1, 2]

(b) Criminal P.C. (1898), S. 517—Property—Party ordered to restore certain property already converted to his own use—Court has power to order money-equivalent.

Where a party has been ordered by a criminal Court to restore certain property to anotber but such party has already converted the property to its own use; the Court has power to order the production of such property as may be capable of production, and the production of the money-equivalent of such property as may be incapable of production: *AIR* 1921 *Cal* 30, *Rel. on.*

[P 457 C 1]

D. N. Bhattacharjee, Durga Das Roy and *Apurba Charan Mukerjee*—for Petitioners.

Order.—This is a Rule issued at the instance of two petitioners, No. 1 Raja Nagendra Nath Sinha Sahas Roy and

No. 2 Nagendra Nath Das calling upon the District Magistrate of Midnapur to show cause why certain proceedings complained of in the petition, on which this Rule has been issued, should not be quashed or why such other or further order should not be made as to this Court may seem fit and proper.

The facts necessary to be stated for the purposes of this Rule are the following. Petitioner 1 is the proprietor of a jungle which he alleges is in his khas possession, and petitioner 2 is a forest guard in the emrloy of petitioner 1. A complaint was lodged on behalf of petitioner 1 against one Baikuntha Nath Ghose and others as accused persons alleging that they were in possession of certain stolen properties, to wit, certain logs of wood, the allegation being that they had been taken away by theft from a portion of the jungle in the khas possession of petitioner 1. The case was tried by a Second Class Magistrate, who acquitted the accused holding that the prosecution had failed to prove beyond reasonable doubt that the trees in question had been cut from the plot which was alleged to be in the khas possession of the complainant, i. e., petitioner 1. At the same time, the Magistrate ordered the alleged stolen logs to be returned to petitioner 1. This order was made on 5th June 1933. The accused Baikuntha Nath Ghose and others preferred an appeal under S. 520, Criminal P. C., on 7th June 1933; and the Additional District Magistrate of Midnapur on the same day admitted the appeal, called for the records, directed issue of notice on the complainant and fixed 22nd June 1933 for the hearing of the appeal. At the same time, the learned Additional District Magistrate made an order staying the restoration of the properties to the complainant, i. e., petitioner 1, pending disposal of the appeal. It now appears that on account of some mistake in the office of the learned Additional District Magistrate, the order staying the restoration of the properties was not communicated to the trial Magistrate.

It is not necessary to refer to the orders that were thereafter passed from time to time by the latter, but it will be sufficient to state that eventually, on 5th July 1933, a notice issued by a Police Officer of Binpur Police Station was received by some officer of petitioner 1 whereby the said petitioner was called upon to take delivery of the trees and it was also stated in that notice that if the said petitioner failed to take delivery within three days of the said notice the same would be sold by public auction and the sale proceeds would be forfeited to Government. The notice also said that it purported to be issued in pursuance of the order which the trial Magistrate had made. On receipt of the aforesaid notice, on 7th July 1933, petitioner 2 took delivery of the logs from the President Panchayat in whose charge the said logs had been up to that time. The fact that the properties had thus been taken away by petitioner 2 on behalf of petitioner 1 was not brought to the notice of the Additional District Magistrate when he heard the appeal under S. 520, Criminal P. C. This the learned Magistrate did on 11th July 1933. On that day the learned Additional District Magistrate holding that the proper order to make in the circumstances of the case was to return the logs to the persons with whom they had been found, allowed the appeal, set aside the order of the trial Magistrate and directed that the logs in question should be returned to the aforesaid Baikuntha Nath Ghose and others. On these facts, the Additional District Magistrate, on 20th September 1933, directed the prosecution of the two petitioners for an offence under S. 403, I. P. C. He purported to take cognizance of the offence under S. 190, Cl, (1), sub-Cl. (c) of the Code. It is against this order of the Additional District Magistrate that the present Rule is directed.

It appears that the proceedings have been taken as aforesaid by the learned Additional District Magistrate upon the view that although on 11th July 1933 the properties were ordered to be restored to Baikuntha Nath Ghose and others by the order which the learned Magistrate made in the appeal on that date, that order became infructuous because the two petitioners had taken delivery of the properties in pursuance of the notice which they had obtained from the police though they knew full well that a stay order had been made by the said learned Magistrate on 7th June 1933, prohibiting such delivery and that

after taking delivery the properties had already been converted by the said petitioners to their own use. The learned Magistrate in the order which he made taking cognizance of the offence has expressly stated that

" the petitioners must have acted dishonestly in taking delivery of the properties from the police on 7th July 1933 and converting them to their own use."

In the explanation which the learned Magistrate has submitted in answer to this Rule he has emphasized the position that the fact that the stay order had been issued by him was known to the pleaders who were appearing in the case on behalf of the petitioners in his Court and he has further said that from such knowledge on the part of the pleaders, knowledge of the petitioners should be presumed. He has observed thus:

"The applicants knew of the stay order as early as 22nd June 1933 if not earlier and (that) in spite of such knowledge they afterwards disposed of the property in such a way as to make it impossible of being returned to the other party if the Additional District Magistrate would order such return."

According to the learned Additional District Magistrate therefore the offence was committed before the order for return of the logs was made by him and consisted in this that inspite of the stay order and with knowledge thereof the petitioners had taken the logs and disposed of them. This, in our judgment, was not sufficient for constituting an offence of criminal misappropriation. Even though they may have been aware of the stay order there was the notice issued by the police, which in distinct terms called upon them to take delivery of the logs and threatened them with a forfeiture in case no delivery was taken. They were thus clearly justified in taking delivery of the logs. If after doing so they disposed of them, although they may have known that the question, as to whom they should be given, was pending consideration in appeal they can not be held guilty of criminal misappropriation. To found a case under S. 403, I. P. C. it would be necessary to allege something more, and indeed Mr. Mukherjee who has appeared on behalf of Baikuntha Nath Ghose and others has himself seen the point. He has therefore placed considerable reliance upon a statement which is to be found in an affidavit which has been filed on behalf of his clients and which is to the effect that the properties were disposed of by the petitioners or converted by them to their own use after the Additional District Magistrate had made his order on 11th July 1933. This statement has been made in an affidavit the deponent whereof has stated that it is true to his information obtained on an inquiry which he held. He has not given the particulars of the inquiry or the source of his information. We express no opinion on the question whether a prosecution under S. 403, I. P. C. would or would not be justified upon an allegation that even with knowledge of the order passed by the Additional District Magistrate on 11th July 1933 the petitioners converted the properties to their own use, because this does not seem to us to be the ground upon which the Additional District Magistrate has proceeded. His order appears to us to be based on the fact that with knowledge of the stay order the properties had been taken delivery of by the petitioners and disposed of or converted in a manner which would make it impossible to restore them to others if an order to that effect was eventually passed. We are of opinion therefore that upon the materials on which the learned Additional District Magistrate has proceeded, such a prosecution would not be justified and cannot be allowed to proceed.

We accordingly make the rule absolute and quash the proceedings under S. 403, I. P. C. against the two petitioners which have been started by the Additional District Magistrate under S. 190, Cl. (1), sub-Cl. (c), Criminal P. C. No. 1186 of 1933. In this case the aforesaid Baikuntha Nath Ghose and others have obtained a rule to show cause why the order made by the Additional District Magistrate on their application of 20th September 1933 should not be set aside and why the opposite parties, namely, the two petitioners in Revision Case No. 1051 of 1933 just disposed of should not be directed to bring into Court the value of logs for payment to the petitioners or why such other order or orders should not be made as to this Court may appear fit and proper. The order of the learned Additional District Magistrate which is complained of in this case runs in these words:

"The property ordered to be restored to Baikuntha Nath Ghose and others by the Additional District Magistrate on 11th July 1933 has already been converted to their own use by Nagendra Nath Sinha Sahas Roy and Nagendra Nath Das. No further action can be taken with regard to the property in a criminal Court. Baikuntha Nath Ghose and others should seek relief in civil Court about the matter."

In support of this rule Mr. Mukerjee has contended that the criminal Court is not powerless in circumstances such as these to give an aggrieved party the remedy which he stands in need of. He has drawn our attention to the decision of the Special Bench of this Court in the case of *Piggot* v. *Ali Muhammad Mandal* (1) and to the terms of S. 517, Criminal P. C. as amended in 1923 and has argued that even though some of the logs have been used up and the rest sold to others it is open to the criminal Court to compel the opposite parties to produce such properties as may be capable of production and also to produce the money equivalent of such properties as may be incapable of production. Without disputing for a moment the power which a criminal Court has got in this respect we think it will be highly inconvenient on the part of the Court now to launch upon an inquiry as to what happened to the logs, how much has been used up by the opposite parties in constructing their buildings and how much has been sold away and for what price. If it was possible from the record, as it is, to get any idea as to the value of the logs actually fetched at their sale or if any specific amount of money could be seized as representing such sale proceeds, such an order could, with propriety, be made by the Court. It has been pointed out to us that in a certain petition which the opposite parties made, they stated that the value of the logs would be Rs. 300 or so. Upon such a statement as that and without knowing what amount, if any, was actually fetched at the sale it would not be possible for the Court to make any order in petitioners' favour. If an inquiry is to be launched upon in order to ascertain the necessary particulars, there is every likelihood of such an inquiry to be not productive of any satisfactory result. We think the order which the learned Additional District Magistrate has made, advising the petitioners Baikuntha Nath Ghose and others to seek relief in the civil Court, is the proper order to make in the circumstances of the case. Rule is discharged.

R.K. *Rule discharged.*

1. AIR 1921 Cal 30=60 I C 325=22 Cr L J 213 =48 Cal 522 (S B).

A. I. R. 1934 Calcutta 457

MUKERJI AND S. K. GHOSE, JJ.

Bibhuti Bhusan Adhikary — Complainant.

v.

Khem Chand Churoria and *others*— Accused.

Criminal Ref. No. 229 of 1933, Decided on 20th February 1934.

(a) Criminal P. C., S. 195—Court—Collector holding investigation under S. 14 Putni Regulation (8 of 1819) is Court.

The summary investigation held by a Collector under S. 14, Putni Regulation (8 of 1819) is one in the course of which proofs can be called for and as the result of which an award may be made. The Collector therefore holding the investigation is a Court within the meaning of S. 195, Criminal P. C. : 17 *Cal* 872, *Rel on*; *AIR* 1918 *P C* 41, *Dist.* [P 457 C 2]

(b) Criminal P.C., S. 195—Court—Tribunal acting without jurisdiction—Still complaint of Court is necessary.

An offence not cognizable without the complaint of the Court concerned, or some Court to which it is subordinate, cannot be cognizable on the complaint of some other person or body when the Court itself was acting without jurisdiction. [P 458 C 2]

Sarat Chandra Basu and *Narendra Krishna Basu*—for Complainant.

N. K. Basu, *Panchanan Ghose*, *Sourindra Narain Ghosh* and *Pares Nath Mukerji* (*Jr.*)—for Accused.

Mukerji, J.—In the case of *Raghoobuns Sahay* v. *Kokil Singh* (1), it was pointed out that the word "Court" as used in S. 195, Criminal P. C., has a wider meaning than "Court of Justice" as defined in the Penal Code, and that, as therein used, it would include a tribunal empowered to deal with a particular matter and authorised to receive evidence bearing on that matter. The summary investigation which a Collector holds under S. 14, Putni Regulation (8 of 1819) and in the present case that is the investigation that was held by the Officer concerned, is one in the course of which proofs can be called for and as the result of which an award may be

1. (1890) 17 Cal 872.

made. The Collector holding the investigation therefore was a tribunal which would come within the meaning of the word "Court" as explained in the aforesaid case. That being the position. we think the ground on which this reference has been made is well founded, and the complaint under S. 193, I. P. C., against the petitioners could not be taken cognizance of except upon the complaint of the said Court or of some Court to which such Court is subordinate : vide S. 195 (1) (b), Criminal P. C.. To this conclusion Mr. Bose has objected on four grounds.

He has argued in the first place that the Judicial Committee in the case of *Raja of Pachete* v. *Kumud Nath* (2), have made some observations indicating the position that a Collector acting under S. 14 of the Regulation is not a "Court." We have carefully read these observations and we are of opinion that their Lordships in that case had no occasion to consider the meaning of the word "Court" as used in S. 195, Criminal P. C., and all that their Lordships laid down was that the Collector acting under S. 14 of the Regulation was not "an ordinary Court" and that he acts thereunder not magisterially but ministerially and that the true view of his functions in such a case is that he has no capacity as regards inquiring into title comparable to the capacity possessed by an ordinary judicial tribunal. The second argument of Mr. Bose is that there is nothing expressly stated anywhere indicating that the Collector can in such circumstances take evidence on oath and that accordingly he is not a "Court." This argument does not help him : for if the proceedings be not judicial proceedings, then no false evidence was given or fabricated within the meaning of the second part of S. 193, I. P. C., nor was any false evidence given in any judicial proceeding or fabricated for the purpose of being used in any judicial proceeding, within the meaning of the first part of S. 193, I. P. C. It is contended that the receipts were fabricated for being used in a regular suit to be brought afterwards. But there was no such suit pending nor does it appear that any such suit was in contemplation at the time : and on that ground no case under S. 193, I. P. C., would be disclosed on the complaint.

Thirdly, it has been contended by Mr. Bose that the Deputy Collector who held the investigation under S. 14 of the Regulation had no authority to hold it and so no complaint was necessary. The Deputy Collector was, in our opinion, a "Court" all the same, though he may not have been a Court acting with jurisdiction. The argument cannot be countenanced that an offence under S. 193, I. P. C., which is an offence against public justice and so not cognizable without the complaint of the Court concerned or some Court to which it is subordinate, would be cognizable on the complaint of some other person or body when the Court itself was acting without jurisdiction. Lastly, it has been argued by Mr. Bose that the complaint discloses an offence of cheating. The complaint and the examination of the complainant on oath, properly read, show that if any deception was practised it was practised for fabricating the receipts. But if it is intended to proceed against the accused on a charge of cheating that cannct be done on the basis of the present complaint nor at the instance of the present complainant. First hand materials, disclosing all the elements which are requisite to make out such an offence, must be before the Court before any process can issue in respect of it. The present proceedings are under S. 193, I. P. C. only and, in our opinion, they cannot proceed. The Reference is accepted and the processes issued under S. 193, I.P.C., are quashed.

S. K. Ghose, J.—I agree.

R.K. *Order accordingly.*

2. AIR 1918 P C 41=45 I C 827=45 I A 103=46 Cal 1 (P C).

A. I. R. 1934 Calcutta 458

MUKERJI AND S. K. GHOSE, JJ.

Debendra Chandra Sarkar and *others* —Accused.

v.

Emperor—Opposite Party.

Criminal Jurisdiction Ref. No. 53 of 1933, Decided on 27th February 1934.

(a) Criminal Trial — First information — Witnesses in, not examined—Omission tells heavily on prosecution case.

In a case where the important witnesses examined are tenants either exclusively or, at any rate, partly of landlord interested in the prosecution, an omission to examine witnesses named in first information must tell very heavily on the prosecution case. [P 459 C 1]

(b) Criminal Trial—First information report—Writer not examined—It cannot be ascertained whether report is genuine version or coloured version.

If the man who wrote out the Ejahar produced in Thana has not been examined, it is not possible to ascertain what exactly was the version of the informant at the time when the Ejahar was put first down in writing or whether the writing represented a genuine version given by the informant himself or a version coloured by interference from other sources. [P 459 C 1]

(c) Criminal P. C. (1898), S. 162 — Objection of S. 162 is to guard against true case being spoilt—Provisions must be conformed when investigating police officer is allowed to be cross-examined by defence.

The objection of S. 162 is to guard against a true case being spoilt by an unscrupulous Investigating Police officer and the Court must conform to those provisions when the Investigating Police officer is allowed to be cross-examined by defence. [P 459 C 2]

N. K. Basu, Suresh Chandra Taluqdar, Ramendra Chandra Roy—for Accused.

D. N. Battacharji and *A. C. Sen*—for the Crown.

Order.—There are several reasons why we felt that we shall not be justified in interfering with the verdict of the majority of the jury in this case. In the first place, there appear to have been three persons, named Kandu Gopal and Shib Charan, who were named as witnesses in the first information but they have not been called. No explanation worth the name has been given for the omission to call them; the suggestion put forward by the prosecution being that they may have been gained over, but there is nothing on which such a suggestion could be supported. In a case like this, where the important witnesses examined are tenants either exclusively or, at any rate, partly of landlord interested in the prosecution, such an omission must necessarily tell very heavily on the prosecution case. Secondly a written Ejahar was produced at the Thana, the prosecution case being that it was written out, because the Police Offcer concerned asked for a written Ejahar. The Police Officer has denied the story. The man who wrote it out has not been examined. In his absence it is not possible to ascertain what exactly was the version of the informant at the time when the Ejahar was put first down in writing or whether the writing represented a genuine version given by the informant himself or a version coloured by interference from other sources.

Thirdly, and this, in our opinion, is of far greater importance, the story given by the witnesses of burnt paddy etc., being found by the Sub-Inspector when he arrived at the spot was contradicted by the latter. It would not be sufficient to say in answer, as the Judge has purported to say that there is nothing in the police diary supporting the denial of the Sub-Inspector. It was a negative, which might naturally not find a place in the diary and yet may be true. It is note-worthy that though the Sub-Inspector's honesty has been challenged, the Circle Inspector who came later on on the scene and at whose instance the charge-sheet was submitted and who must also have seen the burnt paddy etc., if the story as to their existence was true, was not called as a witness. The omission to call him as a witness was in our opinion, exceedingly unfortunate. Then, there is the fact that some rent receipts etc., were saved from the fire and later on produced in Court for the purpose of proving possession. The explanation as to how they were saved is not very satisfactory and, in any event, is somewhat conflicting so far as its details are concerned. On the whole, we think, there are points on which it was open to the majority of the jury to hold that there were elements of doubt in the case. We desire to draw the attention of the learned Judge to the provisions contained in S. 162, Criminal P. C., and to impress on him the necessity of conforming to the said provisions when the Investigating Police Officer is allowed to be cross-examined by the defence. It was with the object of guarding against a true case being spoilt by an unscrupulous Investgaing Police Officer that these provisions were enacted. The provisions, as far as we can see, have not been conformed to in this case. The reference is rejected. The accused are acquitted and should be discharged.

R.K. *Accused acquitted.*

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A. I. R. 1934 Calcutta 460

Special Bench

BUCKLAND, AG. C. J., COSTELLO AND PANCKRIDGE, JJ.

Abdul Karim—Appellant.

v.

Eastern Bengal Ry.—Respondent.

Appeal No. 50 of 1932, Decided on 26th February 1934, against order of Commissioner for Workmen's Compensation, Bengal, D/- 28th September 1931.

(a) Workmen's Compensation Act (1923), S. 10—"Institute,"

The word "institute" in S. 10 does not refer to the proceedings before the commissioner but only to the workmen's claim for compensation against employer : *Powell* v. *Main Colliery & Co. Ltd.* (1900), *A C* 366, *M'Cafferty* v. *Mac-Andrews & Co. Ltd.* (1930), *A C* 599, *Ref.* [P 461 C 1]

(b) Workmen's Compensation Act (1923), S. 10– Six months in S. 10 relates to claim for compensation made by workman against employer.

The period of six months, to which S. 10 refers relates to the claim for compensation made by the workman against his employer and has no reference to the period within which an application for the settlement of the matter by the Commissioner can be made. [P 461 C 1]

Panindra Kumar Sanyal and *Jogesh Chandra Sinha*—for Appellant.

Rupendra Kumar Mitter — for Respondent.

Buckland, Ag. C. J.—This is an appeal against the order of Mr. Blank, Commissioner for Workmen's Compensation, Bengal, dated 28th September 1931, on an application under S. 22, Workmen's Compensation Act, preferred by the appellant Abdul Karim. Upon the application there are endorsed by the commissioner, first a note in which he writes "where is the reasonable cause from 11th March till date" and below his order : "Pleader states he has no further cause to show. Claim dismissed as not maintainable under S. 10 (1) of the Act," both dated 28th September 1931. The question to be decided is whether or not the application was barred by limitation which appears to have been the view which the Commissionor took under the section specified by him. S. 10 (1) of the Act is as follows :

"No proceedings for the recovery of compensation shall be maintainable before a commissioner unless . . . . . the claim for compensation with respect to such an accident has been instituted within six months of the occurrence of the accident or, in the case of death, within six months from the date ofdeath."

Then there is a proviso that:

" the commissioner may admit and decide any claim to compensation in any case notwithstanding that the notice has not been given, or the claim has not been instituted, in the due time as provided in this sub-section if he is satisfied that the failure so to give the notice or institute the claim, as the case may be, was due to sufficient cause."

This section appears to have been taken from the English Statute. S. 14, English Workmen's Compensation Act, 1925, provides as follows:

"Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless . . . . the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident, etc.,"

The section contains two provisions of which the first refers to proceedings for settling the claim and the second to failure to make a claim within the time specified. The difference in the form of the opening words of the two sections which in the Indian section say that no proceedings shall be maintainable unless something has been done, and in the English section say that proceedings shall not be maintainable unless something has been done may be ignored. The question that arises is whether the use of the verb "institute" in relation to the claim for compensation distinguishes the Indian section in any way from the corresponding section of the English Act which refers to the "making" of the claim for compensation. If there is no substantial difference between the two sections except in the form of the language employed, then it is clear, according to the decision in *Powell* v. *The Main Colliery Co., Ltd.* (1) and the judgment of Lord Dunedin in *M'Cafferty* v. *MacAndrews & Co., Ltd.* (2) that the section does not lay down that proceedings must begin within six months of the occurrence but that it only says that proceedings shall not be maintainable unless two conditions have been complied with, (1) the giving of notice as soon as possible, and (2) the making of a claim within six months, and that the words "claim for compensation" refer not to proceedings before the tribunal by which the compensation is to be

1. (1900) A C 366=69 L J Q B 758=16 T L R 466=65 J P 100=49 W R 49=83 L T 85.
2. (1930) A C 599=99 L J P C 145=46 T L R 559.

assessed but a claim for compensation by the workman's employer. If no distinction can be drawn from the use of the words "institute" and "make" respectively the principles of these decisions apply to the Indian Statute.

This brings me to the narrow question which has to be decided, whether the use of the word "institute" refers to the proceedings before the commissioner or whether it is an unfortunate substitution for the word "make" in the English Act? In my judgment, it is the latter and it is not necessary to go very far to find support for this view. S. 22 relates to the initiation of proceedings before a commissioner and refers to an "application for the settlement of any matter by a commissioner" and prescribes certain particulars which are to be contained in the application, and among them, "in the case of a claim for compensation against an employer" certain details are to be given. I should find it difficult to hold that the words at the head of the section, 'an application for the settlement of any matter by a commissioner," and the reference to a "claim to compensation against an employer" both refer to exactly the same thing, namely, that by which proceedings are initiated before the commissioner. In my judgment, the period of six months, to which S. 10 refers relates to the claim for compensation made by the workman against his employer and has no reference to the period within which an application for the settlement of the matter by the commissioner can be made. In this view the commissioner has not applied himself to the matter in hand. It may be that the claim for compensation was not made within time. It may be that if it was not made within time, nevertheless the commissioner should in the exercise of the discretion which the Act allows admit the claim and decide it. These matters are not before us now. They are matters to which the commissioner will have to address himself. The order will be that the application be remanded to the commissioner to deal with in accordance with law. The appellant is entitled to his costs of this appeal. The hearing fee is assessed at two gold mohurs.

Costello, J.—I am of the same opinion.

Panckridge. J.—I am the of same opinion. S. 10 (1) is clearly based upon similar provisions in the English Statutes. At the date of the passing of the Indian Act the words "claim for compensation" had been judicially interpreted by the House of Lords in *Powell* v. *The Main Colliery Co. Ltd.* (1). The presumption I think must be that the Indian Legislature was aware of such interpretation and intended it to be followed in the later enactment. I find nothing either in the section which we are considering or elsewhere in the Act by which this presumption can reasonably be said to be rebutted.

K.S. *Application remanded.*

A. I. R. 1934 Calcutta 461

GUHA AND BARTLEY, JJ.

Arjun Kaibarta and *others*—Appellants.

v.

Manoranjan De Bhoumick and *others*—Respondents.

Appeals Nos. 2067 to 2070 of 1930, Decided on 18th July 1933.

(a) Fishery—Grant of—Exclusive right of fishery in public, tidal and navigable rivers can be granted by Crown.

An exclusive right of fishery in public, tidal and navigable rivers may be granted by the Crown to private individuals: *AIR* 1914 *P C* 48 and 11 *Cal* 431, *Foll.* [P 462 C 2]

(b) Fishery—Grant of, by Government—Evidence must be clear and conclusive.

The evidence of a grant by Government of an exclu-ive fishery in navigable waters ought to be conclusive and clear. [P 462 C 2]

(c) Civil P. C. (1908), S. 100—Issue of fact—Issue of law is not involved merely because documents not being direct foundations of rights, have to be construed—Mistake as to meaning of document by lower Court—Still second appeal does not lie.

Where the question to be decided is one of fact, it does not involve an issue of law merely because documents which are not instruments of title, or otherwise the direct foundations of rights, but merely historical materials, have to be construed for the purpose. A second appeal does not lie merely because some portion of the evidence is contained in a document or documents and the lower Court has committed a mistake as to its meaning: *AIR* 1930 *P C* 91, *Rel. on.* [F 463 C 1]

(d) Easement—Proof—Evidence for proving right in gross or profits a prendre is of same sort as for proving easement.

A right in gross or profit a prendre, as it is technically called, may be established by the

same sort of evidence as is used to established either a profit a prendre appurtenant or an easement in the ordinary sense of the term: 5 *Cal* 945; 19 *Cal* 544 (*F B*) and 12 *I C* 205, *Ref.* [P 463 C 2]

(e) Custom—Custom throwing unjust burden on some for benefit of others is unreasonable—So also if it would destroy subject-matter of right—Profits a pendre in favour of indefinite or fluctuating body of persons cannot be supported—Easement.

Every custom sanctioned and upheld by the Courts must be reasonable. It is unreasonable when it throws an unusual burden on some for the benefit of others. It is also unreasonable if it would destroy the subject-matter of the right. A profit a prendre cannot therefore be supported on the ground of custom specially in favour of an indefinite and fluctuating body ot persons, as it would result in the subject-matter being soon exhausted. [P 464 C 1, 2]

(f) Limitation Act (1908), Art. 49—Claims to damages for wrongful taking of fish, is governed by Art. 49.

Period of limitation for wrongful taking of fish is not different from that for suit for damages for cutting and carrying away or misappropriating crops, or from a suit for compensation for wrongful removal of trees after they have been cut down; and the proper article is Art. 49. [P 465 C 1]

Sharatchandra Ray Chaudhuri, *Khettramohan Ghosh* and *Mahendrakumar Ghosh*—for Appellants.

Brajalal Chakrabarti, *Upendrakumar Ray*, *Sureshchandra Majumdar* and *Birajmohan Majumdar* — for Respondents.

Judgment.—These appeals are directed against the decision of the learned Subordinate Judge, Third Court, Dacca, substantially affirming the decision of the Munsif, First Court, Narayanganj, in four suits instituted by the plaintiffs, for recovery of damages against the defendants, on the allegation that they caught fish in a part of the public navigable river Meghna, specifically described in the plaints, the exclusive fishery in which had been granted to Nawab Sir Ashanulla of Dacca, and of which the plaintiffs were in possession as patnidars. The case of the plaintiffs was that the Nawab had, by virtue of a grant from the Crown, an exclusive right of fishery in the part of the river in question. The defendants in the suits denied the plaintiffs' right to the fishery and asserted that Nawab Sir Ashanulla had not obtained a grant from the Crown, so far as the exclusive fishery was concerned, and the plaintiffs could not therefore derive any title to the same by a settlement in their favour. It was asserted by the defendants that they had acquired an easement right to fish in the jalkar in question, and that they had also a customary right to do so. The case of the defendants was that a very large number of people of various districts openly catch fish without making any payment to anybody, as they had a right to catch fish in the jalkar in question as an easement as also by custom. The Court of first instance and the Court of appeal below agreed in deciding the cases, so far as the material questions in controversy were concerned, in favour of the plaintiffs: the variation made by the lower appellate Court in the decision of the trial Court related only to the measure of damages. The defendants have appealed to this Court.

In these appeals it has to be considered, first, whether the plaintiffs-respondents, could claim a right to the jalkar in a public, navigable river as patnidars under the grantee under the Crown; whether there was a grant by the Crown of an exclusive fishery, which had been established by the plaintiffs, so as to enable them to assert their rights as patnidars under the grantee from the Crown. It must be taken to be established that an exclusive right of fishery in public, tidal and navigable rivers may be granted by the Crown to private individuals. As their Lordships of the Judicial Committee of the Privy Council have laid down in the case of *Srinath Roy* v. *Dinabandhu Sen* (1), accepting the rule laid down by this Court in the case of *Hori Das Mal* v. *Mahomed Jaki* (2), the evidence of a Government grantee of an exclusive fishery in navigable waters ought to be conclusive and clear; but, in so far as such could be expected to be forthcoming as to particular grants, which were old, the evidence must be sufficient to show that the competent authority—the Government of India—in right of the Crown did actually grant a jalkar right of several fishery. In the cases before us, the Courts below have carefully reviewed the material placed before the Court,

1. AIR 1914 P C 48=25 I C 467=41 I A 221=42 Cal 489 (P C).
2. (1885) 11 Cal 434.

and have come to the conclusion, on those materials, that there was direct and conclusive evidence of grant by the Crown; that Nawab Sir Ashanulla of Dacca obtained a grant from the Crown, and then leased the jalkar to the plaintiffs. Our attention was drawn to two of the documents bearing upon the question of a grant from the Crown—Exs. 2 and 41 in the cases. These two documents, taken together, indicate that the exclusive fishery in question was intended to be sold and was sold along with a zamindari mahal in the year 1863 to Nawab Sir Ashanulla, from whom the plaintiffs obtained a patni settlement of the jalkar.

The documents, by themselves, may not be conclusive evidence of the grant from the Crown, but taking them into consideration, along with the other materials on the record, including judgments of competent Courts, directly bearing upon the questions in controversy, the Courts below have come to the decision that the case of a Crown grant, as asserted by the plaintiffs, was established. As was observed by their Lordships of the Judicial Committee of the Privy Council in the case of *Wali Muhammad* v. *Muhammad Bakhsh* (3), where the question to be decided is one of fact, it does not involve an issue of law merely because the documents which were not instruments of title, or otherwise the direct foundations of rights, but were merely historical materials, have to be construed for the purpose of deciding that question; and a second appeal would not lie because some portion of the evidence might be contained in a document or documents and the first appellate Court had made a mistake as to its meaning. Considered in the light of these observations, the decision concurrently arrived at by the Courts below on the question of fact, whether there was the grant of an exclusive fishery by the Crown, must be taken to be conclusive as between the parties concerned. The question of the plaintiffs' title by virtue of a settlement from the grantee of an exclusive fishery from the Crown, must, accordingly, be taken to have been established.

The right of easement was pleaded in the suit, as against the plaintiffs. It may be taken to be well settled now that a right in gross or profit a prendre, as it is technically called, as claimed by the defendants in these cases, may be established by the same sort of evidence as is used to establish either a profit a prendre appurtenant or an easement in the ordinary sense of the word : see *Chundee Churn Roy* v. *Shib Chunder Mundul* (4), *Fadu Jhala* v. *Gour Mohun Jhala* (5) and *Lokenath Bidyadhar* v. *Jahania Bibi* (6). Evidence was adduced by the defendants in proof of the particular nature of easement asserted by them, and on that evidence the Court of appeal below has held that all the defendants in the four suits, who had claimed right of easement, failed to prove it.

The Court below has observed in this connexion that even if some fishermen on the banks of the river Meghna have fished in this jalkar without paying rent to anybody from generation to generation, they may have individually acquired rights of easement; but that does not amount to a complete ouster of the plaintiffs. There could not be any ouster of the plaintiffs, so far as the defendants in these suits were concerned, in view of the definite finding of fact referred to above, that all the defendants in these suits had failed to establish the right claimed by them. It was contended on this part of the case that the Court below is wrong in holding that the tenants of the plaintiffs, in respect of other properties, could not acquire by prescription a right to fish as claimed by the defendants ; that the father's previous possession could not be tacked on to the subsequent possession by the son, and that the right to fish, acquired as an easement could not be inherited by the son, on the footing that such a right was not heritable. It is necessary only to express the opinion that we do not feel justified to express agreement or dissent on any of the points mentioned above as they do not call for decision in the present cases, in view of the findings arrived at by the Court below, that it has not been proved that the deceased father of any of the defendants acquired the

3. AIR 1930 P C 91=122 I C 316=57 I A 86=11 Lah 199 (P C).

4. (1880) 5 Cal 945=6 C L R 269.
5. (1892) 19 Cal 544 (F B).
6. (1911) 12 I C 305.

easement as claimed. No evidence was led in these cases to prove the acquisition of easement by the deceased father of any of the defandants, and there was no specific evidence as to when the fathers of all the defendants died, or as to the period of their fishing. The acquisition of easement, as claimed by the defendants in the suits, must therefore be held not to have been established.

The defendants in the suits asserted that they had a customary right to catch fish in the plaintiffs' jalkar. An issue was raised on the point, and the Courts below have given their decision against the defendants. The evidence bearing on this part of the case to which reference has been made by the Court of appeal below in its judgment, is this :

"A large fluctuating number of fishermen—the estimate varying from 800 or 900 to 2,C00 or 3,000—coming from Dacca, Tippera and Chittagong Districts, catch fish in the Meghna, acting either singly or in batches, using all kinds of nets, large and small. The plaintiffs have from time to time realized rent, from some few cf them, and have occasionally sued some of them successfully for rents or damages ; that owing to the vastness of the tract, most of them escape payment of rents or tolls. The right, which the defendants claim, is to catch fish not merely for consumption in their own families, but for the purposes of sale."

On these facts, it cannot possibly be held as a matter of law that the defendants had, or could have, a customary right to fish in the plaintiffs' jalkar. The relevant question on this part of the case was whether the right set up by the defendants can have for its basis a valid existing custom. Even on the assumption that the defendants had established a custom it cannot be treated as a valid custom on the ground of its unreasonableness. As has been pointed out in the decision of this Court in the case of *Lutchmeput Singh* v. *Sadaulla Nushyo* (7), according to the custom set up, there would be no limitation to the number of persons entitled to enjoy it. The number of persons may increase to any number and an unlimited number of persons can appropriate the profits of a private property, leaving nothing to the owner. Every custom sanctioned and upheld by the Courts must be reasonable a custom is unreasonable when it throws an unjust burden on some individuals for the benefit of others a custom may also be held to be unreasonable on the ground that it would destroy the subject-matter of the right. On the last ground, it has been held by Courts in England that a profit a prendre cannot be acquired by custom. It has also been held that the chief reason, why a profit a prendre cannot be supported by custom in favour of an indefinite and fluctuating body of persons, is that, were such a right recognized, the result would be that the subject-matter of the right would soon become exhausted : see *Race* v. *Ward* (8) and *Lord Rivers* v. *Adams* (9).

In the cases before us on the facts to which reference has been made already the custom set up was not only unreasonable, but its very existence had not been established, the plaintiffs having succeeded in many instances in realizing rents or damages from some of the persons, on whose behalf, collectively, the custom to fish in the river Meghna was claimed by the defendants in these suits. It may also be mentioned in this connexion that although the question, whether or not a custom is reasonable, is a question of law, the Court of fact has to look into the nature of the alleged custom and, if it finds it greatly affecting the rights of private property, it may fairly expect and require that it should be supported by evidence strong and convincing. In the cases before us, the Courts below, after careful consideration of the materials placed before them, have concurrently held that the defendants have failed to prove that they had a customary right of catching fish in the plaintiffs' jalkar, and the conclusion thus arrived at by the Courts below cannot be ignored. The defendants in our judgment, could not be allowed to defeat the plaintiffs' claim in the suits on the ground of existence of any customary right in them as alleged by them in the suits.

The question of limitation as raised in the cases by the defendants, related to the question whether the plaintiffs' claim for damages in the different suits were to be confined to the period of two years before the institution of the suits, or whether the plaintiffs were entitled to recover damages for the wrongful ap-

7. (1882) 9 Cal 698=12 C L R 382.

8. (1855) 4 E & B 702=3 C L R 744=1 Jur (n.s.) 704=24 L J Q B 153.

9. (1878) 3 Ex D 361=48 L J Ex 47=27 W R 381=39 L T 39.

propriation of fish caught by the defendants for the period of three years before the suits were instituted. We are clearly of opinion that the article in Sch. 1, Limitation Act, appropriate to the cases before us, was Art. 49. The period of limitation for claims to damages for wrongful taking of fish as made by the plaintiffs could in no way be different from that for a suit to recover compensation for damages for cutting and carrying away or misappropriating crops or a suit to recover compensation for wrongful removal of trees after they have been cut down and therefore according to the rule laid down by a Full Bench of this Court in the case of *Mangun Jha* v. *Dolhin Golab* (10), no part of the claims in suit could be held to be barred by limitation, and not recoverable as such. The plaintiffs were entitled to claim damages for three years preceding the institution of the suits.

In view of the conclusion we have arrived at on the questions submitted for our consideration in these appeals, as indicated above, the appeals are dismissed with costs. One hearing-fee is allowed in these appeals, which is assessed at three gold mohurs.

There were two applications for revision, filed in connexion with two of these appeals. The applications are rejected.

R.K. *Appeals dismissed.*

10. (1898) 25 Cal 692=2 C W N 265 (F B).

A. I. R. 1934 Calcutta 465

MITTER AND HENDERSON, JJ.

Kangal Chandra Mondal and *others*—Judgment-debtors—Appellants.

v.

Nandalal Marwari and *another*—Decree-holders—Respondents.

Appeal No. 66 of 1932, Decided on 4th July 1933, against order of Sub-Judge, Asansol, D/- 4th January 1932.

(a) Civil P. C. (1908), O. 21, R. 11—Application for execution not mentioning moneys realized by attachment of decree obtained by judgment-debtor — Omission does not vitiate application.

Whether an omission in an application for execution to mention certain particulars is a material irregularity as would vitiate the execution proceedings depends on the facts of each case. An omission to mention moneys received by realizing a decree obtained by the judgment-debtor is not a material irregularity as would vitiate the execution proceedings : *AIR* 1926 *Cal* 1146, *Rel on* ; 2 *Mad* 216 and *AIR* 1919 *Mad* 256, *Ref.* [P 466 C 2]

(b) Civil P. C. (1908), O. 21, R. 15—Rule does not apply where joint-decree has been satisfied in part before application for execution — Notice given to other joint decree-holders — No objection to execution—Application for share is not illegal.

The rule that one of several decree-holders must apply for execution of the whole decree does not apply where the joint-decree has been satisfied in part before the date of the application for execution for part which remained unsatisfied. Where therefore the co-decree holder gives notice of his application for execution of his share of the balance of the decree to the other co-decree holder, who has raised no objection to the execution the application is not illegal. The only effect being as if the applicant had given up his claim to the rest of the decree [P 467 C 1]

(c) Execution — Order of attachment not opposed nor appealed from—Decree subsists and cannot be contended to be barred by limitation—Civil P. C. (1908), S. 11.

Where no objection to the order of attachment is taken in the time, nor is any appeal preferred and the order becomes final the decree subsists and is not barred by limitation on principles analogous to res judicata. [P 467 C 1]

Narendra Chandra Bose, *Bankim Chandra Mukherji* and *Purnachandra Chatterji*—for Appellants.

Gopendra Nath Das—for Respondents.

Mitter, J.—This is an appeal on behalf of the judgment-debtors and is directed against an order of the Subordinate Judge of Asansol dated 4th January 1932 by which he disallowed the objection of the appellants to the execution of a decree obtained against them by the respondents decree-holders. The relevant facts may be briefly stated. On 4th March 1924 Ramkumar Marwari and Durgadas Marwari, father of Nandalal Marwari, the minor respondent to the present appeal, obtained a decree against the appellants for a sum of Rs. 23,000.

The decree was by consent and the decretal money was payable by certain instalments. On 7th January 1925 an application for execution of this decree was made and the said execution case was dismissed in part satisfaction on 25th May 1925 and the sum of Rupees 3,282-8-0 was realized. The present application for execution was made by the minor son of Durgadas Marwari through his mother and guardian Narbuddi Marwari for realization of the sum of Rs. 13,374-8-10 being the half share of the balance left including interest and cost. This application was made on 11th February 1931. Several objections were taken to this execution: (1) That the

petition for execution is not maintainable according to law ; (2) that it is barred by the law of limitation; and (3) that the case cannot proceed as the decree-holder has not complied with the order passed in a previous execution case. Although these three objections were taken in the appellant's written petition the only objection which seems to have been urged before the Subordinate Judge is the last one. This last objection was disallowed by the Subordinate Judge who directed the execution to proceed.

Against this order the present appeal has been brought and the grounds urged before us are: (1) that the application is not in accordance with law as the particulars required to be furnished by the order of 14th December 1929 have not been furnished; (2) that the application being one by a joint decree-holder for his share is not maintainable having regard to the provisions of O. 21, R. 15, Civil P. C.; (3) that the present application is barred by limitation; and (4) that in any event the execution cannot proceed for the entire sum claimed by the petition, but can proceed for the sum of Rs. 23,000 less 3,282-8-0 and subject to a further deduction of the sum of Rs. 9,178-10-0 which has been realized by the decree-holders as appears from the order of 14th December 1929 (Ex. A) —an order which is inter partes.

With regard to the first ground taken the Subordinate Judge has held that there has been a substantial compliance with the order passed on 14th December 1929. He is of opinion that the present application for execution has stated in fact that the results of the previous execution cases and the extracts of the register (Ex. D) filed by them shew the result specifically. It is argued that the sum of Rs. 9,178-10-0 which has been realized by the attachment of one of the decrees obtained by the judgment-debtors against third persons has not been shewn and that therefore the application is not in accordance with law. It is true as shall be shewn presently in relation to the fourth ground that the sum of Rs. 9,178-10-0 should also have been shewn as realized but that circumstance does not make the application any the less in accordance with law as the application is in the tabular form as required by O. 21, R. 11 although it is inaccurate in some particulars.

Ordinarily the applicant for execution is bound to mention in the application any payment made between the parties after decree: see *Paupayya* v. *Narasannah* (1). But the same Court has held that the non-mention of an uncertified payment out of Court in an application for execution does not render it an application not in accordance with law: see *Marimuthu Naicken* v. *Ramaswamy Padayachi* (2). The question whether an application is in accordance with law depends on the facts of each particular case for, as pointed out by Cumming and Mukherji, JJ., in the case of *Soudamini Ghose* v. *Jessore Registered Loan Co.*, *A. I. R.* 1926 *Cal.* 1146, every omission in an application for execution is not necessarily a material irregularity such as would vitiate the execution proceeding and whether an omission is or is not material will depend on the facts of the particular case. Although the decree-holder has not indicated in their application for execution that judgment-debtors are entitled to a deduction of the sum of Rs. 9,178-10-0 they have referred to the judgment of 14th December 1929 as representing the result of the previous Execution Case No. 81 of 1928 and this judgment shews that the sum of Rs. 9,178-10-0 had been realized by the attachment of decree obtained by the judgment-debtor against third persons. In Ex. A the following passage occurs:

"The judgment-debtors have shewn by a certified copy filed before me that at least one of the decrees attached has been satisfied by the recovery of Rs. 9,178-10-0.

As this judgment has been referred to in column 28 its proper legal effect is a matter for consideration by the Court when determining the present application. In these circumstances we are of opinion that the petition is in accordance with law. With regard to the second ground taken it appears that this objection was not taken in the Court below in the precise form in which it is presented here. It does not appear from the petition of objection that the ground was taken to the effect that the application for execution of the decree offended against the provisions of O. 21, R. 15 of the Code. Besides it appears that the rule that one of several decree-holders of a joint decree is not entitled to execution

1. (1878) 2 Mad 216.
2. AIR 1919 Mad 256=51 I C 114.

in respect of his share of the decree, but that he must apply for execution of the whole decree, applies only in those cases where the whole decree has remained unsatisfied. That rule does not apply where a joint decree has been satisfied in part before the date of the application for execution. In such a case execution cannot issue for the whole decree but only for so much thereof as has remained unsatisfied.

In the present case a sum of Rupees 3,282-8-0 in addition to Rs. 9178-10-8 had been realized. Notice of this application for execution with regard to certain portion of a decree, namely, his share, was given to his co-decree-holder Ramkumar Marwari who has raised no objection to the present execution. The effect of this application for execution for the respondent's share of the balance of the decretal amount is as if he has given up his claim to the rest of the decree. There is nothing illegal in such an application as has been held in the case of *Gopendra* v. *Motilal* (3). Besides it appears that when in the previous application for Execution Miscellaneous Case No. 81 of 1928, the present decree-holder applied for execution of his share of the decree no objection was taken by the present appellants. On all these grounds the second ground urged must fail.

The third ground urged relates to the question of limitation. It appears that although the point was taken in the petition of objection it was not pressed before the Court below. Besides it seems to us that this question cannot be raised now on principle analogous to res judicata for on 19th March 1931 the attachment was directed to be made. The judgment-debtor appeared and prayed for time for filing objection and no objection was filed even on 28th April 1931 with the result that the order of attachment became final as their petition for further time was rejected. As no appeal was filed against the order of attachment dated 19th March and against the subsequent order of the 28th April the order of attachment has become final which implies that the decree is a subsisting decree and is not barred by limitation. This ground must also fail.

We now proceed to deal with the fourth and the last ground. There can be no question that at least one of the decrees attached has been satisfied by the recovery of Rs. 9,178-10-0. This order being inter partes is undoubtedly very strong evidence that the sum has been realized. The decree-holder is bound to give credit for this sum. The result is that the order of the Subordinate Judge must be varied and the execution will proceed in respect of the half share of the decree in question—after deducting from the sum of Rs. 23,000 the sum of Rs. 3,282-2-0 and the further sum of Rs. 9,178-10-0 from the said Rs. 23,000. The sum of Rs. 9,178-10-0 must be taken as having been paid before 14th December 1929. The result is that this appeal is allowed and the order of the Subordinate Judge is varied as indicated above. Half share of the balance with interest at the rate of 6 per cent per annum will be allowed. The appeal is accordingly allowed and the order of the Subordinate Judge is varied as indicated above. As the success of the parties is divided each party will bear their own costs throughout.

Henderson, J.—I agree.

R.K. *Order accordingly.*

3. AIR 1928 Cal 559=56 Cal 212=117 I C 677.

A. I. R. 1934 Calcutta 467

JACK AND NAG, JJ.

Bhabadeb Chatterjee — Defendant — Appellant.

v.

Hemanta Kumari Debi and *another*— Respondents.

Appeal No. 885 of 1931, Decided on 29th August 1933, from appellate decree of Sub-Judge, Burdwan, D/- 22nd December 1930.

(a) Bengal Tenancy Act (1885), S. 105—Ex parte decision of settlement officer under S. 105 as to fair and equitable rent does not operate as res judicata in subsequent suit for establishing Nishkar rights—Civil P. C. (1908), S. 11.

An ex parte decision by the settlement officer under S. 105 as to fair and equitable rent does not operate as res judicata in a subsequent suit for establishing nishkar rights. The principle of constructive res judicata does not apply to proceedings under S. 105: *A I R* 1920 *Cal* 253, *Dist*; *A I R* 1929 *Cal* 417; 30 *Cal* 339; *A I R* 1926 *Cal* 822; *A I R* 1917 *Cal* 850; *A I R* 1928 *Cal* 479, *Ref.* [P 468 C 2]

(b) Practice — New plea — Limitation — Question involving question of fact — Plea cannot be raised in second appeal.

Where the question whether the suit is or is not barred by limitation involves questions of fact, it cannot be raised in second appeal. [P 469 C 2]

Bijan Kumar Mukherjee—for Appellant.

Kanai Dhan Dutt—for Respondent.

Jack, J.—This appeal has arisen out of a suit for confirmation of possession on declaration of plaintiff's Niskar right to the land in suit, which is eighteen cottas in area in two plots described in the plaint. It is recorded in the settlement khatian to be in possession of the plaintiff's son and some other persons and liable to the payment of rent. This settlement was held at the instance of the defendant who purchased the Patni right in the Mouza, in which this holding is included, at a Patni sale. The defendant subsequently applied for settlement of fair and equitable rent under S. 105, Bengal Tenancy Act, and the rent was fixed by the Settlement Officer in an ex parte proceeding. Thereafter the defendant instituted a suit for recovery of rent in 1928 and subsequently the plaintiff instituted the present suit for a declaration of her Nishkar right to this land. The suit was dismissed in the trial Court but decreed in the Court of appeal below. The grounds urged in this appeal are, firstly that the proceedings under S. 105 operate as a bar to the present suit; secondly that the suit is barred by limitation and thirdly that the findings of the Court of appeal below in reference to the claim of Nishkar title are not sufficient to establish it.

The first point depends upon the provisions of S. 107, Bengal Tenancy Act, which lays down that:

"In all proceedings under S. 105, the Revenue Officer shall adopt the procedure laid down in Civil Procedure Code, for the trial of suits, and his decision in every such proceeding shall have the effect of a decree of a civil Court in a suit between the parties, and subject to the provisions of Ss. 108 and 115-C shall be final."

It is therefore contended that the Settlement Officer having decided that the holding in question is liable to the payment of the rent which was fixed by him, the present suit is barred. On the other hand it is contended for the respondent that inasmuch as the question whether the land is rent free, as claimed by the tenant, was not raised and was not in issue in the proceedings under S. 105 the decision in those proceedings therefore was no bar to the present suit. In support of the appellant's contention the case of *Apurba Krishna Roy* v. *Shyama Charan Pramanik* (1) is referred to; there, in proceedings under S. 105 the tenants actually appeared and claimed that the land was Nishkar, but subsequently they did not prosecute the defence and the application was ultimately decided ex parte. That case is distinguishable from the present case, inasmuch as in the present case there was no appearance at all and whereas in the previous case it may be said that there was an issue as to whether the land was Lakheraj or not because it was raised in the written statement. In the present case no such issue can be said to have been raised. Another case which has been cited for the appellant is the case of *Prafulla Chandra* v. *Kshetra Lal Sinha* (2). This case was mainly decided on the question of fraud, but in the final paragraph of the judgment it was stated that the claim that the land was Lakheraj was also barred by res judicata owing to the ex parte settlement of rent under S. 105, Bengal Tenancy Act. There was no reference in the judgment to S. 107, Bengal Tenancy Act, nor to any other decision, and there was no discussion as to the grounds on which their Lordships held that the suit was barred by res judicata. It is true that under S 107 of the Act the decision under S. 105 has the force of a decree of a civil Court, but that does not make the decision res judicata on issues which have not been raised in the proceedings. It has been held that the principle of constructive res judicata cannot be applied in connexion with proceedings under S 105, Bengal Tenancy Act, and of course S. 11, Civil P. C., would not apply in the case of such proceedings.

On behalf of the respondent the case of *Kshetra Lal Sinha* v. *Prohlad Chandra* (3) has been referred to; that case appears to be on all fours with the present case, though there is no reference to S. 107, Bengal Tenancy Act. The other cases which indirectly support the contention of the respondent that the suit is not barred, are *Dharani Kanta Lahiri* v. *Gaber Ali Khan* (4), *Priyambada Debi* v. *Priya Nath* (5) and *Nawab Bahadur of Murshidabad* v. *Ahmed Hos-*

1. A I R 1920 Cal 253=54 I C 952.
2. A I R 1929 Cal 417=120 I C 104.
3. A I R 1927 Cal 603=101 I C 800.
4. (1903) 30 Cal 339=7 C W N 33.
5. A I R 1926 Cal 822=95 I C 334.

seain (6) although these decisions are really more concerned with S. 109 which is in one way wider than S. 107. It is urged that in the case of *Priyambada Debi* (5) reliance was wrongly placed upon the decision in the case of *Parbati* v. *Toolshi Kapri* (7), in which there was no decision under S. 106 inasmuch as the proceedings under S. 106 were dismissed for default and it was not a case of ex parte decision. However, there are passages in the judgment of the case of *Priyambada Debi* (5) which show that their Lordships were of opinion that where an issue was not actually raised and decided in preceedings under S. 105 there would be nc bar to a subsequent suit on that issue. Their Lordships regarded cases of this kind as being covered by the decision in the case of *Nawab Bahadur of Murshidabad* (6). On behalf of the appellant the case of *Sajjad Ahmad* v. *Trailakhya Nath* (8) has been referred to, in which it was held that the finding of the Settlement Officer under S. 105 as to area and rent of the holding was conclusive in connexion with a subsequent claim to suspension of rent, but that was on the ground that the finding as to area and rent showed that there could have been no case for suspension of rent and his Lordship the Chief Justice held that,

'the entirety of the original rent is in consistent, with and has been destroyed by the finding of the Settlement Officer."

In the course of his judgment his Lordships said,

"it was contended that under Ss. 105 and 107, Ben. Ten. Act, there was no estoppel or res judicata on the question of the right of the tenant to a suspension of rent. That is quite true . . . inasmuch as the right of suspension of rent was not a matter which was before the Settlement Officer who was concerned entirely with assessing a fair and equitable rent."

Thus this decision is against the contention of the appellant that the decision under S. 105 is res judicata as regards other issues which were not raised. We think therefore that the proceedings under S. 105 are not a bar to the present suit. The other points raised in this appeal are firstly that the suit is barred by limitation, and secondly the findings as to the Lakheraj character of the land was not sufficient to establish that right. As regards the plea of limitation, it was raised but not pressed in the trial Court, possibly on the ground that the period of limitation was extended under S. 18, Lim. Act. In any case since the decision of the questions involves questions of fact, it cannot be raised at this stage. As regards the second point the lower appellate Court has not expressly reversed the finding of the trial Court that the plaintiff failed to connect suit land with the land of the kabala of 1255 B. S. on which she based her claim that the suit land is nishkar and yet the learned Subordinate Judge appears to have based his decision that the entry in the Record-of-Rights has been rebutted partly on the existence of this kabala of 1255. It is clear however that his finding of long possession is independent of the kabala as is also the decision that the plaintiff or her predecessors had never paid rent and the subsequent reference to the kabala shows that though he did not expressly reverse the finding of the trial Court as to the kabala, he held that it referred to the land in suit for he says:

These two facts (i. e. long possession and non-payment of rent) along with the ancient kabala, are sufficient to rebut the presumption of the Record-of-Rights and to establish the plaintiff's niskar title."

In the circumstances I think that the finding as to title are sufficient and this appeal is therefore dismissed with costs.

Nag, J.—I agree.

R.K. *Appeal dismissed.*

6. A I R 1917 Cal 850=35 I C 695=44 Cal 783.
7. A I R 1914 Cal 157=20 I C 1.
8. A I R 1928 Cal 479=116 I C 375=55 Cal 464.

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MITTER, J.

Khagendra Nath Ghose—Defendant—Appellant.

v.

Monmotha Nath Manna and *others*—Respondents.

Appeal No. 839 of 1931, Decided on 24th August 1933, against appellate decree of First Court Sub-Judge, Howrah, D/- 19th September 1930.

(a) Hindu Law—Succession—Rule that son conceived before, but born after succession opens becomes heir is not restricted to male issues only but extends to all heirs.

The rule of Hindu law that an after born son who was in the womb when succession opened, should succeed to the estate of the last owner is not limited to the male issues only but extends also to other heirs: 9 *Beng L R* 377 (*P C*); 7 *Cal* 178; 7 *M I A* 169 (*P C*); 17 *Mad* 287; 26 *Bom* 449, *Rel on.* [P 471 C 1]

(b) Hindu Law—Alienation—Heir liable to be divested and actually divested by preferential heir—Latter can challenge former's alienations.

The alienation made by an heir who succeeds for the time being but whose estate is liable to be divested and is as a matter of fact divested by the birth of a preferential heir can be set aside by such preferential heir: *AIR* 1921 *Cal* 435, *Rel on*; (1864) *W R* 340, *Dist* (*Case law discussed*). [P 471 C 2]

Hari Charan Ganguli and *Dhirendra Nath Ghose*—for Appellant.

Khitish Chandra Chakrabarti and *Benoy Krishna Ghose*—for Respondents.

Judgment.—In this case much unnecessary time has been wasted in argument over points which seem to be firmly settled so far as this Court is concerned. The appeal is on behalf of defendant 1 and arises out of a suit brought by the plaintiff, now respondent, for declaration of his title to certain properties mentioned in the plaint on the allegation that he is the successor of the reversionary heir to one Kartick Manna and is entitled to the properties in suit and that a previous alienation by the heir whom he has divested is not valid. In order to understand the contention raised in this appeal it is necessary to state a few facts regarding which there is no dispute before me. It appears that the property in suit belonged to one Chandra Manna who died leaving behind him a son Kartick and a daughter Panchubala and a sister's son Rajani Kanta Manna who is defendant 2 in the present suit. Kartick was married to one Promila who died on 1st Sravan 1332 B. S. and the question arose on her death as to who would succeed as reversionary heir to Kartick's estate. It appears that at the time of Promila's death Kartick's sister was enciente. But there was at that time alive defendant 2 he being Kartick's father's sister's son and in the absence of other heirs he would be the preferential heir under the Dayabhaga school of Hindu law.

After having succeeded to the estate of Kartick on Promila's death after 1st Sravan 1332 B. S. defendant 2 executed a Kobala in respect of the disputed property to defendant 1. Within 19 days of the death of Pomila, that is on 19th Sravan 1332 B. S. Panchubala gave birth to a son on 20th Pous 1332 B. S., who died shortly after, and plaintiff being the father succeeded to his infant son's estate. The Courts below have come to the conclusion that the plaintiff is entitled to a decree. They have held on a consideration of authorities on the point that the son of the plaintiff being in the womb at the time of the death of Kartick's wife Promila was the preferential heir to his father's (Kartick's) sister's son, and consequently after the death of such son his father, the present plaintiff, is entitled to succeed. Both the Courts below have agreed in decreeing the plaintiff's suit against defendant 1 and ex parte against defendant 2; plaintiff's title to the disputed land and ghar has been declared and his possession has been confirmed.

Against the concurrent judgments of the Courts below the present appeal has been brought and two points have been taken before me in support of this appeal. It has been argued in the first place that the rule of Hindu law which makes an after-born son who was in the womb at the time when succession opened out an heir to his father should not be extended to the case of others heirs. It is said that the authorities or rather the texts of the Hindu law really limit the application of the rule that an after-born person who was in the womb when succession opens out should succeed to the estate of the last owner should be restricted to the case of the male issues only. Reference has been made to a passage in Mr. Golap Chandra Sarkar's (Sastri's) book on Hindu law which would seem to suggest that this rule is applicable only to the proprietor's male issue. But unfortunately for the appellant in this case, whatever the strict Hindu law may be, ever since the year 1830 for nearly a century a series of judicial decisions have laid down that this rule should be extended to other heirs also not on the ground that there is a clear authority of the Hindu law on the question, but on the ground that the principle has been adopted by the modern systems of jurisprudence. Reference may be made in this connexion to the decision of their Lordships of the Judicial Committee of the Privy Council in the well-known case of *Jatindra Mohan Tagore* v. *Ganendra Mohan Tagors*, (1) as also to the decision of the same case reported in the supplementary *L. R.* 1 *I. A.* at p. 7.

1. (1872) I A Sup Vol 47=9 Beng L R 377=18 W R 359=2 Suther 692=3 Sar 82 (P C).

This view has also been adopted in other cases to some of which reference may be made. It has been held in the case of *Nilcomul Lahuri* v. *Jotendra Mohan Lahuri* (2), *Bamundass Mookerjee* v. *Mt. Tarinee* (3), *Narasimha Raju* v. *Veerabhadra Razu* (4) and *Gordhandas Soonderdas* v. *Bai Ramcoover* (5) that where the estate of a Hindu is vested in a person who is the nearest heir at the time of the owner's death he can be divested by the son who was conceived at the time of his death. The proposition that the rule that an after-born heir when succession opened out is in the same position as if he were born before the succession had opened out has been adopted for such a length of time that on the principle which is well known, namely, the principle of stare decis is it would not be right to question these decisions whether they are in accord with the Hindu law or not. But from the argument I have heard I am not at all satisfied that there is any limitation in the commentary of Jimutbahana, namely that the Dayabhaga which regulated the Hindu law in this presidency puts any such limitation as is contended for on behalf of the appellant. It seems to me that a son was taken as the type of the other heirs and the rule is one of general application. Whether that is so or not the decisions have all been in one way and the question is not res integra. In these circumstances it would be unprofitable to examine the authorities of the Hindu law on this question. This view has stood for nearly a century. It was first determined in one of the cases of *Sevestre's* report, namely in the case of *Biraja* v. *Naba Krishna* that a sister's son in embryo at the time of his maternal uncle's death was held to be his heir. The first point therefore that has been taken for the appellant fails.

The next point which has been argued is that the alienation took place before the plaintiff's son was actually born and that if the alienation was to a bona fide purchaser the alienation must stand. But it has been held in this Court at any rate that an alienation made by a Hindu to a bona fide purchaser for value is liable to be set aside by the son who is in the mother's womb when the alienation was made. The question was discussed at very great length by a learned Hindu Judge, Sir Asutosh Mookerjee, and Buckland, J. in the case of *Krishna Kisor De* v. *Nagendra Bala Chaudhurani* (6). In that case after an examination of the different systems of jurisprudence, an examination of the texts of Hindu law and an examinatlon of the earlier decisions on the question it was held that the posthumous son was not bound by the alienation of his mother of his paternal estate before his birth. It was pointed out that the title of a posthumous son must be deemed to relate back to the time of his father's death. Reference was made to a case before me as taking a view contrary to the view taken in *Krishna Kisor De* v. *Nagendra Bala* (6), namely in the case of *Mt. Goura Choudhurani* v. *Chumman Chowdhury* (7). That case was considered by Mookerjee and Buckland, JJ., in the case just referred to and it was pointed out that the view taken in this case was not opposed to the case of *Goura Chowdhurani* v. *Chumman Chowdhury* (7). That case stood on a very different ground. That was a case under the Mithila system of Hindu law and the question arose with reference to a compromise made by the father when the son was in the womb, the compromise having been effected before the son was actually born.

It was held that the son was bound by the compromise effected by the father in such circumstances. That was not the case which we have got here at present the alienation having been made by an heir who succeeded for the time being but whose estate was liable to be divested and was as a matter of fact divested by the birth of a preferential heir. The principle laid down in this case has also been accepted in the case of other High Courts and the whole position is summarized in the Principles of Hindu Law by the Right Hon'ble Sir Dinshaw Mulla (last edition) at p. 319 where the learned author points out that an alienation may be set aside at the instance of any coparcener who, though born subsequent to the date of the alienation, was in his mother's womb at the date of the alienation; the reason being that under the Hindu law a son conceived is,

2. (1881) 7 Cal 178=8 C L R 401.
3. (1857-59) 7 M I A 169=1 Sar 616 (P C).
4. (1894) 17 Mad 287.
5. (1902) 26 Bom 449=3 Bom L R 857.
6. AIR 1921 Cal 435=66 I C 694.
7. (1864) W R 340.

in many respects, equal to a son born. The learned author cites numerous authorities in support of this contention, to wit the case of *Sabapathi* v. *Somasundaram* (8) which was a case of sale, *Ramanna* v. *Venkata* (9) which was a case of gift, *Girdharee Lall* v. *Kanto Lall* (10), *Deo Narain* v. *Ganga Prasad* (11) and *Lachmi Narain* v. *Kishan* (12).

It has been argued that there is a passage in the Dayabhaga in the original edition in Sanskrit at pp. 190 and 191 which throws doubt on the accuracy of the view taken in these cases. The passage referred to does not at all deal with question of inheritance. It refers to a partition made by a father of his property and does not mention whether it was ancestral or self acquired during his lifetime. I have not been able to find that that passage has any bearing on the question in controversy. The result is that the decrees of the Courts below must be affirmed and this appeal must be dismissed with costs. Leave has been asked for in this case to prefer a further appeal under S. 15, Letters Patent. I do not think that a proper case has been made out for granting such a leave having regard to the settled authorities on the question.

R.G. *Appeal dismissed.*

8. (1893) 16 Mad 76.
9. (1888) 11 Mad 246.
10. (1875) 14 Beng L R 187=1 I A 321=22 W R 56=3 Sar 380 (P C).
11. AIR 1915 All 65=26 I C 871=37 All 162.
12. (1916) 38 All 126=33 I C 913.

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MITTER AND HENDERSON, JJ.

Annada Kumar Roy and *another* — Decree-holders—Appellants.

v.

Sheikh Madan and *others* — Respondents.

Appeal No. 467 of 1930, Decided on 1st August 1933, from appellate order of Sub-Judge, Dacca, D/- 28th June 1930.

(a) Civil P. C. (1908), S. 11 — Execution—Application by certain person held maintainable — Subsequent application by same person cannot be objected to.

Where the effect of the decision is that the application for execution is held as maintainable it has the effect of deciding that the person at whose instance the application is held maintainable has a right to maintain it and objection as to maintainability of a subsequent application for execution at the instance of the same person cannot be raised : 8 *Cal* 51 (*PC*) *Rel on* [P 473 C 1, 2]

(b) Civil P. C. (1908), O. 20, R. 12—Mesne profits to be determined in execution — Decree is wrong — But parties not appealing, decree is binding — Dismissal of application in execution in default does not bar claim to mesne profits—Execution.

Even where the decree passed after 1908 directs ascertainment of mesne profits in the course of execution, the effect of the dismissal of the previous application for execution on the ground of default does not amount to a dismissal of the claim for mesne profits and fresh application is not barred. Although the decree be a wrong decree, parties not having appealed, it is binding on the parties. [P 474 C 1, 2]

Atul Chandra Gupta and *Prokash Chandra Pakrashi*—for Appellants.

Basak, Syed Nasim Ali, Rashidul Hassan, Rabindra Nath Chowdhuri and *Surajit Chandra Lahiri* for *Deputy Registrar*—for Respondents.

Mitter, J.—The appellants are decree-holders. They have appealed against an order dismissing their application for execution on the ground that Annada who is one of the persons seeking execution of the decree is neither one of the original decree-holders nor an assignee of any of the original decree-holders, and on the further ground that their previous application for execution having been dismissed for default and the application having been treated as an application in the original suit the claim of the plaintiff for recovery of mesne profits from the defendants cannot be sustained. In other words it has been held that the effect of the dismissal of the previous application for execution on the ground of default amounted to a dismissal of the claim for mesne profits. Both Courts have concurred in this view and the present appeal is directed against the concurrent judgments.

In second appeal in this Court two points have been raised on behalf of the appellants. It has been contended in the first place that it was not open to the respondents judgment-debtors to raise the plea that Annada Kumar Roy was not entitled to execute the decree on the principle analogous to the principle of res judicata by reason of the previous orders made in the course of execution. The second contention is that the lower appellate Court is in error in treating the application in execution as an application in the original suit and in holding that the dismissal

of the previous application for ascertaining of mesne profits on 27th August 1927 had the effect of dismissal of the claim of the plaintiffs, decree-holders, for recovery of mesne profits from the defendants. A few facts require to be stated in order to understand the contentions raised by this appeal. It appears that the decree for recovery of khas possession was obtained by two persons Rasik and Jadunath who were purchasers at a revenue sale. Rasik sold his share to Annada by a conveyance. Annada did not get himself substituted in the decree in place of Rasik and the decree was obtained by Rasik and Jadu Nath. It appears that the decree directed ascertainment of mesne profits in the course of execution. This direction in the decree was already contrary to the provisions of O. 20, R. 12, Civil P. C., of 1908, which had come into operation when this decree was passed. It appears however that neither party carried this matter to a higher Court to have the form of the decree rectified or corrected with the result that the decree directing ascertainment of mesne profits in execution stands.

It appears next that prior to this application in execution other applications for execution of the decree were made by Annada Kumar Roy along with other decree-holders. It is necessary in particular to mention the previcus execution case No. 108 of 1925 where the application was made for determination of mesne profits at the instance of Annada also. This application was refused and an objection on the score of limitation and on the score of incorrectness of the decree was raised and a general objection was taken that the application for execution could not be maintained. The matter was carried to the appellate Court and eventually the lower appellate Court found that the execution case was maintainable. It is said with reference to the first point raised by this appeal that this decision operates as a bar and precludes the contention that the decree could not be executed by Annada, a contention which has prevailed with the lower appellate Court and which is challenged as wrong by this appeal. We are of opinion that the argument of the appellants in this behalf is well founded and must prevail. There can be no doubt having regard to the previous direction given in the execution of the decree at the instance of Annada that this fact prevents or precludes the judgment-debtors contending as they are doing now that the decree cannot be executed at the instance of Annada on principles analogous to the principles of res judicata which have been enunciated in the very early case of *Mungul Pershad Dichit* v. *Girija Kant Lahiri* (1).

In order to determine as to whether the decree could be executed at the instance of Annada and whether the execution of the decree could proceed it was essential to consider whether Annada had any locus standi to maintain the application for execution. The lower appellate Court seems to think that the principle of constructive res judicata or rather the principle analogous to the principle of constructive res judicata has no application to execution proceedings. It seems to us that that is not a correct view to take. The tendency of the recent decisions is to hold that where the effect of the decision is that the application for execution is held as maintainable it has the effect of deciding that the person at whose instance the application is held maintainable has a right to maintain it, although there are no doubt some observations in some of the decisions in the Madras Court to the effect that Expl. (5), S. 11 of the Code or the principle embodied therein has no application to orders made in the course of execution : see the case of *Subramania Ayyar* v. *Raja Rajeswara Dorai* (2), where the observations are really obiter and it does not seem on principle that any distinction should be made in this respect between suits and execution proceedings. We are therefore of opinion that the first contention is sound and must prevail.

The next contention is, as has already been stated, that the application for ascertainment of mesne profits (which was directed to be made in the course of the execution) having been dismissed it cannot be said that the entire claim for mesne profits has been dismissed. There was no doubt some authority for the contrary view : see the case of *Upendra*

1. (1882) 8 Cal 51=8 I A 123=4 Sar 248 (PC).
2. A I R 1918 Mad 1167=38 I C 627=40 Mad 1016.

Chandra Singha v. *Sakhi Chand* (3), but it seems that the true legal position has been indicated in a recent decision of their Lordships of the Privy Council in the case of *Kedarnath Goenka* v. *Anant Prosad Singh* (4). It was held in that case by their Lordships of the Judicial Committee which approved of the decision of the Patna High Court that even under the Code of 1882 such proceedings should be held to be proceedings in execution and not in the suit and that therefore substitution was not necessary. It was argued on behalf of the respondents that as the decree was passed after the Code of 1908 had come into force the decree must be regarded as one which is incapable of execution seeing that the decree was clearly opposed to the terms of O. 20, R. 12, Civil P. C.

It is open to the Court to pass a wrong decree and if any of the parties are aggrieved by it the remedy is to have the decree corrected by the Court of appeal. As has been pointed in the case of *Malkarjun* v. *Narhari* (5) the Court has jurisdiction to decide wrongly or rightly. The question cannot be raised in the course of execution until the respondent has established that the effect of passing a wrong decree is to take away from the jurisdiction of the Court which passed it, such a position is wholy untenable. It is next argued for the respondents that even treating this application as one made in the course of execution the effect of the dismissal on the ground that the decree-holders did not make an endeavour to have the proper evidence brought before the Commissioner who was appointed to ascertain mesne profits is that no further application for execution can be maintained. The order, which is said to be a bar on behalf of the respondents to any further application for execution, is dated 27th August 1927 and runs as follows :

"Decree-holders pleader heard. Decree-holder will not proceed with this execution. As will appear from the Commissioner's report, he did his level best to secure the attendance of the decree-holders at the enquiry directed at their own instance. Decree-holder's pleader was informed on several dates, but there was no response. The Commissioner has therefore returned the writ unexecuted. I have carefully considered the bill submitted by him, and in the circumstances of this case (as will clearly appear from his report and his diary), I allow him a sum of Rs. 25 as his fees and compensation. This execution case stands dismissed with costs."

It is impossible to accept the contention of the respondents that that order operates as a bar to a further application for execution. This order did not determine the rights of the parties on the merits. There is nothing in law to prevent a further application for execution unless there has been a determination of the question as to whether the execution can proceed or not by a previous order. We are therefore of opinion that the second contention also must succeed.

The result is that we set aside the order of the Courts below dismissing the application for execution against defendants other than those who will be mentioned presently. We also direct that so far as the costs of this appeal is concerned the appellant must pay those costs. We assess the hearing fee at two gold mohurs for each set of respondents represented by Mr. Nasim Ali and Mr. Chowdhury respectively. The appeal will stand dismissed as against the following respondents : Respondents 33, 35, 43, 45, 93, 111, 131, 157, 162, 166, 87, 129, 172, 176, 180, 95, 201, 205, 207, 208, 211 and 212.

Henderson, J.—I agree.

R.K. *Order accordingly.*

3. (1912) 15 I C 709.
4. A I R 1925 P C 117=88 I C 482=52 I A 188 =4 Pat 507 (PC).
5. (1901) 25 Bom 337=27 I A 216=7 Sar 739 (PC).

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PANCKRIDGE, J.

Kalachand Bysack—Plaintiff.

v.

Amulyadhone Banerjee—Defendant.

Suit No. 462 of 1932, Decided on 17th November 1933.

(a) Minor — Application by natural guardian for appointment as guardian requesting consideration of application later — Request not granted and guardian ad litem appointed —Latter not responsible for refusal of natural guardian's request — Appointment is not irregular.

A natural guardian put in an application for appointment as guardian but requested that the application may be considered later. The request was not granted and a guardian ad litem was appointed. He was not in any way responsible for the disregard of the natural guardian's request.

Held : the appointment was not irregular.

[P 475 C 2]

(b) Minor—Guardian ad litem is not bound to carry out instructions of natural guardian unless he approves of them — Guardian and Ward.

A guardian ad litem is bound to use his own judgment as to what steps he should take in the litigation. He is not bound to carry out the instructions of the natural guardian unless he approves of them. [P 476 C 1]

(c) Minor — Unsuccessful infant plaintiff can be ordered to pay costs — Guardian and Ward and Civil P. C. (1908), S. 35, O. 32.

The Court has the power to order an unsuccessful infant plaintiff to pay the defendant's costs and vice versa and such costs can be ordered to be paid out of minor's estate. Orders can be made on a next friend or guardian ad litem to pay the costs personally. [P 477 C 1]

(d) Minor — Guardian ad litem accepting position only on undertaking that provision will be made for his costs—Court has jurisdiction to pass any order that it thinks fit—Minor's remedy is to get guardian discharged or to have order of costs set aside or sue guardian for damages for negligence.

Where a guardian ad litem has accepted the position of guardian ad litem on an undertaking being given that provision for his costs will be made, the Court has jurisdiction to pass any order that it thinks fit with regard to the costs. [P 477 C 1]

In such a case the minor's remedy is to get the guardian discharged or to have the order for costs set aside or to sue the guardian for damages for negligence. [P 477 C 2]

S. C. Ray—for Plaintiff.

B. C. Ghosh and *S. Banerjee*—for Defendant.

Judgment.—This is a suit of a somewhat unusual kind. There was a suit of 1904 relating to a certain debutter estate. It appears there were two families, each of which sought to have its members appointed as shebaits. One family may conveniently be referred to as the Bysacks, and the other family as the Setts. Litigation was prolonged, and in 1919 there was an appeal to the Privy Council. At that stage a gentleman named Atul Chunder Bysack was a defendant in the suit, and as such a respondent in the appeal. It is stated however that he took no great interest in the litigation either when it was before this Court or when the appeal was pending before the Judicial Committee. He died in 1922, leaving him surviving his wife, a lady named Nandarani Dassee, and the three plaintiffs before me, all of whom were then infants.

In December 1922, Mr. J. C. Dutt, who was acting for one of the Sett family, took out notice of motion for delivery by certain of the Bysacks of the thakur to his client. This notice was served on the present plaintiff as the sons and heirs of Atul Chunder Bysack. On 5th January 1923, Mr. Dutt wrote to Nandarani that, unless she applied as natural guardian to have herself appointed as guardian ad litem of her minor sons, he would make an application to have an officer of the Court appointed as such guardian under O. 32, R. 4 (4). On 10th January 1923, Mr. C. C. Bose wrote on behalf of Nandarani to Mr. Dutt saying that owing to the fact that she was in mourning occasioned by the recent death of her husband, she was unable to consider her position and asking that the application should stand over for a fortnight. Apparently no notice was taken of this letter, and on 15th January 1923 an order was made by which the defendant was appointed guardian ad litem. The defendant states that he was orally examined to ascertain if he had any interest adverse to the minors, and he satisfied the Master on that point. It is not suggested that in fact he had any adverse interest. I here wish to draw attention to the fact that the defendant was in no way responsible for the fact that the lady's request contained in the letter to Mr. Dutt was disregarded. On 16th January the defendant wrote to the lady informing her of his appointment and asking for her instructions.

On 18th January the lady replied that she was herself willing to act as guardian, and that the defendant should acquaint the Court of the fact. The defendant states that he did inform the Court of the contents of the lady's letter as soon as he had the opportunity, and I see no reason to think he is not telling the truth. Although apprised of the appointment the lady took no steps to have it set aside or to substitute herself for the defendant. I myself cannot see that there was anything irregular in the appointment. A great deal has been said on the question of the terms of the appointment, and my attention has been very properly drawn to the fact that it was of a limited character inasmuch as the summons only asked that the defendant should be appointed to represent, appear and act for the plaintiffs on the hearing of the application to be made on 15th January.

I do not think, for reasons which I shall presently give, that it is necessary to deal with the subsequent litigation at at any great length. The application apparently stood over, and on 17th July 1923 a notice was given to the defendant as guardian ad litem that the applicant proposed to renew it on 23rd July. The defendant forwarded the letter to Nandarani and asked for her instructions. The maternal uncle of the infants, Babu Gagan Chunder Bysack, has given evidence for the plaintiffs, and he says that on receipt of that letter he went to Mr. C. C. Bose, and after consulting him, had a letter typed in Mr. Bose's office on Mr. Bose's advice for the signature of Nandarani, to the effect that as the minors had no separate interest, and, as their uncles were attending to the matter, the defendant need not appear and incur expense. Gagan says that the letter was taken to Nandarani who signed it and kept the draft and Gagan says he personally took it to the defendant's office and got a receipt which however he is unable to produce. The defendant denies receipt of the letter. On this part of the case I have no hesitation in preferring the defendant's evidence to the evidence of Gagan. I notice that in the affidavit of documents, what is now described as a 'draft' is called a 'copy.' Perhaps this has no very great significance, and is explicable upon the hypothesis of carelessness or insufficient instructions, but then there is no corroboration from Mr. Bose's office of this letter having been drafted, and when the receipt, which is stated to have been given, is not forthcoming. I consider that in face of the denial it would be quite impossible to accept Gagan Chunder's evidence.

I may also say that even if I believed the instructions given in the letter were received, they would not conclude the matter, because the defendant was still at the time guardian ad litem, and he was bound to use his own judgment as to what steps he should take in the litigation. He was not compelled to carry out the instructions of the natural guardian unless he approved of them. There were various inquiries ordered, and the officer, to whom they were deputed, duly made his report. Exceptions were taken, and on one occasion at least the matter came before the Court of appeal. On these various occasions the defendant appeared in person as guardian ad litem of the infant. Complaint is made of this, and it is said that the infants were not interested in the matter, which concerned the appointment of shebaits, a position for which they were disqualified on account of their age. I do not think that it necessarily follows that they were not interested in the matter. The dispute was one between two families, and I am not prepared to say that the defendant was wrong in appearing to support the contentions of the family of which the infants were members. If he did not do so, I think there was some possibility that the infants, on attaining majority, might complain that he had not adequately protected their interests.

Moreover it has been clearly established that on the only occasion in which counsel was briefed on behalf of the infants, that was done at the direct request of their uncle Gagan who supplied the money required for counsel's fee. The application was finally disposed of on 9th March 1929. By an order of that date Gagan was appointed a shebait, and it was directed that the defendant as guardian ad litem should be discharged, and that his costs, after taxation as between attorney and client, should be paid out of the estate of the infants. The costs have now been taxed. The allocature has remained in abeyance pending the result of this suit. The main relief prayed is that the order of 9th March 1929 should be set aside in so far as it relates to the payment of costs to the defendant out of the minor's estate. The eldest of the three infants has now attained majority, and he sues on behalf of himself and his minor brothers.

It is said comprehensively that the order is without jurisdiction. It appears to me that many points have been raised in the case with which I cannot possibly deal. I do not see how I can consider the validity of the defendant's appointment as guardian ad litem, though in point of fact I would say that I see no reason at all for supposing that he was not validly appointed. I may also say that I do not think that I can entertain the question how far, in view of the terms of this appoint ment, the defendant was entitled to appear at th

various proceedings for which he has been allowed to charge costs.

It was for the Taxing Officer to decide the extent of the defendant's authority, and to construe the order from that point of view. Moreover I do not think I can go into the question of the general jurisdiction of the Court to award costs against infants. Various cases have been brought to my notice as to the power of the Court to order infants to pay the costs of opponents. I entertain no doubt that the Court has the power to order an unsuccessful infant plaintiff to pay the defendant's costs and vice versa. I also entertain no doubt that orders can be made on a next friend or guardian ad litem to pay the costs personally. Further, I do not think that I can consider whether this order in so far as it directs the costs to be paid out of the infants' estate is right or not. I think, having regard to the very wide terms of S. 35 of the Code, and having regard to the terms of O. 32, that if the Court had power in the circumstances to deal with the matter at all, it had power to direct that costs should be paid out of the minor's estate, and that being so it is not for me to say whether in this particular case such an order was correct or not.

The only hesitation I have felt is occasioned by the fact that the order has undoubtedly been made in favour of the defendant, and in a sense against the plaintiffs in circumstances which preclude the possibility of the plaintiffs' being heard with regard to it. I should have mentioned before that, at the time the defendant was appointed guardian, he stated that he was only willing to accept the position on condition that provision was made for his costs. Thereupon Mr. J. C. Dutt's client undertook to be responsible for the costs. It had turned out that that undertooking is of no value, as far as the defendant is concerned, because Mr. Dutt's client has since been adjudicated insolvent. In my opinion however the existence of this undertaking cannot possibly deprive the Court of jurisdiction to make any order that it thinks fit with regard to the costs.

With regard to the point as to the absence of any one to protect the interests of the plaintiffs when the order was made, I have come to the conclusion that this is not a fatal objection. If it were a fatal objection, the result would follow that an order could never be made providing for the reimbursement of a guardian ad litem at the expense of those whom he represents without getting them (the minors) separately represented, simply for the purpose of dealing with the question of their liability to costs. I do not think this is necessary or that an order made against the infants and in favour of their guardian in circumstances like the present can be regarded as a nullity. I do not say that the infants are altogether without a remedy. I see no reason why when such an order is made that they should not thereafter be able to apply in the suit to have the guardian discharged and the order as to costs set aside or varied. Again, if a guardian ad litem has been negligent, or wasteful, or otherwise imprudent in looking after the interests of the minors, and if he has obtained an order for costs, I should suppose that a suit lies for damages which may be set off against the costs payable under the order. It is true that the plaint does contain an alternative prayer for damages, and did I think any case had been made out for saying that Mr. Banerjee has been negligent or culpably remiss in the performance of his duties, I should be prepared to entertain the claim on this basis, but as I have indicated I do not think such a case has been established. In the circumstances I do not think that the infants can say that the order passed, is as regards their liability, a nullity, and that they are not bound by it. It follows that the suit is dismissed with costs.

K.S. *Suit dismissed.*

A. I. R. 1934 Calcutta 477

JACK AND NAG, JJ.

Sachai Gopinath Harish Chandra Bhagaban Chandra Saha—Petitioners.

v.

Firm Kukari Protab Chandra Saha and *others* — Decree-holders and judgment-debtors—Opposite Parties.

Civil Rule No. 695 of 1933, Decided on 25th August 1933, from order of First Court Sub-Judge, Comilla, in Misc. Appeal No. 19 of 1933.

Civil P. C. (1908), O. 21, R. 90—Attachment before judgment—Subsequent sale in another decree—Person attaching has inte

rest under R. 90 to apply for setting aside sale.

A person attaching property before judgment has ordinarily some interest in the property though not necessarily a right or title, and his interests are thus affected by sale in execution of another decree. He is therefore entitled to apply under O. 21, R. 90: *AIR* 1924 *Cal* 786, *Rel. on.*; 15 *I C* 668, *Dist.*: *AIR* 1925 *Cal* 1103, *Expl.* [P 478 C 2]

N. N. Sirkar and *Chandra Sekhar Sen*—for Petitioners,

Brajalal Chakrabarty and *Bhagirath Chandra Das*—for Opposite Party.

Jack, J.—This Rule has been issued on the decree-holder opposite party, a firm to show cause why an order of the Subordinate Judge, First Court, Tipperah, holding that the petitioner-firm had no locus standi under O. 21, R. 90, Civil P. C., to apply for setting aside a sale inasmuch as they were not persons affected by the sale, should not be set aside.

The petitioner-firm attached before judgment, the property in question on 20th December 1930. The sale took place on 24th March 1931. Subsequently the petitioners obtained a decree on 29th September 1931, and made the application under O. 21, R. 90 for setting aside the sale on 10th February 1932. The only question to be decided in this Rule is whether in the circumstances the petitioners are "persons affected by the sale" so as to be entitled to apply under O. 21, R. 90. The petitioners rely on the widest interpretation of the words of R. 90 pointing out that the wording of the old section has been changed. The corresponding words in S. 311 of the old Code are as follows: "any person whose immovable property has been sold." As compared with the words of the old S. 311 the words of R. 90 "any person whose interests are affected by the sale" are very wide. The petitioners rely on the decision in the case of *Dhirendra Nath Roy* v. *Kamini Kumar Pal* (1) in which it was held that "persons whose interests are affected by the sale" is an expression which is not limited to persons whose proprietary or possessory title is affected by the sale. There it was held that a person who made an attachment before judgment and who had already obtained a decree was a person whose interests were affected by the sale. The only distinction between that case and the present one is that in the present case the decree was obtained after the sale whereas in that case the decree was obtained before the sale.

The narrow interpretation appears to have been adopted in the case of *Jogendra Nath Chatterjee* v. *Manmatha Nath Ghosh* (2) in which it was held

"a person who has attached immovable property before judgment has no present interest in such property and is not entitled to apply under O. 21, R. 90 to set aside a sale of the property in execution of a decree."

That case is however distinguishable from the present case, inasmuch as in the present case the decree had already been obtained at the time of the application under O. 21, R. 90. It is urged on the other hand, on behalf of the opposite party that the attachment before judgment creates no interest in the property; it only prevents the judgment-debtor from dealing with the property but it does not confer any right in the property. But on the view taken in the case of *Dhirendra Nath Roy* (1), it is clear that there need not be any right in the property. It is claimed for the opposite party that reading the previous portion of the rule, it appears, that it was intended to refer only to rights in the property; but had that been the intention of the legislature there seems no reason why it should not have been so expressed. It cannot be said that a person who has attached property before judgment has no interest in the sale. If he had no interest in the property why should he take any steps with regard to the property whatever. It is quite clear that any body who attaches the property, must ordinarily have some interest in the property, not necessarily a right or title but some interest in the sale of the property, in other words his rights are affected by the sale.

The case of *Badiar Rahaman* v. *Sarada Kanta Datta* (3) has been referred to, but that case merely follows the decision in *Jogendra's* case (2). It is a decision of a single Judge and no reasons are given in the report. This rule is accordingly made absolute. The order of the Court below dismissing the application is set aside. The case is sent

1. AIR 1924 Cal 786=84 I C 119=51 Cal 495.
2. (1912) 15 I C 668.
3. AIR 1925 Cal 1103=89 I C 638,

back to the trial Court for decision on the merits.

Nag, J.—I agree.

R.K. *Order accordingly.*

A. I. R. 1934 Calcutta 479

MALLIK AND M. C. GHOSE, JJ.

Hari Nath Das — Decree-holder and Auction-purchaser—Petitioner.

v.

Chandra Kanta Sardar and *others*—Judgment-debtors—Opposite Parties.

Civil Rule No. 1269 of 1933, Decided on 5th March 1934, from order of Sub-Judge, Khulna, D/- 14th September 1933.

Civil P. C. (1908), Ss. 115 and 47—Application by judgment-debtor to set aside sale—Subsequent compromise between decree-holder and judgment-debtor—Latter to make payment within certain period else sale to be confirmed—No payment made—Further time prayed—Judge setting aside compromise order on ground of coercion and ordering application by judgment-debtor to be tried on merits—Order held could not be revised.

One of the judgment-debtors filed an application under S. 174, Ben. Ten. Act and S. 47, Civil P. C., for setting aside the sale. A compromise petition was thereupon filed by both the parties to the effect that if the judgment-debtor paid the total dues to the decree-holder auction-purchaser before a certain date, the sale would be set aside and on default, the petition for setting aside the sale, would be dismissed and the sale would stand. The judgment-debtor did not pay off the dues within the time fixed in the compromise petition and prayed for further time for payment which was opposed by the decree-holder. The Judge set aside the compromise on the ground that the compromise had been obtained by coercion and ordered that the petition should be tried on its merits. The decree-holder came in revision:

Held: that if the order complained of was interlocutory order, it could not come within the purview of S. 115. If it was a final order, the decree-holder had another remedy of an appeal. [P 479 C 2]

Sris Chandra Dutta—for Petitioner.

Bhudar Haldar—for Opposite Parties.

Order.—The facts which have given rise to the present Rule were these. The decree holder, petitioner, in execution of a decree for rent purchased the land in arrears. The sale took place on 19th September 1932 and it was confirmed on 4th November 1932. On 7th November 1932 there was an application for delivery of possession and possession was delivered on 21st December 1932. A day before this date, namely, on 20th December 1932, one of the judgment-debtors, namely, Chandra Kanta Sardar, filed an application under S. 174, Ben. Ten. Act, and S. 47, Civil P. C., for setting aside the sale. A Miscellaneous Case, namely, Case No. 120 of 1932 was started. This case was adjourned several times and on 27th May 1933, there was a compromise petition filed by both the parties to the effect that if the judgment-debtor paid the total dues to the decree holder auction-purchaser before 27th August 1933, the sale would be set aside and in default the petition for setting aside the sale would be dismissed and the sale would stand, and on this condition three months' time was allowed and the case was fixed for 28th August 1933 for disposal in terms of the petition of compromise filed by both the parties. The judgment-debtor did not pay off the dues within the time fixed in the compromise petition and prayed for further time for payment. This prayer for further time was opposed by the decree-holder. This opposition however was overruled and the learned Subordinate Judge set aside the compromise on the ground that the compromise had been obtained by coercion and ordered that the Misc. Case No. 120 of 1932 petition should be tried on its merits. It is against these orders of the learned Subordinate Judge that the present Rule is directed.

The Rule, in my opinion, must be discharged. The order, complained of, was either an interlocutory order or an order that was final. If it was an interlocutory order it cannot very well come within the purview of S. 115 of the Code. If it is a final order the petitioner had another remedy, namely, of an appeal. An attempt was made to show that no appeal lay. But from what I have stated above it would appear that the application for setting aside the sale was made under S. 47, Civil P. C., and therefore there was a remedy of an appeal open to the petitioner. In this connexion reference was made to a decision of the Patna High Court in the case of *Jagdis Missir* v. *Sureswar Missir* (1) where it has been held that the provisions of O. 23, Civil P. C., do apply to an order made on an application for setting aside a sale. On behalf of the petitioner it was said that the learned Subordinate Judge ought to have given

1. A I R 1921 Pat 107=62 I C 608=6 Pat L J 253.

effect to the petition of compromise filed by the parties and the petitioner's real grievance therefore was that the learned Judge did not give effect to that petition. If that was so, the order complained of, was in controvention of the provisions of O. 23, R. 3, Civil P. C. An order passed in contravention of that Rule is clearly an order which is appealable under O. 43, R. 1, sub-R. (m). The re-ult is that this Rule is discharged with costs the hearing-fee being assessed at one gold mohur.

R.K. *Rule discharged.*

A. I. R. 1934 Calcutta 480

COSTELLO, J.

Dhananjoy—Accused—Petitioner.

v.

Provat Chandra Biswas—Complainant—Opposite Party.

Criminal Revn. No. 57 of 1934, Decided on 16th March 1934.

(a) Penal Code (1860), S. 447 — Accused driving lessee of ferry and forcibly taking possession of ferry boat — Court at place where possession of boat was taken has jurisdiction.

– Accused made an attack on the lessee of the ferry, drove him away and then forcibly occupied and took possession of the ferry boat and with the help of Manjhis plied between the two sides of the river, collected tolls from persons whom he carried across the river for a period of nine days. The accused was prosecuted under S. 447.

Held: though the occurrence began at one side of the ferry the Magistrate of the place where the possession of the ferry boat was taken had ample jurisdictlon to try the case. [P 481 C 2]

(b) Penal Code (1860), S. 441—Ferry boat is properly within S 441.

The words "property" in S. 441 do not mean only immovable corporeal property but includes also a ferry boat. [P 481 C 2]

(c) Penal Code (1860), S. 447 — Accused acting high-handedly—Sentence of fine of Rs 200 held not excessive.

Where the action of the accused was high-handed in the extreme as he not only took possession of the boat which he knew had been leased to another but he proceeded to appropriate to himself moneys which might otherwise have gone into the pockets of the lessee, the sentence of the fine Rs. 200 was held not to be excessive. [P 483 C 1]

Satindranath Mukherjee and *Siddheswar Chakravarty*—for Petitioner.

Santosh Kumar Basu and *Parimal Mukherjee*—for Opposite Party.

Order. — The applicant Dhananjoy Dhara was convicted by a Deputy Magistrate, First Class, of Krishnagar under S. 447, I. P. C., and sentenced to pay a fine of Rs. 200 or, in default, to undergo rigorous imprisonment for 20 days. It was also ordered that out of the fine, if paid, the local Municipality through the complainant who was the Chairman of the Santipur Municipality should receive Rs. 50 as compensation. Against his conviction Dhanan Dhara appealed to the Sessions Judge of Nadia. As regards the facts of the case the learned Sessions Judge was in agreement with the Deputy Magistrate but he came to the conclusion that the conviction ought to be under S. 448, I. P. C., and not under S. 447 and he ordered accordingly; that is to say, he dismissed the appeal with the modification that the conviction was to be under S. 448 and he maintained the sentence which he considered was quite fit and proper for the ends of justice. The facts of the case, briefly stated, are as follows. There is a very old ferry known as Santipur or Guptipara or Satgachi ferry serving to cross the river Bhagirathi between Guptipara on the Hoogly side of the river and Santipur on the Nadia side. In the year 1928 the management of this ferry was transferred under Government orders to the Municipality of Santipur with a direction that the income derived from such ferry should be divided between the Municipality of Santipur and the District Board of Hoogly. From that time onwards the Chairman of the Municipality of Santipur has leased out the ferry year by year to the highest bidder at public auction and in the year 1933 it was leased out at the usual auction to a man named Panchu Gopal Dhani who acquired the ferry rights for a period of one year for a sum of Rs. 1,300. This man had been in possession of the ferry by plying it for hire between the two points I have mentioned and collecting tolls from the passengers, carts and so on. He had also erected a hut on the Hoogly side of the river.

It appears that on 19th April 1933 the present applicant Dhananjoy Dhara made an attack on Panchu Gopal Dhani the lessee of the ferry, drove him away and then forcibly occupled and took possession of the ferry boat and with the help of Manjhis plied between the two sides of the river, collected tolls

from persons whom he carried across the river for a period of nine days. He even set at defiance the municipal peon who came to him for the purpose of getting possession of the moneys which Dhananjoy Dhara had collected. The reason for Dhananjoy Dhara's action, according to his version of the matter, was that his mother in-law, a woman named Sukeshi Dasi had purchased the proprietary right in a char named Sultanpur at a revenue sale. This char Sultanpur was on the Nadia side of the river and Dhananjoy Dhara claimed that in exercise of the right to the char the ferry became his on the ground that the ferry landing place or ghat on the Santipur side of the river was situated in char Sultanpur. The lessee of the ferry, Panchu Gopal Dhani, who had been treated in the manner I have narrated and the municipal peon lodged a complaint with the Chairman of the Santipur Municipality as a result of which the Chairman caused the present case to be instituted. The defence set up was that the case had been concocted for the purpose of forcing the owners of the landing ghat to part with their right, title and interest therein. At the trial it was also suggested on behalf of the defence that the Nadia Court had no jurisdiction as the occurrence had really taken place on the Hooghly side of the river, that is to say at Satgachia. The learned Sessions Judge in his judgment said:

"The only points for determination in this appeal are whether the accused assaulted and abused the complainant, ferry man and criminally trespassed into his ferry boat with intent to commit an offence or to intimidate or insult or annoy any person in possession thereof and whether the accused did so in exercise of any bona fide claim of right to the property."

Now, with regard to the facts both the Courts came to the conclusion that they were substantially as the prosecution averred. As regards the question of jurisdiction the learned Sessions Judge said:

"The evidence of the prosecution witnesses clearly shows that though the occurrence began at Guptipara side"

(that is to say at Satgachia)

" it culminated at Santipur side where the complainant was pushed down from the boat and the ferry boat was taken possession of by the accused who plied it with the help of manjhis for about nine days and collected tolls etc."

and he accordingly and no doubt rightly came to the conclusion that the Magistrate of Krishnagar had ample jurisdiction to try the case. With regard to the question of bona fide claim of right the learned Sessions Judge pointed out that the accused had never laid any claim to the ownership of the boat or the ferry which was an incorporeal right quite independent of and separate from the right to the soil. The learned Sessions Judge summed up his finding in these words:

" In these circumstances I hold that the accused criminally trespassed into the ferry boat of the complainant with intent to commit an offence to intimidate or annoy the person in possession thereof."

He then proceeded to discuss the question whether the conviction under S. 447, I. P. C., was right. As to that he said this:

" As to S. 447, I. P. C. under which the accused appears to have been convicted, it is argued that the words 'property' in S. 441, I. P. C., means only immovable corporeal property and does not include vessel as held by the trying Magistrate. There is much force in the above argument for Mayne also holds that this S. 441, I. P. C., does not appear to include any cases of trespass to moveable property."

The passage in Mayne's Criminal Law of India to which the learned Sessions Judge referred is to be found at p. 741, Edn. 4. The passage reads as follows:

"This section " the learned author was referring to S.447."does not appear to include any cases of trespass to moveable property. The language is inconsistent with such a construction, particularly the words having lawfully entered into or upon such property, unlawfully remains there."

Now, S. 441, I. P. C., reads as follows:

" Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate insult or annoy any person in possession of such property, or, having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate insult or annoy any such person, or with intent to commit an offence, is said to commit criminal trespass."

It is upon the language of the second part of the section that the learned commentator suggested, it seems to me he did no more than suggest, that this section did not apply to a case of trespass to moveable property. It is a little difficult to see how that view was arrived at except possibly upon the basis of the suggestion thrown out by Mr. Basu (who appeared to show cause against this rule) to the effect that it had not been contemplated at the time this treatise was written that there would be such a

variety of moveable property as we find in use in modern times susceptible of being entered into or upon. I invited Mr. Mukherjee who appeared in support of this rule to cite to me any authority or judicial decision having the effect of putting upon the word "property" as used in S. 441 the narrow interpretation suggested in Mayne's book. He was quite unable to produce anything of the kind. I have no doubt that the reason is that it has never been seriously argued in a Court of law that the word "property" is not sufficiently wide to cover any kind of property either moveable or immovable into or upon which it is possible for a person to enter with an intent of the description mentioned in S. 441. It seems to me quite obvious that it is reasonable to hold, for example, that there could be a criminal trespass within the meaning of S. 447 to a motor car, an aeroplane and certainly to a boat. The learned Sessions Judge having accepted what is obviously no more than a speculation on the part of Mr. Mayne and clearly being of opinion that the accused ought to be convicted of some offence, then proceeded to convict him under the provisions of S. 448, I. P. C., which is the operative section if I may so describe it for the offence described in S. 442. S. 442 says :

"Whoever commits criminal trespass by entering into or remaining in any building, tent or vessel used as a human dwelling, or any building used as a place for worship or as a place for the custody of property, is said to commit house trespass."

The learned Sessions Judge seems to have thought that the ferry boat in question was a "vessel" within the meaning of S. 442, I. P. C. No evidence whatever was given to show that this particular boat was ever used as a human dwelling or even that anyone ever slept upon it. It is to be observed that the offence described in S. 442, I. P. C., is more serious than that described in S. 441. It is indeed an aggravation of the offence described in S. 441 for the obvious reason that there is likely to be a greater degree of annoyance and inconvenience involved by the invasion of the amenities or privacy of persons dwelling in any building, or tent or vessel of the kind contemplated by S. 442. As this offence is more serious than the offence under S. 441 in my opinion it was not open to the learned Sessions Judge in any event to make the substitution even had it been shown that this particular vessel was used as a dwelling house but as I have stated there was no such evidence. I take the view however that the definition given in S. 441 is quite wide enough to cover the circumstances of the present case and it must be taken that a ferry boat is "property" within the meaning of that section.

The ground on which Mr. Mayne has expressed his opinion is as I have indicated, that generally speaking it is not possible to enter into or upon a moveable property. Obviously in the case of a car or carriage or aeroplane or a boat it is quite easy to conceive circumstances where a person has lawfully entered into or upon any one of these things and yet has unlawfully remained there with such intent as would constitute an offence under the provisions of S. 441. In my judgment the right order to make in the present case is that the decision of the Magistrate who tried the case should be restored and that the accused should stand convicted under S. 447, I. P. C. Mr. Mukherjee has made an appeal for reduction of the penalty which has been imposed. It is clear that the action of Dhananjoy Dhara was high-handed in the extreme. He not only took possession of the boat which he knew had been leased to Panchu Gopal Dhani but he proceeded to appropriate to himself moneys which might otherwise have gone into the pockets of Panchu Gopal Dhani. In all the circumstances I cannot see any reason why it should be said that the fine of Rs. 200 which has been imposed is in any way excessive. The rule will be discharged but an order will be made restoring the original order of the Magistrate.

R.K. *Rule discharged.*

A. I. R. 1934 Calcutta 482

PATTERSON AND GUHA, JJ.

Parbati Charan Baisya and *others* — Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. 1064 of 1933, Decided on 16th March 1934.

(a) Criminal P. C (1898), S. 110 (f)—Proceedings under S. 110 against several persons—Persons alleged to be members of

terrorist organisation — Joint trial is not only permissible but the only procedure — Separate findings against each accused is however necessary.

Where a proceeding under S. 110 (f) is initiated against several persons on the ground that they belonged to a terrorist organisation, the object of which was to terrorise people and to collect money by illegal means, and to collect arms and ammunition for the purpose of murdering persons in authority, and those helpful to Government, a joint trial is not only permissible, but a joint trial is the only procedure that can be followed. The Magistrate is however, required to come to separate findings as regards each of the persons charged, individually: 27 *Cal* 781; *A I R* 1923 *All* 95; *A I R* 1925 *Mad* 189; and *A I R* 1923 *Pat* 104 *Dist*; *A I R* 1919 *Cal* 702 and 11 *C W N* 789, *Rel on.* [P 485 C 1, 2]

(b) Criminal P. C. (1898), S. 110 — Revision—High Court's powers are unfettered—Question of asking security is however concern of Magistrate and Local police — High Court therefore interferes only if miscarriage of justice is clearly proved.

In the case of orders made in the proceeding under S. 110, the revisional jurisdiction of the High Court is as much unfettered as in other cases coming before it and interference would be called for, and justified, on a proper case being made out. But the question whether it is necessary in the interest of keeping the peace, to take security from a person, is essentially a question which concerns the Magistrate and the local police The power to demand security from suspected persons is a power that is almost as much of an executive as of a judicial nature. The High Court will therefore interfere only on very strong and clear grounds which go to show that there has been a miscarriage of justice. [P 484 C 2]

(c) Criminal P. C. (1898), S 110 — Joint trial— Procedure though illegal does not vitiate trial unless prejudice to accused is proved.

Even in a case in which an imperative rule of procedure has been broken, it is not enough to vitiate the trial or proceeding The gravity of the irregularity or omission has to be considered, and unless such irregularity or omission has worked actual injustice to the accused the contention regarding the illegality of a joint trial of the petitioners cannot be given effect to in the absence of proof of any prejudice; *A I R* 1927 *P C* 44, *Rel on.* [P 485 C 2]

(d) Criminal P. C. (1898), S. 110 (f)—Accused discharged from dacoity case before trial—Immediate proceedings under S. 110 are not unjustifiable.

There can be no doubt that evidence which was regarded as unreliable and insufficient to convict a person on the charge of dacoity, should not be treated as reliable evidence to show that such person is a dangerous and desperate character who ought to be called upon to furnish security for good behaviour But where the accused are discharged before the trial of the dacoity case and there is no question of evidence against them so far as their participation or association with others in the dacoity who were actually tried having been disbelieved, the proceeding under S. 110 (f) started immediately after discharge is justifiable. [P 486 C 1, 2]

(e) Criminal P. C. (1898), Ss. 110 and 123 —Sessions Judge cannot under S. 123 accept or reject sureties—He must send back proceedings to Magistrate.

The Magistrate is vested with the authority either to accept or reject sureties demandable under S. 110 and it is not open to the Sessions Judge, exercising jurisdiction under S. 123 to accept or reject the sureties offered. The course open to the Sessions Judge under the law is to send the proceedings back to the Magistrate, with his decision on the merits of the case, for taking action under S 122. [P 487 C 1]

(f) Criminal P. C. (1898), S. 110 — Sureties—Relatives are better persons to keep eye—*Obiter*.

Obiter—The relatives of the persons to be bound are in a better position than other persons to keep an eye on them. [P 487 C 1]

Birendra Kumar De—for Petitioner.

Khondkar and *Anil Chandra Roy Choudhury*—for the Crown.

Guha, J.—This Rule was issued on an application arising out of a proceeding binding down the petitioners under S. 110, Criminal P. C., and it was allowed to be argued on the footing that it related to two orders passed by the learned Sessions Judge of Mymensingh; one on 26th August 1933, and the other on 15th September 1933, the former calling upon the petitioners to furnish security on the ground that they are so desperate and dangerous as to render their being at large without security, hazardous to the community, and the latter rejecting the bonds given by the sureties offered, and directing the petitioners Parbati Charan Baisya, Dhirendra Nath Dutta and Birendra Chanda Choudhury (petitioners 1, 2 and 3) to surrender. The Rule granted by this Court on 13th November 1933, was, it may be mentioned, in general terms; to show cause why the order binding the petitioners down under S. 110 read with S. 118, Criminal P. C., should not be set aside, or why such other or further order should not be made as to this Court may seem fit and proper.

It appears that a proceeding under S. 110 (f), Criminal P. C., was initiated against the petitioners, on the report of the Additional Superintendent of Police, East Mymensingh, dated 2nd May 1933, on the ground that they belonged to a terrorist organisation, the object of which was to terrorise people, and to collect money by illegal means, and to collect arms and amunition for the purpose of murdering persons in authority

and those helpful to Government. In point of time, the initiation of the proceeding under S. 110 (f), Criminal P. C.. followed closely upon the discharge of the petitioners from the category of accused persons in a dacoity case, which was tried by a Special Tribunal appointed by the Government. The case against the petitioners so far as the dacoity was concerned, appears to have been withdrawn under S. 494 of the Code on 20th March 1933, before the Special Tribunal constituted for the trial of the dacoity case known as the kunihati dacoity case, functioned. The trial of the petitioners, so far as the proceeding started against them under S. 110 of the Code was concerned, was held before the learned Additional Magistrate, Mymensingh; and the Magistrate in a judgment, exhaustively dealing with the materials placed on the record, gave his decision on 5th June 1933 directing each of the petitioners to execute a bond of Rs. 500 with two sureties of a like amount, to be of good behaviour for two years. The case then came up to the Sessions Judge of Mymensingh, under S. 123 (2), Criminal P. C., on the petitioners having refused to furnish security. The learned Judge in his judgment dealt with the questions raised before him on behalf of the petitioners, bearing upon matters of procedure and on the merits of the case, and gave his decision on 22nd June 1933, affirming the order of the learned Magistrate, and recorded an order on 15th September 1933, dealing with the question of fitness of sureties offered by the petitioners, and embodying the reasons for his conclusion that none of the sureties offered by the petitioners 1, 2 and 3 named above should be accepted.

It may be mentioned at the outset that the orders passed by the Sessions Judge in the case before us, were made by him when the records were before him in view of the provisions contained in S. 123 (2), Criminal P. C. The position may also be indicated that the orders passed by the Sessions Judge in this case, which have been challenged in the application on which this Rule was granted, are subject to revision by this Court, on grounds on which revisional powers are exercised in the case of non-appealable sentences or orders. There can be no doubt that in the case of orders made in a proceeding under S. 110, Criminal P. C., the revisional jurisdiction of this Court is as much unfettered as in other cases coming before it; and interference by this Court would be called for, and justified, on a proper case being made out. At the same time the position cannot be overlooked that the question whether it is necessary, in the interest of keeping the peace, to take security from a person, is essentially a question which concerns the Magistrate and the local police; and it may be said that the power to demand security from suspected persons is a power that is almost as much of an executive as of a judicial nature. This Court will therefore interfere only on very strong and clear grounds which go to show that there has been, in a particular case, a miscarriage of justice. The question therefore in the case before us is whether the order of the Additional District Magistrate, who held the inquiry under S. 110, Criminal P. C., and the order passed by the Sessions Judge under S. 123 of the Code, should be interfered with by this Court on the grounds submitted for our consideration in support of this rule, in the light of the observations made above.

In regard to the question raised before us, that the joint trial of all the petitioners was illegal and that the adoption of such a procedure has prejudiced each of them, it has to be noticed that the subject-matter of a charge against the petitioners was that they were so desperate and dangerous as to render their being at large without security hazardous to the community, as mentioned in S. 110 (f), Criminal P. C. Details of the charge so made were given in the proceeding drawn up by the Magistrate in this case on 2nd May 1933, reference to which has already been mentioned. On the proceeding as drawn up, the inquiry was to be of the nature contemplated by S. 117 (5) where two or more persons have been associated together in the matter under inquiry, and these persons could therefore under the law, be dealt with in the same or separate inquiries as the Magistrate thought just. As has been pointed out by this Court in the case of *Jogendra Kumar Nag* v. *Emperor* (1) a joint trial in a case under

1. AIR 1921 Cal 625=61 I C 233=22 Cr L J 377.

S. 110 is permissible, where there is evidence in the nature of a conspiracy or acting in concert; the legality of a joint trial depending on what is alleged for the prosecution. It may be mentioned in this connexion that a man of "desparate and dangerous character" in Cl. (f), S. 110, means a man who has reckless disregard of the safety of persons and the property of his neighbours, as has been held by this Court: see *Wahed Ali Khan* v. *Emperor* (2) and *Manindra Mohan Sanyal* v. *Emperor* (3).

The word "neighbours" used in these decisions must be taken to have been used to denote the members of "the community;" "community" being the word mentioned in Cl. (f), S. 110, Criminal P. C. The observations of Sanderson, C. J., in *Manindru Mohan Sanyal's* case (3) referred to above, throw a great deal of light on the question of joint trial of persons under S. 110 (f) of the Code, where the case is that the accused persons were associated or connected with an organization the activities of which were of the nature contemplated by the aforesaid provision of the law, invoking a menace not only to the person, but also to the property of the community; and in view of those observations a joint inquiry was the proper procedure to be followed in a case of the present description. On the provisions of the law as contained in S. 117 (5), Criminal P. C., and on the authority of decisions of this Court, to which reference has been made above, the conclusion appears to be irresistible that a joint trial in the case before us was not only permissible, but a joint trial was the only procedure that could be followed in the case, regard being had to the nature of the proceeding. and the facts and circumstances which had to be established by evidence.

Reference was made in the course of argument before us to the case of *Hari Telang* v. *Queen-Empress* (4), and to some other cases decided by other High Courts in India; *Emperor* v. *Angu Singh* (5), *In re Kutti Goundan* (6) and *Jhari Lal* v. *Emperor* (7), in which joint trials of persons under S. 110, Criminal P. C. were held to be improper. On an examination of the decisions referred to above, it is abundantly clear that on the facts and in the circumstances of the cases joint trials of persons under S. 110, Criminal P. C., could not be supported. The cases cited before us were cases in which joint trials could not properly be held, inasmuch as the matter under inquiry was whether a person individually was or was not an habitualoffender. There can however be no doubt that a joint trial could be held, and a joint trial was the proper procedure, in the case of persons acting in concert; persons who are associates and confederates, so as to call into operation the provision contained in S. 117 (5), Criminal P. C. In cases where proceedings are taken jointly against more persons than one, under S. 110, the Magistrate is required to come to separate findings as regards each of the persons charged, individually. That has been done, in this case, both by the Additional District Magistrate and the Sessions Judge.

The joint trial of the petitioners therefore was proper on the facts and in the circumstances of the case before us, and regard being had to the position that the evidence against each of them was separated and considered distinctly, there was no prejudice, so far as the petitioners were concerned, by their having been jointly tried. A reference may be made in this connexion to the observations of their Lordships of the Judicial Committee of the Privy Council in the case of *Abdul Rahman* v. *Emperor* (8), that even in a case in which an imperative rule of procedure has been broken, that was not enough to vitiate the trial or proceeding. The gravity of the irregularity or omission has to be considered, and whether such irregularity or omission might have worked actual injustice to the accused. For the reasons stated above, the contention urged before us regarding the illegality of a joint trial of the petitioners cannot be given effect to in the absence of proof of any prejudice. It was not suggested even that the joint trial in this case

2. (1907) 11 C W N 789=6 Cr L J 1.
3. AIR 1919 Cal 702=46 I C 152=46 Cal 215.
4. (1900) 27 Cal 781=4 C W N 531.
5. AIR 1923 All 35=71 I C 865=24 Cr L J 257 =45 All 109.
6. AIR 1925 Mad 189=86 I C 49=25 Cr L J 673.
7. AIR 1923 Pat 104=65 I C 484=23 Cr L J 100.
8. AIR 1927 P C 44=100 I C 227=54 I A 96=5 Rang 53 (P C).

has worked actual injustice to the accused and no prejudice could be pointed out.

The question next raised before us in support of the rule related to this, that the evidenee adduced by the prosecution was not sufficient to justify an order under S. 110 (f), Criminal P. C. So far as this question is concerned there can be no doubt, upon the exhaustive judgments of the Courts below, that in the case of each of the petitioners, the overt acts with which they were connected, received the consideration they deserved, and that the findings on evidence before the Magistrate, cannot possibly be interfered with. Closely connected with the general question referred to above, was the argument advanced before us, that the first witness on the side of the prosecution, Ambica Charan Bhattacharjya, was not a reliable witness, and that the evidence given by this witness had not been corroborated in material particulars. It has only to be mentioned in this connexion that both the Magistrate and the Sessions Judge have carefully dealt with the evidence given by this witness, and have considered the question of corroboration of that evidence. There is no reason to differ from the conclusions arrived at, on evidence, by the Courts below: and no serious attempt was made before us to make out that those conclusions were not justified on the materials on the record.

It was urged before us in support of the rule that the case against the petitioners in which they were charged with commission of a dacoity having been withdrawn, and the petitioners having been discharged, the proceeding under S. 110 (f), Criminal P. C., started immediately after the discharge, was not justifiable. There can be no doubt that evidence which was regarded as unreliable and insufficient to convict a person on the charge of dacoity, should not be treated as reliable evidence to show that such person is a dangerous and desperate character who ought to be called upon to furnish security for good behaviour.

In one of the decisions cited before us on this part of the case, the evidence against the person charged under S. 110 consisted of evidence given in the dacoity case, which was disbelieved by the Court, and had therefore to be excluded from consideration in the trial of the accused under S. 110. The rest of the evidence was extremely flimsy, and on that evidence it was not possible to compel the accused to give sureties for good behaviour [*Kismat Akanda* v. *Emperor* (9).] In another case relied upon before us, after the prosecution failed to prove a definite charge against the accused, there was a proceeding under S. 110, and the evidence given in support of the proceeding so drawn up against the accused was considered to be perfectly worthless as proving that the accused were habitual thieves and dacoits [*Alap Pramanik* v. *Emperor* (10).] In the case before us, evidence was led on the side of the prosecution for the purpose of making out that the petitioners took part in the dacoity known as the Kunihati dacoity. The petitioners were, as mentioned already discharged before the trial of the dacoity case by a Special Tribunal; and there was no question of any evidence against them so far as their participation or association with others in the dacoity who were actually tried before the Special Tribunal, having been disbelieved. There was evidence led against the petitioners, which according to the Court below, established beyond reasonable doubt that they were members of the anushilan of Netrokona; that the anushilan was a terrorist organisation whose object was to commit violence crimes; and further that the petitioners were individually connected with overt acts in furtherance of the objects of the anushilan. In this state of the evidence before the Court, it could not be seriously argued that the proceeding under S. 110 (f), Criminal P. C., as initiated, was not justified, on the facts proved in the case. The evidence to which detailed reference has been made in the judgments of the Courts below, and the conclusions come to upon that evidence, justified the proceeding, inspite of the fact that the petitioners were discharged, so far as the commission of the offence of dacoity with other persons at Kunihati was concerned.

In view of the above decision, arrived at by us, negativing the contentions urged in support of the Rule, the orders passed by the Additional District Magistrate of Mymensingh on 5th June 1933,

9. (1907) 11 C W N 129=4 Cr L J 464.
10. (1907) 11 C W N 513=5 Cr L J 191.

and the decision of the Sessions Judge of Mymensingh dated 22nd August 1933, must be upheld; and we direct accordingly. It remains now to consider the order of the Sessions Judge passed on 15th September 1933, refusing to accept the sureties offered on behalf of the petitioners, Parbati Charan Baisya, Dhirendra Nath Dutta and Birendra Chandra Chowdhury. On a careful examination of the provisions contained in Ss. 122, 123 and 406-A, Criminal P. C., it appears that the power to reject sureties is given to the Magistrate and that there is a right of appeal from an order passed by the Magistrate refusing to accept or rejecting a surety under S. 122 to the Sessions Judge. The clear implication of these provisions of the law taken together is that the Magistrate is vested with the authority either to accept or reject sureties demandable under S. 110 of the Code, and it is not open to the Sessions Judge, exercising jurisdiction under S. 123 of the Code, to accept or reject the sureties offered.

The course open to the Sessions Judge under the law as it stands, was to send the proceedings back to the Magistrate, with his decisions on the merits of the case, for taking action under S. 122, Criminal P. C. This was not done in the case before us; the Sessions Judge took upon himself to reject sureties for reasons stated by him. It might be mentioned incidentally that the reasons given by the Judge do not altogether commend themselves to us, that there is much to be said in favour of the view that the relatives of the petitioners are in a better position than other other persons to keep an eye on them, and that the position that they are sureties for the petitioners, might very well lead these relations to consider seriously the fact of their inability to control the activities of the petitioners. These are however matters for consideration by the Magistrate on proper materials, and relating to which inquiry may have to be made by him, before he accepts or rejects the sureties offered by the petitioners when the cuse goes back to him. The order of the Sessions Judge passed on 15th September 1933, so far as it relates to petitioners 1, 2 and 3 in this Court, is set aside: and the case is remitted to the Additional District Magistrate, for consideration of the question of acceptance or rejection of sureties offered by these petitioners, in accordance with law.

In the result, the Rule is discharged and the case is sent back to the Additional District Magistrate, for continuing the proceedings as contemplated by S. 122, Criminal P. C., in ths light of the observations made above. In view of the order passed by this Court, on 13th November 1933, petitioners 1, 2 and 3 will continue to be on bail, pending the termination of proceedings before the Additional District Magistrate.

Patterson, J.—I agree.

R.K. *Rule discharged.*

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C. C. GHOSE, AG. C. J. AND HENDERSON, J.

Nagendra Chandra Ganguli and *others* —Petitioners.

v.

Benamali Das and *others* — Opposite parties.

Criminal Revn. No. 582 of 1933, Decided on 7th August 1933.

Criminal P. C. (1898), S. 324 — Names cancelled from list of jurors restored—Order is not judicial one.

An order by which the names of persons cancelled from the list of jurors are restored is not a judicial order. [P 488 C 1]

Ramendra Chandra Roy for *Hemendra Kumar Das*, *Purnendu Bhusan Chaudhuri* and *Hitendra Kishore Roy Chaudhuri*—for Petitioners.

Sudhansu Sekhar Mukherji, *Shailendra Majumdar* and *Himanshu Chandra Chaudhuri*—for Opposite Parties.

Facts.—The Judge and the Collector of Darrang published a revised jury list and fixed 18th March 1933, for receiving objections against any of the jurors in the aforesaid list. Two petitions were filed by the petitioners including some lawyers of Tezpur objecting to the enlistment of the opposite parties as jurors. Their names were accordingly struck off. When the persons aggrieved came to know of this order, they lodged their protests against the removal of their names on allegations made behind their back. At first they were asked to wait till the next year. But when the protests grew numerous, the Judge and the Collector decided to hear the grievances of those persons and fixed 4th April for

hearing the parties. A copy of this order was published in prominent public places. On 4th April the petitioning pleaders submitted an applicatien that reconsideration of the matter would be ultra vires of the Criminal Procedure Code. The Judge and the Collector, however, restored the names of the opposite parties in the jury list.

Order.—We have examined the record and we are not of opinion that the order complained of is a judicial order. That being so, we decline to interfere. The result, therefore, is that the Rule is discharged.

K.S. *Rule discharged.*

A. I. R. 1934 Calcutta 488

MALLIK AND JACK, JJ.

Benoda Charan Chakravarty and *others*—Defendants—Appellants.

v.

Ramani Kishore Chakravarty and *others*—Respondents.

Appeal No. 1741 of 1931, Decided on 7th December 1933, from appellate decree of Third Sub Judge, Dacca, D/- 17th January 1931.

(a) Evidence Act (1872), S. 35— Butawara record is not conclusive evidence—It is weak evidence of title.

The butwara record is not conclusive evidence but merely evidence as an official record. It is a very weak evidence of title : *AIR* 1925 *Cal* 437; *AIR* 1928 *Cal* 553, *Rel on.*,; 63 *I C* 194, *Dist.* [P 488 C 2; P 489 C 1]

(b) Appeal—Partition suit—Appeal by some of defendants—One of defendant in whose favour no decree was passed dead — Non-impleading of his heirs is not defect of parties.

It is open to some of the defendants in a partition suit to file an appeal without making the heirs of a deceased defendant parties, in whose favour no decree is passed in the partition suit and there is no defect of parties. [P 489 C 2]

Atul Chandra Gupta and *Bankim Chandra Banerjee*—for Appellants.

Phanibhusan Chakravarty — for Respondents.

Jack, J.—This appeal has arisen out of a suit for partition on establishment of the plaintiff's four annas right, title and interest in the Niskar lands described in the plaint. The plaintiff's case is that the disputed property appertains to No. 362 Kharija Taluk Harinarain Chakravarti which was partitioned by the Collector, but that the permanant Niskar tenure Utsarga Raghudeb Chakravarty was left common and undivided and is covered by partition Chitta Dags Nos. 63, 65, 66 and 67 of the year 1899 in which the plaintiff had four anna share and the defendants 12 anna share and it is in respect of these plots that the plaintiff seeks partition on establishment of his title. The plaintiff claims partition of the plots which are covered by nine cadastral survey plots of which four were recorded as appertaining to Niskar Raghudeb Chakravarty in the settlement survey namely, plots Nos. 244, 279/1029, 245 and 246 and the rest as appertaining to the other taluks. Defendants 1, 13 and 14 want partition on the basis of the butwara dags. Defendants 2 to 12 and 15 to 18 contend that the lands of the Niskar tenure are covered by the four cadastral survey plots only and they have no objection to the partition of these plots. They maintain that the other lands alleged by the plaintiff to belong to the tenure do not belong to it and that the plaintiff's right thereto, if any, has been extinguished by adverse possession for over 12 years.

The suit was decreed preliminarily in the trial Court with respect to the four survey plots only. The plaintiff's claim to the other plots was dismissed. In the lower appellate Court the decree of the trial Court was set aside and the case was remanded, the Subordinate Judge declaring the plaintiff's title to one-fourth share in the four butwara dags but remanding the case for consideration by the trial Court and of the report of the commissioner appointed by the trial Court as to the lands which are actually included in these butwara dags. The learned Subordinate Judge in finding in favour of the plaintiff with respect to all the butwara dags relying on the partition record states that the entries in the khatians are binding upon the parties to the butwara proceeding and that as the contesting defendants were parties to that proceeding they cannot now say that the lands which were included in that butwara proceeding as belonging to the Niskar tenure did not in fact belong to it. He has ignored entirely the presumption arising from the settlement record and even as regards the effect of the butwara record he is also in error inasmuch as the butwara record is not conclusive evidence but merely evidence under S. 35, Evidence Act, as an official

record. In support of this contention we had been referred to the case in *Satis Chandra* v. *Kali Charan* (1) and also to the case in *Gocool Chandra Law* v. *Jamal Biswas* (2). On the other hand we had been referred to the case of *Debilal Sah* v. *Ram Bibeki Singh* (3). But the facts of that case do not apply in the present case. In that case the lands in suit were taken into account as assets of the estate under partition. In the present case the lands in suit were excluded from partition and they were merely referred to as so excluded. The butwara record is therefore very weak evidence of title. Neither of the Courts below referred to any other evidence of title but the record of rights, and though it is urged on behalf of the appellant that there is other evidence on the record our attention has not been drawn to anything which, we think, has been overrlooked by the Court below. We therefore think that the Court below was right in relying on the entry in the Record of Rights. There is no dispute as regards the four settlement plots Nos. 244, 245, 246 and 279/1029 and the plaintiff's title to these lands appears to have been established.

As regards the other five plots we think the presumption arising from the Record of Rights has not been rebutted and both the Courts below have found that these plots had been in the exclusive possession of the defendants to the knowledge of the plaintiff from the date of the final publication of the Record of Rights. The lower appellate Court erred in thinking that the 27th October 1916 was the date of the final publication of the Record of Rights, it appears that 12th September 1916 was the date of final publication and the suit, having been brought on 16th November 1928, was brought more than 12 years from that date twelve years would expire on 12th September 1928 and therefore the suit was not within 12 years from the date of the plaintiff's knowledge of adverse possession. But even if the date of knowledge of the plaintiff be taken to be the date of the certification of the final publication of the Record of Rights on 27th October 1916 even then there was adverse possession for over 12 years inasmuch as the suit was not instituted on the reopening day after the pujah vacation, namely 15th November 1928, but on the following day.

A preliminary objection was raised with regard to the maintainability of the appeal inasmuch as the heirs of Alauddin one of the defendants were not made parties. But we think that there is no force in this objection. Inasmuch as there was no decree in his favour, it was quite open to the other defendants to prefer the appeal without making them parties; there was therefore no defect of parties. We think that the fact that this Court refused to set aside the abatement of the appeal on the application of the appellant for the addition of the heirs as party respondents to the appeal does not affect the matter; vide the case of *Midnapur Zamindari Co. Ltd.* v. *Amulya Nath* (4). This appeal is therefore allowed and the decree of the lower appellate Court is set aside, and that of the Court of first instance restored with costs in this Court and in the lower appellate Court.

Mallik, J.—I agree.

K S. *Appeal allowed.*

1. AIR 1925 Cal 437=86 I C 14.
2. AIR 1928 Cal 553=111 I C 107=55 Cal 680.
3. (1921) 63 I C 194.
4. AIR 1926 Cal 893=95 I C 649=53 Cal 752.

A. I. R. 1934 Calcutta 489

GUHA AND BARTLEY, JJ.

Sheik Eusuf—Defendant—Appellant.

v.

Jitendra Nath Roy—Plaintiff—Respondent.

Appeal No. 1046 of 1931, Decided on 29th August 1933, from appellate decree of Addl. Sub. Judge, Khulna, D/- 15th December 1930.

Bengal Tenancy Act (1885), S. 3 (5)—Interest on rent is not rent—Separate suit for interest on rent is not maintainable.

Interest on rent is not rent as defined by the Bengal Tenancy Act. Hence a suit for recovery of interest only, apart from any claim for rent on which interest may be payable either under a contract or under the law, is not maintainable as a suit for rent. [P 490 C 1]

Syed Nasim Ali and *Syed Farhat Ali*—for Appellant.

Hemendra Chandra Sen—for Respondent.

Judgment.—This is an appeal by the defendant in a suit instituted by the plaintiff landlord to recover the amount of Rs. 59-12-12½ gds. as interest on rent payable by the tenant defendant. The claim was made by the landlord on

the footing that rent and cesses from 1332 to 1334 B. S. in respect of a tenancy had been sent by postal money order and were accepted by the plaintiff, but as the rents due were not received on due dates, interest was claimed according to contract between the parties concerned. One of the pleas raised in defence by the contesting defendant was that the suit was not maintainable. The Courts below have agreed in passing a decree in favour of the plaintiff. The effect of which is that interest on rent as claimed in the suit has been made recoverable as rent. In our judgment, interest on rent cannot be held to be rent as defined by the Bengal Tenancy Act, and the term "rent" as defined in the said Act does not include interest: see in this connection *Koylash Chandra De* v. *Tarak Nath Mondal* (1). We are further of opinion that a difference exists, and the difference must be recognised between cases in which interest is claimed with rent, and those like the case before us, in which interest on rent only is claimed; and a suit for recovery of interest only, apart from any claim for rent on which interest may be payable either under a contract or under the law, is not maintainable as a suit for rent.

On the above ground only, we are unable to affirm the decision of the Courts below. It was argued before us that no appeal lay from the decision of the Court of appeal below, and we have to give effect to that contention. The case however is a fit one in which the revisional jurisdiction of this Court should be exercised in favour of the defendant in the suit; and we have no hesitation in allowing the application for revision presented in this Court by the defendant. The appeal is dismissed on the ground that it is not maintainable under the law; but the application for revision is allowed. The result is that the decisions of the Courts below are set aside, and the plaintiff's suit dismissed. The parties are to bear their own costs throughout the litigation.

V.S. *Revision allowed.*

1. (1898) 25 Cal 571*n*=1 C W N 63.

A. I. R. 1934 Calcutta 490

NASIM ALI, J.

Tofail Ahammad Mia—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 725 of 1933, Decided on 24th November 1933.

Penal Code (1860), S. 282—Overloading one's boat in middle of monsoon being dangerous is culpable negligence.

Criminal negligence is gross and culpable neglect or failure to exercise that reasonable and proper care to guard against injury either to the public in general or to the individual in particular which having regard to the circumstances it was the imperative duty of the accused person to have adopted. Thus, overloading a boat particularly in the middle of the monsoon would be dangerous. It is culpable negligence on the part of the accused to leave the whole thing in the hands of the boatman and thus to leave the passengers to their fate.

[P 491 C 1]

Hamidul Huq Choudhury—for Petitioner.

Anil Ch. Roy Choudhury — for the Crown.

Judgment. — This Rule is directed against the conviction of the petitioner under S. 282, I. P. C. The ground on which the present Rule was issued is that in view of the fact that there is no evidence to show that the disaster was due to any act, omission and negligence for which the petitioner is responsible but that on the contrary he has been acquitted of the charge under S. 25, Bengal Ferries Act, for breach of the Rules regarding the safety of the vessel and the passengers the Court below ought to have held that the petitioner is not criminally liable for the acts or omission or negligence of the Majhi.

There can be no doubt that there had been negligence of the part of the Majhis. The whole question is whether the lessee of the Ferry, that is, the master, is liable for this offence. The learned Magistrate has found that from the circumstances it can be gathered that overloading far from being an exception is a rule and surely the lessee who profits by the earnings must have known about the facts of overloading. The Judge on appeal has found that the petitioner did not take proper precaution to ensure that his Majhis did not overload the boats. The question therefore is whether on these findings it can be said that the petitioner negligently caused to be conveyed for hire any person by water in any vessel so loaded as

to endanger the life of that person: criminal negligence is gross and culpable neglect or failure to exercise that reasonable and proper care to guard against injury either to the public in general or to the individual in particular which having regard to the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted.

In order therefore to decide whether there had been criminal negligence in a particular case, it is to be found out whether the person charged took such precaution as a prudent and a reasonable man would consider to be sufficient upon all the circumstances of the case. The petitioner is the lessee of public ferry and has the exclusive right to carry passengers across the turbulent Meghna river into the mouth of Bay of Bengal. It was therefore his incumbent duty particularly in the middle of the monsoon to see that the safety of the passengers is not in any way endangered by overloading. It appears to me that the petitioner did not take any precaution to ensure that his Majhis did not overload. There was gross negligence on his part inasmuch as he allowed the Majhis to load the boats in any way they liked. The accused certainly knew that overloading particularly in the middle of monsoon would be dangerous and as a prudent man he should have given definite instructions to that effect in view of the carrying capacity of the boat. He should have also taken steps to see that the Majhis carry out the instructions relating to the loading of the boats. It was culpable negligence on his part to leave the whole thing in the hands of the boatman and thus to leave the passengers to their fate. In view of these facts and circumstances I am of opinion that the petitioner has been rightly convicted under S. 282, I. P. C. The Rule is accordingly discharged.

v.s. *Rule discharged.*

A. I. R. 1934 Calcutta 491

LORT-WILLIAMS AND M. C. GHOSE, JJ.

Mofijuddin Muhuri—Petitioner.

v.

Mofizuddin—Opposite Party.

Civil Ref. No. 7 of 1933, Decided on 20th December 1933, from order of Munsif, Comillah, D/- 5th July 1933.

(a) Bengal Tenancy Act (1885), S. 174 (3), Proviso (b) — Sale of tenure for arrears of rent — Applicant other than judgment-debtor whose interests are affected by sale must either deposit decree amount or satisfy that such deposit is unnecessary.

An applicant, other than a judgment-debtor, whose interests are affected by the sale held for arrears of rent must either deposit the amount recoverable in execution of the decree, or satisfy the Court, that no such deposit is necessary.

[P 491 C 2 ; P 492 C 1, 2]

(b) Bengal Tenancy Act (1885), S. 174 (1) —Deposit made under S. 174 (1) — It should be disposed according to principles of equity and good conscience.

The deposit made under S. 174 (1) must be disposed of by the Court according to principles of equity and good conscience. Thus, for example, if the sale be set aside on the ground that the decree-holder has been guilty of fraud, it would not be just to allow him to benefit by that fraud, by ordering payment of the decretal amount by the applicant. If however the decree-holder be innocent, then the Judge may consider it both equitable and conducive to a saving of further litigation and costs, to order the applicant to deposit the amount recoverable towards the satisfaction of the decree.

[P 492 C 2 ; P 493 C 1]

(c) Bengal Tenancy Act (1885), S. 174 (1) —Time for requiring deposit is after hearing of application.

The time for requiring the deposit to be made is after and not before the hearing of the application.

[P 493 C 1]

(d) Bengal Tenancy Act (1885), S. 174 (3), Proviso (b) — "Allowed" means granted relief on application and not simply admitted.

The word "allowed," in proviso (b) to S. 174 (3), means granting relief in application and not merely admitting of application.

[P 493 C 1]

Abinash Chandra Ghose — As amicus curiae.

Lort-Williams, J.—This is a reference made by the Munsif of the Central Court, Comilla, under O. 46, R. 1, Civil P. C. None of the parties have appeared, but Mr. Abinash Ghose has very kindly and ably assisted the Court as amicus curiae. The case arose on an application made by mortgagees under S. 174 (3), Ben. Ten. Act, as persons whose interests were affected by the sale of a holding for arrears of rent. The decree-holder was willing to allow the sale to be set aside on condition that the mortgagees paid to him the decretal amount. This they were unwilling to do, on the ground that proviso (b) to the sub-section did not apply to them, because no amount was recoverable from them in execution of the decree.

The questions which we are asked to decide are: (a) Whether an applicant, other than a judgment-debtor, whose

interests are affected by the sale must either deposit the amount recoverable in execution of the decree, or satisfy the Court, that no such deposit is necessary. (b) If relief be granted and the sale be set aside, whether the deposit made by such an applicant ought to be used to satisfy the decree, or returned to the applicant. (c) Ought such deposit to be made before the application is heard? Ss. 174 and 174-A, Ben. Ten. Act, have been adopted from O. 21, Rr. 89, 90, 92 and 93, Civil P. C. Of S. 174, sub-Ss. (1) and (2) are founded upon O. 21, R. 89, sub-S. (3) and proviso (a) thereto on R. 90, while S. 174-A is founded upon Rr. 92 and 93. But proviso (b) to sub-S. (3) is new, and has been added to the scheme thus outlined in the Code, without clearly defining its incidence and its terms, and without sufficient consideration of its bearing on the rest of the sections. Hence the difficulties which have arisen in applying the sub-section. The relevant provisions are : Sub-S. (3) where a tenure or holding has been sold for arrears of rent due thereon, the decree-holder, the judgment debtor, or any person whose interests are affected by the sale, may, at any time within six months from the date of the sale, apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting the sale :

Provided as follows : (a) no sale shall be set aside on any such ground unless the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud ; and (b) no application made by a judgment-debtor or any person whose interests are affected by the sale under this sub-section shall be allowed unless the applicant either deposits the amount recoverable from him in execution of the decree or satisfies the Court, for reasons to be recorded by it in writing, that no such deposit is necessary. Sub-S. (4), R. 91, O. 21 in Sch. 1, Civil P. C., 1908, shall not apply to any sale under this chapter: sub-S. (5). An appeal shall lie against an order setting aside or refusing to set aside a sale : Provided that where the Court has refused to set aside the sale on the application of the judgment-debtor or any person whose interests are affected by the sale and the amount recoverable in execution of the decree is not in deposit in Court, no such appeal shall be admitted unless the appellant deposits such amount in Court.

The word "applicant" in proviso (b) is applicable both to a "judgment-debtor" and to a person whose interests are "affected by the sale," but the "amount recoverable from him in execution of a decree" cannot be said to be recoverable from a mortgagee or other person interested, except by a misuse of language. On the other hand, it is clear from the very words of the proviso that the legislature intended it to apply to persons so interested, otherwise it was unnecessary to include such persons within its terms.

Moreover, the object of the proviso was stated in the notes on clauses to be the prevention of false and vexatious applications, and this object clearly applies to persons interested as well as to the judgment-debtors, and the proviso to Sub-S. (5) requires the appellant to make such a deposit, whether he be the judgment-debtor or a person interested, though the Select Committee had recommended that only in the case of a judgment-debtor should this be required. Therefore the words "from him" in proviso (b) must be construed as meaning "from the judgment-debtor," or must be regarded as intended to cover a person interested, in the sense that the debt is recoverable indirectly out of his interest and therefore from him, or they must be treated as redundant, and the proviso read as in the proviso to sub-S. (5).

Consequently the answer to question (a) is in the affirmative. Questions (b) and (c) must be considered together. The object and destination of the deposit provided in sub-S. (1) is stated therein, as it is in the analogous O. 21, R. 89, but no such statement is made in proviso (b) to sub-S. (3).

The object was stated in the notes on clauses already referred to, and the intended destination must be sought for in the light of that statement, so far as it is helpful. Otherwise, the deposit must be disposed of by the Court according to principles of equity and good conscience. Thus, for example, if the sale be set aside on the ground that the decree-holder has been guilty of fraud, it would not be just to allow him to

benefit by that fraud, by ordering payment of the decretal amount by the applicant. If however the decree-holder be innocent, then the Judge may consider it both equitable and conducive to a saving of further litigation and costs, to order the applicant to deposit the amount recoverable towards the satisfaction of the decree. These examples are intended only as suggestions and obviously are not exhaustive. If the sale be not set aside it is difficult to determine what the legislature intended to be done with regard to any deposit. Obviously none would be required to satisfy the decree, because the purchase money would be available for that purpose. It is difficult to see how these matters can be decided until the Court has considered the evidence, and the present case can only be decided after hearing such evidence, unless the parties agree.

This leads to the conclusion that the time for requiring the deposit to be made is after and not before the hearing of the application. It is true that such a provision cannot be very effective in preventing false and vexatious applications. On the other hand, in most cases the Court will not be in a position to decide whether any deposit is necessary, until it has heard the evidence, and it cannot have been intended that the evidence should be heard twice.

Moreover, proviso (b) states that no "application made" shall be "allowed" unless the applicant "deposits" the amount recoverable or "satisfies" the Court that no deposit is necessary. Strictly speaking to "allow" means to "permit." But the context makes it clear that the proviso does not refer to "allowing" the application "to be made," but to "granting" the relief asked for in the application. That the word "allow" is intended to be used in this sense is clear from the terms of S. 174-A, sub-Ss. (1) and (2) and the analogous O. 21, R. 92, in all of which a distinction is drawn between making, and allowing or disallowing the application. Consequently, question (c) must be answered in the negative. And this disposes of the outstanding doubts raised in question (b), because, as I have shown the question of returning the deposit cannot arise.

The necessity for the amendment and clarification of these sections of the Bengal Tenancy Act, when opportunity arises, should be brought to the attention of the Local Government.

M. C. Ghose, J.—I agree. The difficulty of interpreting S. 174 (3) (b) has arisen from the use of the expression "from him" after the words "the amount recoverable." On a plain view it would appear that the decretal amount was recoverable only from the judgment-debtor and not from any other person whose interests are affected by the sale. It was on this view that the mortgagees declined to deposit the amount. It is clear, however, that this sub-S. 3 (b) to S. 174, Ben. Ten. Act, was meant to cover the case of all persons and not merely the judgment-debtor who intended to have the sale set aside. The provision for the deposit of the decretal amount was made with the object of preventing false and vexatious applications. It may be said that every person whose interest is affected by the sale has to pay the decretal amount if the sale is to be set aside: for unless the sale is set aside, his interests cannot be safeguarded.

In the present case, the mortgagee under S. 72, T. P. Act. may deposit the amount of the decree and add it to the mortgage money and recover the same from the debtor. Under S. 65, Ben. Ten. Act, the rent is the first charge on the holding and under S. 159, upon sale for arrears of rent, the interest of the mortgagee which is not a "protected interest" would disappear. In this view, it may be said that the decretal amount is recoverable from the mortgagee if he desires to safeguard his interests.

Whether the amount of the deposit should be paid at the time of the application or after the Court has gone into the evidence and come to a conclusion, the use of the word "allowed" is in my opinion conclusive in the matter. If the Legislature had intended that the amount should be deposited before the Court had gone into the evidence, they would have used the word "admitted" as they have done in sub-S. (5) to S. 174, Ben. Ten. Act.

On the question whether, when the sale is set aside, the amount should be returned to the depositor or be paid to the auction-purchaser or the decree-holder, I agree with my learned bro-

ther that this question cannot be answered in the abstract. It must be considered on the facts of each case. If it be found upon evidence that the decree-holder was guilty of fraud, then in fairness he should not be allowed to be benefited by his own fraud. If, however it be found that the decree-holder was not guilty of fraud but the sale was set aside on the ground of negligence or otherwise of the person who served the processes, the Court may in its discretion order the deposit to be paid to the decree-holder.

K.S. *Reference answered.*

A. I. R. 1934 Calcutta 494

MUKERJI AND S. K. GHOSE, JJ.

Ashutosh Ghose—Appellant.

v.

Sudhangshu Bhusan Ghose—Respondent.

Appeal No. 501 of 1931, Decided on 22nd August 1933, against order of 2nd Court Sub-Judge, Dacca, D/- 22nd August 1931.

(a) Arbitration — Award — Arbitrator can reserve some part of reference to be dealt separately—But award is not complete unless both parts are decided.

An arbitrator is at liberty to reserve some parts of a reference to be dealt with separately but unless these parts are decided the award cannot but be taken to be incomplete provided the parties themselves did not expressly agree that the arbitrator was to give his award on the other points separately and the same award might be taken as an entirely valid award whilst the award on the parts yet undetermined subsequently made would be treated as another and independent and separate award.

[P 496 C 1]

(b) Arbitration—Endorsement or signature of party to invalid award does not bind party to accept it.

An endorsement to an award or the signature will not bind a party to accept an award which is not a valid award. [P 498 C 1]

Bijan Kumar Mukerji and *Manilal Bhattacharjee*—for Appellant.

S. C. Basak, Rajendra Chandra Guha and *Mahendra Kumar Ghose*—for Respondent.

Judgment.—The plaintiff who is the appellant in this appeal and the defendant who is the respondent therein are two brothers. They had an 8 annas share and their cousin had the remaining 8 annas share in a residential house, which was joint, but for convenience of possession they were in separate possession thereof from their said cousin. Besides the dwelling house, the two brothers had various joint movable properties, some moneys invested on interest, some G. P. notes, a Life Insurance Policy, the worship of family deities, and also some joint debts. Disputes having arisen between the two brothers, two proceedings under S. 107, Criminal P. C., was started against them in the Court of the Subdivisional Msgistrate of Sadar (South) in Dacca. Upon that through the intervention of mutual friends and on the advice of well-wishers of them both, the two brothers voluntarily approached Mr. Sachindra Nath Chatterji, the said Magistrate, and prevailed upon him to act as arbitrator for effecting a settlement of their differences. On 25th September 1930 the arbitrator aforesaid completed and signed his award. On 30th November 1930 the plaintiff applied to him for delivery of the original award to him. He got it on 1st December 1930 and on the same day filed it with the Collector to have it stamped.

On 23rd December 1930 it was stamped by the Collectorate and returned to the plaintiff. On 5th January 1931 the plaintiff applied to the Court below for filing the award, and a suit being commenced on the application, was eventually dismissed. From the order thus passed, he has taken the present appeal. The defendant in the Court below challenged the award upon various grounds, invalidity of the reference, misconduct on the part af the arbitrator, incompleteness in the award, etc., etc. These gave rise to a number of issues. All these issues with the exception of one were decided against the defendant. The issue which was decided in his favour and against the plaintiff was issue 7: "Does the award decide all matters of dispute between the parties. If not, can any decree be passed on it?" The Court below found that certain debts which were designated in the proceedings as 'market-debts' were left undetermined by the arbitrator.

To understand the position some more facts require to be stated. On the Magistrate agreeing to arbitrate two petitions were filed before him, one by each of the parties, on 23rd December 1929. They were similarly worded, and in each it was stated that he was to act as arbitrator "for the purpose of deciding all matters in dispute between us, both brothers." On 25th December 1929 a

statement, representing the points in dispute between the parties, and consisting of eight paragraphs was filed on behalf of the plaintiff, each paragraph stating separately some item or items of joint property and the nature of the dispute relating thereto. A somewhat similar statement was on the same day filed on behalf of the defendant. The arbitrator noted against each paragraph in the plaintiff's statement how he proposed to proceed as regards each particular matter. Para. 3 of the plaintiff's statement is important. It ran in these words:

"3. Both the brothers have some debts. Some of the bonds, handnotes or promissory notes are executed by both the brothers, some by Ashutosh (plaintiff) alone and some by Sudhangsu (defendant) alone. There are some haolats without any documents. When the two brothers separated in mess in June last, Babu Dhirendra Chandra Das Gupta, Pleader, Dacca, as arbitrator of both the brothers, made a division of those debts. Arbitrator will consider the question of confirming Debendra Babu's decision on the point, and he will make provisions as to how one brother will be liable to the other in case any creditor realizes any amount from one brother only."

The corresponding paragraph in the defendant's statement ran thus:

"3. There is only one joint debt to the extent of Rs. 5,000 as principal and interest thereon due to the Gangasagar Saha Firm. I am liable for no other debt."

The note of the arbitrator against this item in the plaintiff's statement was:

"The accounts are to be examined with a view to ascertain if the items were duly entered and the expenditure was incurred for the benefit of the estate or the family. Let a letter be addressed to the Luxmi Industrial Bank for the purpose of ascertaining what the actual liabilities are."

On 2nd April 1931 the arbitrator formulated the point of reference. The point relevant in this connexion was the fourth one and the following extract will show how the said point was formulated:

"4. Arbitrator is to ascertain and decide as to which of the debts and howlats incurred by both the brothers or either of the brothers are ijmali between the two brothers and which are personal * * * *."

So far so, it would seem that the question of market-debts was not specifically raised by any of the parties but the question of debts generally speaking was raised. But there is little doubt that at some stage or other the question of market debts was raised and considered. And not merely so but that market debts were also decided upon would appear from the draft award that was eventually prepared and copies of which were made over to the parties. It is admitted that three typed copies of the draft award were made and the defendant who received one of the copies has produced the copy that was given to him. It is necessary to examine this copy with care. In the fourth paragraph of this copy it is said:

"It may be mentioned here that there has been a separate reference to me by the two brothers for division of their ijmali documents, records, collection papers, etc., and other connected matters. The decision of the same will require more time and I will pass my award on that reference later on.

In that copy the fourth point of the reference begins at p. 9 and it is said there at the commencement of that page:

"Arbitrator is to ascertain and decide as to which of the debts, howlats and market debts incurred by both the brothers or either of the brothers are ijmali between the two brothers and which are personal, etc.. etc."

The decision on this point runs on to the end of p. 12. In p. 10 the heading is "A". Apportionment of debts, Howlats and market debts. From there up to the end of p. 11 five items are dealt with which are not strictly speaking market debts but loans due to a bank, a loan due to a firm on a Hatchitta and certain other loans taken from individuals. P. 12 opens with the words, 'Ashutosh Ghose and Sudhansubhusan Ghose." Then follows on that page a sixth item separately headed as "6. Market debts as published below" liability will be joint each brother bearing one-half of the following debts. 11 items of market debts are detailed the aggregate coming up to Rs. 692-3-9. In the copy of the award which has been filed in this case and which was signed by the arbitrator on 25th September 1930, and on which the plaintiff's application was based changes to the following effect appear: (1) In para. 4 from the beginning the words "and also for appointment of the Ijmali market debts" were inserted by the arbitrator, thus stating that market debts too were included in "the separate reference." (2) When dealing with the fourth point for reference at the top of p. 9 the words "market debts" were struck out, and from the heading at the top of p. 10 also the said words were deleted. (3) The words "Ashutosh

Ghose and Sudhangsu Bhusan Ghose" which appeared at the top of p. 12 were inserted at the end of p. 11; and p. 12 in which the market debts were shown and dealt with was entirely removed. (4) Other corresponding changes, e. g., renumbering of the pages, etc, were made. The net result of the alteration was that "market debts" were treated as a matter included in "the separate reference," and the item was left over for consideration in future. It is to be observed here that the award as delivered contains the signatures of the defendant and of the plaintiff, the signatures being dated 25th September 1930 and under an endorsement made by the plaintiff in the following words:

"We agree that the reference as enumerated in this award was made by us and we agree to abide by all the decisions of this award."

The Subordinate Judge quite correctly formulated the law to be applied to the case, saying that the arbitrator was at liberty to reserve some parts of a reference to be dealt with separately, "but unless these parts are decided the award cannot but be taken to be incomplete provided the parties themselves did not expressly agree that the arbitrator was to give his award on the other points separately and that the same award might be taken as an entirely valid award whilst the award on the parts yet undetermined subsequently made would be treated as another and independent and separate award."

On the question whether there was such an agreement between the parties the learned Judge has said,

"that the arbitrator threw aside p. 12 of his award and made many additions and alterations seems to be founded on the impression that he was not called upon to decide the point of market debts then, and that his award on other points delivered without the point of the market debt, etc., would be quite a valid award in accord with law."

The learned Judge was of opinion that though the arbitrator acted on such an impression, there was in point of fact, no such agreement between the parts and that though the parties did sign at the foot of the award in the manner indicated above, that did not preclude any of the parties from challenging its validity on the ground that a part of the reference was in fact left undetermined. In arriving at his conclusion that there was no such agreement between the parties the learned Judge felt very much pressed by the statement of the arbitrator in his evidence that by "separate reference" he meant not exactly that there was a reference as to market debts etc., made by the parties separately but that he himself wanted to deal with matters separately. The learned Judge for reasons that he gave was not disposed to believe the plaintiff's own evidence that there was such an agreement. It is clear to our mind that if the decision as to market debts was ultimately excluded from the award, it was excluded because the arbitrator was not willing to saddle the defendant with a liability to pay a half of the debt as was his decision embodied in the draft. The contest between the parties as regards market debts was that while the plaintiff said that these debts, amounting to only Rs. six hundred and odd, were Ijmali debts and payable by the parties in proportion to their shares, the defendaut's contention was that it was the plaintiff's personal debts for which the plaintiff alone was liable. The proposal to exclude this part of the decision could have either proceeded from the side of the defendant or emanated from the arbitrator himself, and in the latter case only because of the contention which the defendant had put forward. What exactly were the circumstances under which the exclusion was made is a matter upon which the arbitrator has not said anything. But it would appear that he was not given a chance of explaining the point. We think also that by reason of the manner in which the question was brought up by the defendant for the consideration of the Court, the plaintiff too was not in a position to make out that it was necessary for him after what was stated in the award itself to give any explanation on the point.

The plaintiff filed his application treating the award as a complete award. He might well do so in view of the reservation which was contained in para. 4 of the award itself as regards market debts, and also Ejmali documents, records, collection papers, etc., coupled with the statement contained in the endorsement over the signatures of the parties in which appeared the words, "the reference as enumerated in this award." The defendant in para. 8 of his written statement pleaded quite generally that the arbitrator had not decided all matters in dispute. But in

para. 14 of the written statement a specific item was mentioned, not relating however to market debts, which the arbitrator, it was alleged, had left undecided. Issue 7 was framed in quite general terms. When the arbitrator was in the witness box as witness 1 on behalf of the plaintiff he was not asked a single question on behalf of the defendant as to why market debts were left out, but only a few questions were put to him to show that there was no reference. Indeed from his cross-examination and from that of plaintiff's witness 3, Babu Birendra Nath Bose, the plaintiff's pleader, it would not seem that the defendant was making any grievance that the market debts though a part of the reference, had been left out. The whole of the cross-examination of the latter witness was directed to make out that the arbitrator fraudulently took off p. 12 of the award without the defendant's knowledge and that the endorsement was inserted after the defendant had put down his signature. Upon the defendant's case as subsequently presented, the real issue was whether the parties had agreed that the question of market debts would be left over for further consideration. Not one question as regards this agreement was put to any of these witnesses. That some matters though not market debts were so left over is not disputed on behalf of the defendant because the copy of the draft award which he has filed shows that the question of division of Ijmali documents, records and collection papers was to be considered afterwards. To this, no objection was taken at the time, nor has any objection been taken now. So far as these items are concerned, such an agreement, though not expressly admitted, is more than probable. The whole question is whether that agreement embraced market debts as well. We are of opinion that the question should be answered in the affirmative. It should be noted that the defendant while deposing in his examination-in-chief at first said that the arbitrators did not decide points 6, 7, 8 and 9 of the defendant of points of difference, and then added that the arbitrator had decided about the market debts but had afterwards taken off the page containing it. He has made no complaint about the other items, namely the Ijmali documents, records, collection papers, etc. Before he came into the witness box the plaintiff in his examination-in-chief had definitely deposed:

"The talk of market debts first arose after the points of difference were settled (three or four months after). The opposite party said that these debts were my personal debts whilst I said that they were Ijmali, at the time. At that the S. D. O. said that these were required to be decided on evidence and the matter might as such be postponed. We both parties agreed to such arrangement of postponement."

Not one question was put to the plaintiff in his cross-examination to suggest that the statement made by him as above was not true. The defendant has made various aspersions against the arbitrator but has not said a word in repudiation of the plaintiff's story as to the agreement. It has been argued before us that the plaintiff's statement quoted above cannot be true, because his statement, as it stands, would suggest that the agreement was reached a long time before the award, and if that was so, the decision of market debts as contained in the draft award would be impossible. We are not prepared to read the statement in that way. The plaintiff was only answering the questions that were being put to him. And the statement only shows the sequence of events as they have happened and not that the agreement was come to at any particular point of time. It has been also argued before us that the decision as to market debts having been there in the draft award, nothing could have happened between the evening of 24th September 1930 when the final discussion after the draft took place and the morning of 25th September 1930 when the award was signed which could justify the arbitrator changing his mind and excluding the decision as to market debts. It has been argued that the only talk that took place during those discussions related to the question of the stamping of the award. We do not think that the evidence established that that was the only item of discussion, for the pleader P. W. 3 has said that:

"Pankaj Babu (meaning the defendant's pleader) objected as to the entries in the award at the time."

Some argument has been addressed to us to make out that the endorsement over the signatures of the parties was

interpolated after the defendant had put down his signature. The question is not of any importance because the endorsement or the signature would not bind a party to accept an award which is not a valid award. But on the question of fact as to whether the endorsement was there when the defendant signed, we think there is enough to show that the endorsement was not made after the defendants signature The result is that, in our opinion, this appeal should be allowed and the order of the Court below being set aside it should be ordered that the award be filed and a decree made on it. The appellant will have from the respondent his costs of this Court, hearing fee five gold mohurs, and of the Court below. The cross-objection is dismissed but without any order for costs.

K.S. *Appeal allowed.*

A. I. R. 1934 Calcutta 498

MUKERJI AND BARTLEY, JJ.

Hem Chandra Das and *others*—Accused—Petitioners.

v.

Sulodh Chandra Das—OppositeParty.

Criminal Revn. No. 783 of 1933, Decided on 21st December 1933.

(a) Bengal Municipal Act (15 of 1932), S. 28 (1)—Cl. (1) of S. 28 does not apply to Revising Authority.

Clause (1) of S. 28 cannot apply to persons who constitute the Revising Authority. Such persons are vested with the powers of holding summary enquiry into claims and objections preferred in connection with the revision of the Preliminary Electoral Roll, and their orders allowing or disallowing such claims and objections are to be mechanically followed in amending the said Roll. [P 499 C 1]

(b) Bengal Municipal Act (15 of 1932), S. 28, Cl (2)—Member of Revising Authority is not Municipal Officer or servant.

A member of the Revising Authority is neither a Municipal Officer nor servant. [P 499 C 1]

(c) Bengal Municipal Act (15 of 1932), S. 34 (c)—Deposit of Rs 50 is condition precedent to entertainment of complaint—But complaint dismissed for want of deposit may be revived on deposit of amount.

The deposit of Rs. 50 is a condition precedent to the entertaining of a complaint; though, of course, a complaint dismissed merely on the ground of such non deposit may be revived on the deposit being subsequently made if the complaint is otherwise in order. [P 499 C 1]

Santosh Kumar Basu and *Prafulla Chandra Nag*—for Petitioners.

D N. Bhattacharjee and *Himangshu Chandra Chowdhury* — for Opposite party.

Order.—The first two petitioners are pleaders practising in the Court of the Munsif at Sherpur and the third petitioner is a Talukdar and merchant of tha Sherpur town. In connection with the First General Election of Commissioners of the Sherpur Municipality which was to be held under the Bengal Municipal Act (Bengal Act 15 of 1932) a committee consisting of the Chairman and two Commissioners was appointed under S 21 of the Act. The said committee appointed the three petitioners as the Revising Authority under O. 4 of the Orders issued under Notification No. 5717-M, dated 1st December 1932, to revise the preliminary Electoral Roll. The complainant, who is a ratepayer of the said Municipality instituted a complaint against the three petitioners and the three members of the committee on 21st January 1933 alleging that certain malpractices had been committed by them in regard to the revision of the Preliminary Electoral Roll. The deposit of Rs. 50 contemplated by S. 34, Cl. (c) of the Act was not made at the time. The complaint was filed before an Honorary Magistrate, who was not willing to deal with it and so forwarded it to the Subdivisional Magistrate for action. The Subdivisional Magistrate, Mr. Trivedi, dismissed the complaint under S 203, Criminal P. C., observing as follows:

"No case under S. 28 (2), Bengal Municipal Act 5 of 1932 is made out The Revising Authority is alleged to have rejected the objections. This is not sufficient for showing any offence * * * * * *. The cost of Rs. 50 required to be deposited by law was not deposited."

The complainant then moved the Sessions Judge, who ordered that a further enquiry should be held on the complaint on the complainant depositing Rs. 50. When the case came back to the file of the Subdivisional Magistrate, a date was fixed within which the complainant was to make the deposit. On the deposit being made when the Subdivisional Magistrate was about to hold the enquiry, an objection was taken on behalf of the petitioners that they are not persons who can come under Cl. (2) of S. 28. The complainant then took up the position that his case as against the petitioners fell within Cl. (1) of S. 28. The Subdivisional Magistrate then proceeded to hold a judicial enquiry in

which the complainant was to adduce evidence

"for the purpose of proving that the omission of the names of certain rate-payers from the electoral roll was procured deceitfully by the petitioners."

The complainant then examined certain witnesses on his behalf and the Subdivisional Magistrate issued summonses against the petitioners for an offence under S. 28, Cl. (1) of the Act. The present rule is directed against the summonses so issued and the proceedings following them. We are of opinion that the petitioners are not persons to whom Cl. (1) of S. 28 can possibly apply. They are Revising Authority, who are vested with the powers of holding summary enquiry into claims and objections preferred in connection with the revision of the Preliminary Electoral Roll, and their orders allowing or disallowing such claims and objections are to be mechanically followed in amending the said Roll (vide O. 12 and 13 of the Notification). The words of the clause "who by claiming a qualification" apply only to the case of claimant; the words "by using false documents or by a false declaration or by any other deceitful means procures" indicate a person who practises a deception and thereby obtains from some other individual or body an improper entry, etc. The clause, in our opinion, cannot possibly include the Revising Authority from whom the order is procured. It has been contended before us on behalf of the complainant that the present case is covered by Cl. (2) of S. 28. We are unable to hold that a member of the Revising Authority is either a Municipal officer or servant. We desire also to point out that the words of Cl. (c) of S. 34 clearly indicate that the deposit of Rs. 50 is a condition precedent to the entertaining of a complaint; though, of course, a complaint dismissed merely on the ground of such non-deposit may be revived on the deposit being subsequently made, if the complaint is otherwise in order. The Rule is made absolute. The proceedings complained of are quashed and the complaint of the opposite party is dismissed. If the petitioners are on bail, their bail bond will be discharged.

K.S. *Rule made absolute.*

A. I. R. 1934 Calcutta 499

MALLICK AND JACK, JJ.

Sm. Charubala Basu—Plaintiff—Appellant.

v.

German Gomez—Defendant—Respondent.

Appeal No. 2498 of 1931, Decided on 21st November 1933, from appellate decree of Addl. Sub Judge, Bakergunge, D/- 11th August 1931.

(a) Evidence Act (1872), S. 116 — Tenant let into possession by predecessor of plaintiff sued as trespasser by plaintiff after expiry of term—He is not entitled to dispute plaintiff's title.

Where a tenant who has been let into possession by plaintiff's predeces or is sued as a trespasser by plaintiff for eviction after expiry of the term, the tenant is not entitled to dispute plaintiff's title: *AIR* 1915 *P C* 96, *Ref.* [P 500 C 1]

(b) Evidence Act (1872), S. 116—Tenant let into possession cannot deny landlord's title even after termination of tenancy unless he has openly surrendered possession to landlord—Landlord and tenant.

A tenant who had been let into possession cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord. And the tenant's estoppel operates even after the termination of the tenancy: *AIR* 1928 *Cal* 546, *Ref.* [P 500 C 1, 2]

Atul Chandra Gupta and *Radhika Ranjan Guha* — for Appellant.

Prafulla Kumar Roy — for Respondent.

Jack, J.—This appeal has arisen out of a suit for ejectment of a sub tenant and for mesne profits. The defendant originally held the land under a kole karsha kabuliyat for nine years which he executed in favour of Mr. John Louis. He got a renewal of the lease in 1320 executing a fresh kabuliyat for nine years and paid rent up to 1327 B E. for the land and for three years to the plaintiff to whom Mr. John Louis had transferred his interest in 1325 corresponding to 1918. On the termination of the lease in 1922 the plaintiff asked the defendant to quit possession and had a notice served upon him. In the trial Court the suit was decreed. The plaintiff's title as claimed was declared and it was ordered that she should recover khas possession after eviction of the defendant

In the appellate Court the appeal was allowed and the prayer for khas possession was dismissed. The plaintiff's title to the land was declared and it was de-

clared that the defendant was her tenant. The appellant urges that the learned Subordinate Judge in the Court of appeal below erred in law in applying the provisions of Act 4 of 1928 to this case inasmuch as the suit was filed in October 1923 whereas that Act did not come into force until 21st February 1929 and the defendant was holding the land as an under-raiyat and inasmuch as it is admitted that the previous Act is applicable to this case. In these circumstances the Court of appeal below was certainly wrong in allowing the appeal on the ground on which it was allowed inasmuch as under the old Act, which was applicable, the landlord is entitled to eject the tenant on the expiry of his lease. However the decree af the Court below has been assailed on the ground that as the defendant had been let into possession by the predecessor of the plaintiff he was not entitled to deny his landlord's title as he seeks now to do. For the respondent it has been urged inasmuch as the landlord's interest was not transferable he was not entitled to transfer it to the present plaintiff and on the expiry of the lease the respondent having been sued as a trespasser was entitled to dispute the title of the plaintiff. The case in *Bilas Kunwar* v. *Desraj Ranjit Singh* (1) is however an authority for holding that he is not entitled to dispute the plaintiff's title. Their Lordships of the Judicial Committee of the Privy Council said in that case that S. 116, Evidence, Act is perfectly clear on this point and rests on the principle well established by many English cases that a tenant who had been let into possession cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord.

In this case there is no question that the tenant, the defendant, has not restored possession to his landlord. He claimed to be in possession under the superior landlord, the howladars, in whose favour he has executed a kabulyat subsequent to the expiry of his lease, namely, in 1924. But it is clear that the plaintiff is still in possession of the land through his tenant inasmuch as the landlord sued to evict the plaintiff and the appeal in that case was being heard along with the appeal in this case. It is urged by the respondent that the lease having terminated and the defendant having been sued as a trespasser the tenant's estoppel no longer operates. But it has been held that the tenant's estoppel operates even after the termination of the tenancy. In this connexion we have been referred to the case of *Muzibar Rahaman* v. *Isub Surati* (2) in which reference is made to several other cases in which this principle has been recognized. It is clearly impossible to hold that immediately on the termination of the tenancy the tenant would be entitled to question his landlord's title. We therefore think that the plaintiff is entitled to khas possession and the decree of the lower appellate Court must be set aside and that of the Court of first instance restored. The plaintiff will recover mesne profits at the rate of Rs. 12 per year with interest at six per cent per annum till realization. The plaintiff is entitled to his costs throughout.

Mallik, J.—I agree.

K S. *Appeal allowed.*

1. AIR 1915 P C 96=30 I C 299=42 I A 202=37 All 557 (P C).

2. AIR 1928 Cal 546=114 IC 409=59 Cal 15.

A. I. R. 1934 Calcutta 500

MUKERJI AND BARTLEY, JJ.

Indra Kumar Hazra—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 997 of 1933, Decided on 19th December 1933.

(a) Penal Code (1860), S. 477-A—Prosecution for false entries—Accused pleading that his father was partner of complainant's firm and that entries were made under his authority—Unless it was established that father was not partner conviction held to be bad.

Where the entries in account books according to the prosecution were false entries wilfully made by the accused who was the Gomasta of the complainant's firm and the accused's defence was that the entries were merely in the nature of adjustment entries, that the accused's father was a partner of the complainant's firm and that the entries were made in the books of the complainant's firm under the direction and authority of the partners who constituted that firm,

Held : that as the point whether the father of the accused was a partner in the complainant's firm was made out or not was not clearly proved, the conviction should be set aside.

[P 501 C 1]

(b) Evidence Act (1872), S. 101—Prosecution for false entry—Defence raised that

entries were made under direction of member of complainant's firm — Prosecution should prove the negative of this plea Criminal Trial.

In a prosecution for false entries the defence raised was that the entries were made under the direction or authority of the member of the complainant's firm; the lower Court held that it was the accused's defence and therefore it was for the accused to prove it.

Held ; that it was the duty of the prosecution to call some of the partners or at least some responsible person as a witness and to give a positive denial of the allegation which the accused put forward. [P 501 C 2]

Sudhansu Sekhar Mukerjee—for Petitioner.

Santosh Kumar Basu and *Kamalakshya Basu*—for Complainant.

Judgment.—It seems to us that this case has been tried without a proper appreciation of the elements which are necessary to be established in order that the conviction of the accused can be justified. The entries according to the prosecution were false entries wilfully made by the accused who was the Gomasta of the complainant's firm. The accused's defence was that the entries were merely in the nature of adjustment entries, that the accused's father Benode Behari Bazra was a partner of the complainant's firm and that the entries were made in the books of the complainant's firm under the direction and authority of the partners who constituted that firm. One of the points therefore which the learned Magistrate had to determine was whether the case which the accused set up, namely, that his father was a partner in the complainant's firm was made out or not was not clearly proved, the conviction should be set aside. On that point, there is no finding at all in the judgment of the learned Magistrate. The evidence which is there on the record has been placed before us and on a consideration of that evidence we find it exceedingly difficult to hold that it has been sufficiently proved that the accused's father is not such a partner. One of the witnesses, P. W. 4, no doubt, has attempted to give positive evidence of the fact that the accused's father, although he was a partner in the complainant's firm previously has ceased to be so. But then, he has also in his evidence referred to certain circumstances which make it highly doubtful whether his statement on this point can be accepted at its face value. Another witness, P.W. 7, while making a positive statement to the effect that the accused's father was formerly a partner in the complainant's firm, that is to say, up to 1336 B. S., has stated further that he cannot say definitely whether he has ceased to be such a partner or not. He has also said that the profit accounts after 1336 of the complainant's firm have not yet been adjusted. Upon this state of the evidence, it would not be possible to hold with any degree of certainty that the fact that the accused's father was not a partner in the complainant's firm has been sufficiently proved.

The other question which arises in this case is whether the accused's defence to the effect that the entries were made under the direction or authority of the members of the complainant's firm is true or not. So far as this matter is concerned, the learned Magistrate has disposed of it in his judgment by saying that it was the accused's defence and therefore it was for the accused to prove it and that he has not given any evidence in support of it. That however is not the true position. That being the defence, which the accused had taken and had suggested in the course of the cross-examination of the prosecution witness it was the duty of the prosecution to call some of the partners or at least some responsible person as a witness and to give a positive denial of the allegation which the accused put forward. We are of opinion therefore that on this state of the evidence it is not possible to uphold the petitioner's conviction. The Rule is made absolute and the conviction and sentence passed on the accused are ordered to be set aside. The accused will be discharged from his bail-bond.

V.S. *Rule made absolute.*

A. I. R. 1934 Calcutta 501

MITTER AND HENDERSON, JJ.

Jnanendra Bhusan Bakshi—Plaintiff —Appellant.

v.

Chairman Municipal Commissioner, Naihati Municipality — Defendant — Respondent.

Appeal No. 1026 of 1931, Decided on 11th August 1933, from appellate decree of Second Addl. Sub-Judge, Alipur, D/- 6th February 1931.

(a) Bengal Municipal Act (3 of 1884), Ss. 105 and 121—Movable of any person found in defaulting holding may be subject to distress or sale under S. 121 even though owner is resident within Municipality—But under S. 105 tax can be recovered from occupier only if owner is not resident within Municipality.

Under S. 121 tax is leviable by distress and sale of the movables of any per-on, which may be found on the defaulting holding even if the owner is resident within the Municipality. But under S. 105 the tax can be recovered from occupier only if owner is not resident within the Municipality. [P 503 C 1]

(b) Bengal Municipal (3 of 1884), S. 128—S. 128 applies only to defects of forms in notice or warrant but not to defects of mode of levying distress.

S. 128 applies to defects of forms in the notice or warrant and cannot refer to the mode of levying distress where movables to be attached are situate within the zenana apartments. [P 503 C 1]

S. C. Basak and *Rajendra Bhusan Bakshi*—for Appellant.

Rupendra Kumar Mitter—for Respondent.

Mitter, J.—The appellant is the plaintiff in an action brought against the Naihati Municipality for refund of a certain sum of money as also for damages. Both the Courts below have agreed in dismissing his suit; hence the present appeal. In order to appreciate the points which fall for determination in the present appeal the following relevant facts may be briefly stated. The plaintiff is a tenant under one Asutosh Haldar who defaulted in the payment of municipal taxes; the plaintiff wrote a letter to the Municipality informing the Chairman that Asutosh lives in a separate portion of the building but notwithstanding such letter the Municipal Daroga went inside plaintiff's house by a khirki door, attached his cycle and thus subjected him to humiliation; plaintiff paid Rs. 17-3 0 for the release of his cycle. He maintains that the action of the Municipality was illegal and ultra vires and claims the refund of the said sum. He maintains further that the action of the Municipal Daroga in entering through back door in a place appropriated for the zenana or residence of women which by the usage of the country is considered private without giving notice and opportunity for the retirement of the women was illegal and in doing so the daroga contravened the provision of S. 123, Bengal Municipal Act; that his act constituted a trespass for which his employer, the Municipality, is liable. The defence of the Municipality is (1) that the plaintiff is not entitled to the refund as his property was liable to be attached as he was the occupier of the holding in question or of a portion of it; (2) that the act of the daroga was not a trespass and even if it was so the Municipality is protected by S. 128 of the Act. Both these defences have prevailed with the Courts below with the result that the plaintiff's suit is dismissed. In the appeal before us it is contended that plaintiff was not liable to have his movable properties attached, having regard to Ss. 105 and 121 of the Act. S. 121, so far as is material, runs as follows:

"If any person, after service upon him of such bill and notice shall not . . . . service of such notice . . . pay the sum due . . . . the amount of the arrear due, with costs on the scale shown . . . b levied by distress and sale of any movable property belonging to the defaulter . . . wherever found or of any movable property belonging to any other person . . . . . which may be found within the holding in respect of which defaulter is liable to such tax or rate"

It is argued that under the terms of this section read with S. 105 the movable property belonging to any person which may be found within the defaulting holding may be subjected to distress only when the owner is not a resident within the Municipality, and it is admitted in the present case that the owner was a resident within the Municipality. In order to support this argument reference is made to S. 105 of the Act which runs as follows:

"If the sum due from the owner of any holding remains unpaid after the notice of demand has been duly served, and such owner be not resident within the Municipality, or the place of abode of such owner be unknown, the same may be recovered from the occupier for the time being of such holding, who may deduct, from the next and following payments of his rent, the amount which may be so paid by or recovered from him; provided that no arrear of rate, which has remained due from the owner of any holding for more than one year, shall be so recovered from the occupier thereof."

It is said for the appellant that in order to reconcile the provision of S. 105 with S. 121 the latter section must refer to a case where the owner is not a resident within the Municipality. The two sections in our opinion refer to different cases. S. 121 lays down the procedure for the realization of the tax by levying distress or sale of movable pro-

perties belonging to any person which may be found on the holding in arrears. Whereas S. 105 enacts that the tax can be recoverd from the occupier if the owner is not resident within the Municipality, there is no such limitation in S. 121. According to the plain meaning of the latter section the tax is leviable by distress and sale of the movables of any person, which may be found on the defaulting holding. The Courts below have come to a correct conclusion on the matter and p aintiff's claim for the refund must be disallowed.

The next point taken is that the act of daroga in entering through the khirki door was an act of trespass and was actionable per se without proof of special damage. It was indeed improper for the daroga to enter through the back door and invade the privacy of the plaintiff. The proviso to S. 123 makes it incumbent on the officer of the Municipality to give notice at least three hours before the entry and thus afford the female members an opportunity to withdraw from the zenana apartments. No such notice was given; no opportunity was given to the female members to withdraw There can be no question therefore that the act of the daroga was in contravention of S. 123. The Municipality says that the act of the dar ga was not a trespass by reason of S. 128. S. 128 in our opinion applies to defects of forms in the notice or warrant and cannot refer to the mode of levying distress where movables to be attached are situate within the zenana apartments. We are therefore of opinion that the defendant is answerable in damages to the plaintiff. We assess the damage however at Rs. 20. We modify the decree of dismissal by the Courts below and direct that plaintiff should have a decree for damages for the sum of Rs. 20 and dismiss his claim for the refund. The sum of Rs. 20 will carry interest from the date of the decree to realization at the rate at six per cent per annum As the success of the parties is divided each party will bear their own costs throughout.

Henderson, J.—I agree.

K.S. *Decree modified.*

A. I. R. 1934 Calcutta 503

LORT-WILLIAMS AND M. C. GHOSE, JJ.

Rai Kiran Chandra Roy Bahadur and *others*—Plaintiffs—Petitioners.

v.

Erfan Karikar and *others*—Defendants—Opposite Parti s.

Civil Rule No. 55 of 1933, Decided on 12th De ember 1933.

(a) Civil P C (1908) O. 20 R 12—Mesne profits—Basis upon which mesne profits are to be assessed must be decided at time of passing of preli minary decree and not subsequently.

There is no provision in the Code for deciding the basis upon which mesne profits are to be assess d, at a date subseq ent to the pa sing of the preliminary de ree. When the Judge passes the preliminary decree under O. 20, R 12, and directs an inquiry as to mesne profits he should, at th same time, decide the ba-is upon which the mesne profi s are to be asses-d. Then at a subsequent date an application can be made by one or o her of the parties for the app intment of a commis-ioner who wo ld proceed to h ld an inquiry, and assess the me-ne profits upon the ba-is which the Judge had alre dy directed when he passed the preliminary de ree. [P 504 C 2]

(b) Mesne profits - Decree for mesne profits from tenants—Basis of calculation is not fair and equitable rent for lands but profits actually received from property by wrongful possession—Civil P C. (1908), S 2 (12).

W ere a suit for khas possession and mesne profits is decreed as against tenants, the basis of calculation of mesne profits is not the rate of rent which would be fair and equitable for the lands in question but the profits which the tenants have actually received or might with ordinary diligence have received from their wrongful pos-ession. [P 505 C 1]

(c) Civil P. C. (1908), S 115 - Order as to basis of calculation of mesne profits passed subsequent to preliminary decree—Though S. 115 is inapplicable High Court can interfere if great deal of money can be saved to parties.

Section 115 is not intended to apply to an order as to basis of calculation of mesne profits passed sub-equent to the preliminary decree. But if great deal of money can be sa ed to both parties by interfe ence of the High Court, it may do so where the basis is a wr ng one. [P 505 C 1]

(d) Mesne profits—Decree for mesne profits as against Secretary of State—Basis is rent actually received.

Where a decree for mesne pr fits is passed against the Secretary of State, the b sis of calculation is the rent actually receiv d by him unless it can be shown that with due diligence he could have obtained a higher rent [P 505 C 1]

(e) Civil P. C (1908), S 2 (12) — Mesne profits— 'Profits" means balance left after deducting cost of cultivation, rent paid and the cost of maintenance

The "profits" referred to in S 2 (12) is the balance left after deducting the cost of cultivation, rent paid and the cost of maintenance [P 505 C 2]

Hemendra Chandra Sen and *Surendra Nath Basu (Sr.)*—for Petitioners.

Surajit Chandra Lahiri—for Opposite Parties.

Lort-Williams, J. — In this case a Rule was issued on the opposite parties 2 to 139, the tenants defendants, to show cause why a certain order of the Subordinate Judge, Pabna, dated 30th November 1932, should not be set aside. It appears that there was a suit for khas possession of about 400 bighas of land and for mesne profits. Some of the plaintiffs succeeded before the Subordinate Judge who made a decree for khas possession of the lands which they claimed and for mesne profits. With regard to the rest of the plaintiffs he held that their suit failed owing to some question of notice. The result was that there was an appeal to the High Court where it was decided that notice had been waived and that the rest of the plaintiffs were entitled to the property which they claimed and that otherwise the decree of the Subordinate Judge would stand. In passing, it may be noted that the High Court decreed khas possession in favour of the second lot of plaintiffs, but seems to have forgotton to pass a decree for mesne profits. A question may arise at some time hereafter, whether the effect of the judgment of the High Court is to apply that part of the Subordinate Judge's judgment which decreed mesne profits, to the second lot of plaintiffs in whose favour the High Court passed a decree for possession, or whether the judgment of the High Court amounts simply to a decree for possession, and not for mesne profits.

The Subordinate Judge passed a decree under O. 20, R. 12, Civil P. C. for (a) possession; (b) mesne profits, and (c) directing an inquiry as to mesne profits. He did not however decide at the time when he passed the preliminary decree, what was to be the basis upon which the mesne profits were to be assessed. He said that that matter could be decided thereafter, when the plaintiffs made an application for the appointment of a commissioner to hold the inquiry. The result was that at a subsequent date and after the decision given by the High Court, the Subordinate Judge heard an application for the appointment of a commissioner and then proceeded to decide the basis upon which the mesne profits should be assessed. In my opinion this procedure was wrong. There is no provision, in the Code for deciding the basis upon which mesne profits are to be assessed, at a date subsequent to the passing of the preliminary decree. When the Judge passed the preliminary decree under O. 20, R. 12 and directed an inquiry as to mesne profits he should have at the same time, decided the basis upon which the mesne profits were to be assessed. Then at a subsequent date an application could have been made by one or other of the parties for the appointment of a commissioner who would proceed to hold an inquiry, and assess the mesne profits upon the basis which the Judge had already directed when he passed the preliminary decree.

It is against the decision of the Judge as to the basis upon which the mesne profits are to be assessed, that the present application has been made, under S. 115, Civil P. C. The Judge decided that the basis as against the Secretary of State, should be the rent which he had realized from the tenants, if this was a fair and proper rent, or the rent which he could have realized by the exercise of due deligence, having regard to the rate of rent of similar lands in the locality. The latter factor of course need only be considered if the rent realizable by the exercise of due diligence would have been greater than the rent which he actually realized. With regard to the tenants the Judge decided that the basis for calculation of mesne profits should be the rate of rent which would be fair and equitable for the lands in question.

The petitioners who were the plaintiffs in the suit, have objected to this order on the ground that the meaning of mesne profits has been defined in S. 2, sub-S. 12, Civil P. C. In my opinion their contention is correct. It may be that the basis laid down by the Judge, would work out substantially at the same figure as would be ascertained by adhering to the principle laid down in S. 2 (12). But the petitioners have argued very strongly that this is not so, and that the figure which would be arrived at according to the basis in S. 2 (12), would be much larger than the figure which would be arrived at on the basis of fair and equitable rent.

The question then arises whether we ought to interfere with this order. It is doubtful whether such an order comes within the provisions of S. 115, Civil P. C., which provides that the High Court may call for the record of any case which has been decided by any Subordinate Court and in which no appeal lies to the High Court. On the question whether such an order as this, and similar interlocutory orders are cases within the meaning of that section, there has been a good deal of judicial disagreement. I should be inclined to think that the section is not intended to apply to orders of this kind. But if the learned Judge had acted as, in my opinion, he ought to have done in the first place, and had included this decision in his preliminary decree, other considerations might have arisen, and it may be that a preliminary decree under O. 20, R. 12, is a case within the provisions of S. 115, Civil P. C. That being so, and bearing in mind that a great deal of money, time and labour will be wasted, if this inquiry be held upon the basis laid down by the Judge, assuming that this basis is a wrong one, which I believe it to be, I think that the circumstances ought to be considered sufficient to induce us to interfere with the order which the Judge has made. I am led to this conclusion because I feel that a great deal of money may be saved to both parties if a decision on the point be given now.

In my opinion, the learned Judge's direction was wrong, and must be set aside and he must direct the commissioner to inquire what are the mesne profits to which the plaintiffs are entitled and to assess them upon the basis that mesne profits have the meaning as defined in S. 2 (12), Civil P. C. That is to say, he has to ascertain with regard to the tenants, what profits they actually received or might with ordinary diligence have received from their wrongful possession of the property, together with interest on such profits.

With regard to the Secretary of State, his order seems to be correct. Mesne profits, as against him, are rightly assessed upon the basis of the rent actually received by him, unless it can be shown that with due diligence he could have obtained a higher rent. In order to provide for any dispute which may arise hereafter, as to the exact meaning of "profits" in S. 2 (12) which meaning it is not necessary for us at the moment to decide, the Judge should direct the commissioner to ascertain: (1) the gross profits which the tenant did obtain (or could reasonably have obtained) from his cultivation of the soil; (2) what ought, reasonably, to be deducted irom that gross sum for (a) costs of cultivation, and (b) on account of rent paid to the Secretary of State, and (3) the cost of maintenance of the cultivators.

After deducting the cost of cultivation, and the rent paid, and the cost of maintenance, the balance left appears to me to be the profit referred to in S. 2 (12). If the plaintiffs disagree with any of these deductions, as for example the cost of maintenance of the cultivator, it will be open to them to raise such points when the Judge makes his final decree under O. 20, R. 2 (12), which of course is subject to appeal. In view of the fact that the points discussed herein are not free from difficulties and that the necessity for coming to this Court has arisen owing to the fact that the learned Judge seems to have misdirected himself in law, this Rule will be made absolute but without costs.

M. C. Ghose, J.—I agree. The Rule must be made absolute on the ground that the learned Subordinate Judge committed an error of law in directing that the basis of calculation of mesne profits shall be the rate of rent which would be fair and equitable. The basis should be the profits which the cultivating tenants received or might with ordinary diligence, have received from the cultivation of the lands together with interest on such profits.

The learned advocate for the opposite party has urged that if a fair and equitable deduction be made for the rents and out of pocket expenses of the cultivation, namely, the costs of cattle, ploughs and implements, the costs of feeding the workers who worked on the lands including the women who helped in threshing or otherwise, the net profit which would remain to the cultivators, would hardly exceed the amount which would be ascertained to be a fair and equitable rent. The learned Subordinate Judge will be particular in giving proper direction, on this basis, to the commissioner, but the basis

must be according to the provisions in S. 2 (12), Civil P. C., and not on the basis of rent.

K.S. *Rule made absolute.*

A. I. R. 1934 Calcutta 506

COSTELLO, J.

Corporation of Calcutta—Defendant—Petitioner

v.

Rashmoni Debi — Plaintiff — Opposite Party.

Civil Rule No. 766 of 1933, Decided on 18th December 1933, from decision of Small Cause Court, Judge, Sealdah, D/- 11th March 1933.

Calcutta Municipal Act (3 of 1923), S. 303 (2)—Object is to prevent erection of building which will add to already existing obstruction.

The object of S. 303 is to prevent erection of structures which will seriously add to an obstruction already existing on land which falls within a projected street alignment and which the corporation can sanction if they choose. It has no application to the erection of an entirely separate building. [P 507 C 1, 2]

Krishnalal Banerji—for Petitioner.

Bijan Kumar Mukerji and *Sanat Kumar Chatterjee*—for Opposite Party.

Order.—This Rule was issued under the provisions of S. 27, Provincial Small Causes Courts Act (11 of 1887) and is directed against a decision of a Judge of the Small Cause Court, Sealdah, dated 11th March 1933. One of the points that arise out of that judgment raises a question of considerable public importance The suit in which the judgment was given was brought by a lady named Sm. Rashmoni Debi against the Corporation of Calcutta and was for recovery of compensation under the provisions of S. 303 (2), Calcutta Municipal Act 1923, which is Bengal Act 3 of 1923. The plaintiff is the owner of certain premises known as No. 27 Halderpara Road, and on the front portion of those premises there is a small two-storeyed house and the back portion of the premises consists of low-lying land which was formerly occupied by a tank. In the month of January 1929 the plaintiff submitted to the Corporation of Calcutta a plan of a proposed new building which, according to the case for the defendant's was to be entirely detached and situated at some distance behind the existing building and to the west of it. A reference to the site plan of the proposed building shows that the land belonging to the plaintiff was of irregular shape and the back portion of the premises lies in a line to the west of the front portion. On 20th February 1929 the Corporation refused to sanction the proposed building on various grounds, amongst others on the ground that there were various violations of the building rules and also on the ground that the proposed building would fall within the alignment of a projected street. Some two years later, that is to say, on 20th July 1931, the same plan was resubmitted to the Corporation and on 17th August 1931 the plan was returned to the plaintiff and the Corporation informed her that sanction was refused as the site of the proposed building fell entirely within the projected road alignment, and the Corporation did not think it necessary to repeat all the other grounds for their refusal of sanction to the plan. On 16th November 1931 an agent of the plaintiff, Ram Chandra Mukherji, wrote a letter to the surveyor to the Corporation requesting him to place the matter before the Estates and General Purposes Committee for consideration; but it seems that on 16th February 1932 the plaintiff without waiting for the decision of that Committee served a notice on the Corporation under S. 533, Calcutta Municipal Act, giving the Corporation notice that the plaintiff proposed to take legal proceedings. On 29th March 1932 the surveyor to the Corporation wrote to the plaintiff to the effect that the matter would be decided by the Estates and General Purposes Committee and in fact that committee in a meeting of 31st March 1932 resolved.

"That consideration of the matter be postponed for a report from the Building Department as to whether, apart from the objection that the building was affected by the alignment, there were other objections under the Building Regulations and whether there was any independent access to the proposed building from Halderpara Road."

Before any decision of the Estates and General Purposes Committee of the Corporation was arrived at however the plaintiff in the month of April 1932, instituted the suit out of which this matter arises, claiming damages, as I have indicated, under S. 303 (2), Calcutta Municipal Act, and putting such damages at the figure of Rs. 175. The matter, in fact, did come up before

the Estates and General Purposes Committee of the Corporation on 10th November 1932 for consideration but, in view of the fact that a suit had then been instituted the committee resolved "that the item was withdrawn as it was reported to be sub judice." It appears that it was contended that on behalf of the defendant Corporation before the Court of Small Causes, amongst other points, that S. 303 (2), Calcutta Municipal Act, had no application; but the learned Judge over-ruled that contention and allowed the plaintiff's claim assessing the damages at Rs. 70. This was on 11th March 1933 when the judgment I have already mentioned delivered. It seems that at the trial the case was mainly contested on two grounds. The learned Judge in his judgment says:

"It is in evidence that in the letter written by the defendant refusing sanction of the plaintiff's plan, the ground of its being included within the street alignment was only set forth; it is not denied again t at the defendant did not acquire the site within the meaning of S. 303, Cl 2, Municipal Act; as such the provisions of this section seem to be applicable in this case; the defendant's pl a that the site was such that the plan could not be sanctioned on other grounds as well has not been made out by any independent evidence."

The learned Judge therefore came to the conclusion that the plaintiff was entitled to compensation under Sub-S. (2) of S. 303. I am of opinion however that the learned Judge has entirely misconceived the purpose and the effect of S. 303; in deed it is now admitted by the learned Advocate who has appeared before me in the present proceeding that no one in the course of the case seems to have appreciated that sub-S. (2) of S. 303 only provides for compensation in very limited circumstances. The purpose of S. 303 is to place restrictions on the erection of or additions to a building or boundary wall within a street alignment or building line. The object of the section clearly is to prevent erection of structures which will seriously add to an obstruction already existing on land which falls w thin a projected street alignment. The operative part of this section is contained in sub-S. (1) which says:

"No portion of any building or boundary wall shall be erected or added to within a street alignment prescribed under S. 302."

So that we start with a clear and definite delaration that anything which may put further difficulties in the way of clearing or preparing ground which has been allocated for the purpose of a public street must not be sanctioned. Sub-S (1) however contains a proviso which says that

"the Corporation may, in their discretion, permit additions to a building to be made within a street alignment if such additions merely add to the height of, and rest upon an existing building or wall, upon the owner of the building executing if required to do so by the Corporation, an agreement binding himself and his successors in interest (a) 'not to claim compensation in the event of the Corporation at any time thereafter calling upon him or such successors, by written notice to remove any addition made to any building in pursuance of such permission, or any portion thereof and (b) 'to pay the expenses of such removal'.

That proviso enables the Corporation at their discretion to permit additions to a building which are upwards and not side ways, if I may so express it; in other words, the Corporation may, if they choose, permit such additions as from their nature do not in fact cause any further obstruction on the actual site of a projected street. Reading therefore sub S. (1) in its entirety it comes to this: that lateral or detached additions are prohibited whereas vertical additions may be permitted under the conditions specified in the proviso. Now it seems to me that it is abundantly clear that sub-S. (2) has reference solely to the latter class of additions, namely, the kind of additions which the Corporation can sanction if they choose. The section provides that if the Corporation refuse to grant permission to add to any building then in certain circumstances, namely, if the land destined for a street is not in fact acquired by the Corporation within six months from the date of their refusal of the sanction then they will be liable to pay reasonable compensation to the owner of the site. Now it seems to be beyond any question, indeed, it is shown on the plan to which I have referred and is moreover now admitted by Dr. Mukerji who appears for the plaintiff the respondent in the present proceeding that the projected building could in no sense be described as an addition to any existing building either vertical or even lateral. It was in fact an entirely separate building that the plaintiff desired to erect. Dr. Mukerji has also very frankly conceded that in those cir-

cumstances he is in a position of having to admit that sub-S. (2) affords the plaintiff no relief. Having regard to the interpretation and construction of S. 303 and in particular of sub-S. (2) which I have enunciated, it follows that the decision of the learned Judge of the Small Cause Court of Sealda, was erroneous in law or to use the words of S. 25, is not according to law. Therefore, the decree which he has made must be set aside and the plaintiff's suit dismissed. The Rule is made absolute on those terms; but having regard to the fact that the precise point on which I decide the matter was never raised by the defendants in the Court below, there will be no order as to costs.

K.S. *Rule made absolute.*

A. I. R. 1934 Calcutta 508

LORT-WILLIAMS AND M. C. GHOSE, JJ.

Secy. of State— Defendant—Appellant.

v.

Messrs Fakir Mohammad Wazir Mohammad and *others*—Respondents.

Appeal No. 3034 of 1931, Decided on 7th December 1933, from appellate decree of 2nd Addl. Dist. Judge Howrah, D/- 27th July 1931.

(a) Railways Act (1890), S. 72—Risk note H—Packing in van done entirely by consignor—Company is not liable for defective packing.

Where the packing of the goods in the van is entirely done by the consignor and his men and the Railway Officials have nothing to do with it, the Company cannot be held liable for defective packing. [P 509 C 1]

(b) Railways Act (1890), S. 72—Goods handed over to Railway Company for delivery to consignee—Consignor does not by itself lose title in goods.

A consignor does not loss his title in goods by merely handing them over to the Railway Company for delivery to consignee. It depends on the facts of each case. [P 510 C 1]

(c) Railways Act (1890), S. 72—Consignor must furnish address of consignee and write it plainly and legibly—Company is not liable for loss or delay occasioned by consignor's failure to do so.

It is duty of the consignor to furnish the address of the consignee and write the same plainly and legibly. If the consignor does not perform his duty and the goods are thereby lost or delayed, the company cannot be held responsible for the same. [P 510 C 1]

(d) Railways Act (1890), S. 72—Risk note H—Goods deteriorated in middle of journey—Consignor agent of consignee—Railway company consulting consignor and disposing goods according to his instructions—Company is not guilty of misconduct.

Where goods sent by the consignor who is the agent of the consignee are deteriorated in the middle of journey and the company consults the consignor and disposes of the goods according to his instructions, the company is not guilty of mis-conduct for not obtaining instructions from the consignee where such a step would have caused delay and the consignee is bound by the instructions given to the company by his agent, consignor. [P 511 C 1,2]

S. C. Brahmachari and *Bhabesh Narain Bose*—for Appellant.

Amarendra Nath Bose, Birendra Nath Bote and *M. C. Ghose*—for Respondents.

M. C. Ghose, J.—This appeal arises out of a suit for recovery of Rs. 4,500 as damages for non-delivery of a consignment of 150 baskets of grapes booked by defendant 4 Habibulla at Chaman Station on the North Western Railway under P. W. Bill No. 77033, dated 19th October 1926, in refrigerator van No. 2777 for delivery to the plaintiffs at Howrah Station on the East Indian Railway. The delivery of the consignment not having been obtained by the plaintiffs, they after communication with the Railways concerned instituted the present suit on the last day of limitation provided by the Code. The suit in effect was against two Railway Companies, the East Indian Railway and the North Western Railway. The suit as against the East Indian Railway was dismissed and the suit as against the North Western Railway Administration was decreed in part by the trial Court for the sum of Rs. 3,870. That judgment and decree have been affirmed in appeal by the Second Additional Judge of Howrah. The North Western Railway Administration have appealed to this Court.

The case was argued before us in great detail by the learned Advocates of both sides. The facts of the case are that the consignment left Chaman Railway Station on 19th October and covered 812 miles to Jakhal Station on the North Western Railway and arrived at about 10 a. m. on 22nd October when fire was seen coming out of the van. Steps were immediately taken to put out the fire and the van was opened and 129 baskets were salvaged while 21 baskets were totally damaged. The occurrence of the fire was disputed by the plaintiffs in the trial Court: but the trial Court found on the evidence that the fire occurred spontaneously as stated by the defendants and that 21 baskets were

totally damaged and were unfit for use. The Courts found that the Railway Company are not liable for the loss of these 21 baskets. Both Courts however have found that the Railway Company are liable for the price of 129 baskets which were salvaged and which were not delivered to the plaintiffs at Howrah Station. It is admitted that the consignment was sent by Habibulla under Risk note H under which, in consideration of special reduced or owner's risk rates, the consignor agreed and undertook to hold the Railway Company harmless and free from all responsibility for any loss, destruction or deterioration of, or damage to, all or any of such consignments from any cause whatever, except upon proof that such loss, destruction, deterioration or damage arose from the misconduct of the Railway Administration's servants. The learned Advocate for the plaintiffs admits that the case will fail, unless he can establish misconduct on the part of the Railway Administration or their servants. He argues that upon the facts and circumstances of the case, the Courts below were correct to hold that the Railway Company were guilty of misconduct.

The only question before us is whether upon the facts and circumstances of the case, the Courts below were correct to hold that the Railway Company were guilty of misconduct in respect of the disposal of the 129 baskets. It was stated that the Railway Company packed the baskets wrongly in the van and were wrong to place 150 baskets in one van. As to this, the facts are that the van was packed entirely by the consignor and his men and the Railway Officials had nothing to do with the packing. The Railway Company, in our opinion, cannot be held liable for the alleged defective packing. The capacity of the van was 150 baskets and it was therefore not packed beyond its capacity. As to the cause of the fire, the train examiner of the Railway Company gave evidence. He stated many different theories as to the cause of fire. He said that he could not come to any definite conclusion but that, in his opinion, the fire had started spontaneously by the friction of the canes of the baskets with the roof of the van. That there was something wrong in the van appears from the same officer's evidence that while the first fire was put out at 10 a.m., fire again broke our in that van at 8 p.m., and for the third time the fire broke out at midnight. In out opinion, the Courts below were right to hold that the Railway Company cannot be held responsible for the loss by the fire.

The question is whether the 129 baskets which were salvaged after the fire at 10 a.m., on the 22nd could be duly sent on to the consignee at Howrah. Both the Courts below came to the conclusion that the salvaged baskets were in perfectly good condition and could have been sent to Howrah from Delhi in about 25-27 hours. The learned Advocate for the Railway Company states that this conclusion of the Courts below is not justified by the evidence. From Jakhal to Delhi the distance is 124 miles and the North Western Railway Administration terminates there. From Delhi to Howrah the distance is 902 miles and it is in the administration of the East Indian Railway. The evidence is that upon the fire the van on fire was emptied and the salvaged baskets were put into another van and sent on by a train leaving Jakhal at 5 p.m., and the same van reached Delhi on 23rd October and delivery of the baskets was made to one Daroga Rahaman Bux, fruit merchant, at Delhi at 8 a.m., on the 24th. Even at that time Daroga Rahaman Bux found that 50 out of the 129 baskets were damaged and he made a note in the receipt which he gave to the Railway Company. He stated in evidence that the remaining baskets were also soft emitting juice. The learned Advocate for the Railway Company argues that the van was sent by an Express Parcels train and it took three days to cover the first 812 miles and in ordinary course, it would have taken more than three days to cover the 1026 miles from Jakhal to Delhi and having regard to the poor condition of the salvaged grapes, the Railway Company acted reasonably in holding that the grapes could not bear a journey to Howrah. He also urges that having regard to the soft condition of the grapes, the East Indian Railway Administration who were to carry the fruits from Delhi to Howrah might reasonably have objected to carry them. It is well known that soft fruits, specially when subjected to heat and pressure, do not keep long fit for human

consumption. In all these circumstances, we are of opinion that the conclusion drawn by the Courts below was wrong. The North Western Railway Administration acted properly in disposing of the salvaged goods at Delhi. They cannot be held guilty of any misconduct on that account.

The next question is whether it was the duty of the Railway Company to consult the plaintiffs who were the consignee about the disposal of the goods at Delhi. The learned Advocate for the plaintiffs has urged that the plaintiffs being the consignees, the Railway Company ought to have concluded that they were the owners of the goods and it was their duty to consult them. He urges that when the consignor consigned the goods to the consignee and made over the goods to the Railway Company, the interest of the consignor ceased in the goods and the Railway Company became the agents of the consignee and it was their duty to consult the consignee and as they did not consult the consignee, the Courts below were right to hold that they were guilty of misconduct. We are of opinion that it cannot be laid down as a proposition of law that the consignor loses his title in the goods as soon as he makes them over to the Railway Company for delivery to the consignee at another station. In this connection, it is interesting to note the case of *Chhogantal Shalgram Shet* v. *E. I. Ry. Co.* (1), where one G booked a consignment of goods to be delivered to one R at Kampti; after the goods had left the receiving station and were on their way to Kampti, G, the consignor instructed the Railway Company not to deliver the goods to R at Kampti but to deliver the same to the plaintiffs at another station. The goods arrived at Kampti and R insisted on taking delivery of them and threatened the Railway Officers, whereupon delivery was made to him. The plaintiffs thereupon sued the Railway Company and obtained damages from the Courts. This case would go to show that the proposition that the consignor loses his title to the goods as soon as he makes them over to the Railway Company cannot be accepted as a correct proposition of law. It would depend upon the circumstances of each case. It may be that the consignor would remain the owner of the goods during the time they are in the possession of the Railway Company or it may be that the consignee was the owner of the goods. The facts must be considered: and we must, in fairness, consider what was the knowledge of the Railway Company at the time when the damage at Jakhal took place and they had to act quickly in an emergency. It is in evidence that Habibulla is a partner in a Firm of fruit merchants at Quetta and the firm have a large trade in fruits which they send by the North Western Railway, and some time before the present occurrence, Habibulla on behalf of the firm had executed and delivered to the North Western Railway Administration an owner's risk note in respect of all fruits which the firm would send by the Railway during the next six months. From this fact it is urged by the learned Advocate for the Railway Company that the Railway officers had good reason to believe that in this case the consignor remained the owner even after making over the goods to the Railway Company. As a matter of fact, it was proved by evidence and accepted by the Courts below that the plaintiffs were really the owners of the goods and Habibulla, the consignor was the agent of the plaintiffs. Accepting that finding of the Courts below as correct, namely. that the plaintiffs were the owners and Habibulla, the consignor, was the agent of the plaintiffs, it is a question whether the Railway Company acted improperly in consulting Habibulla in the matter of the dispcsal of the goods.

In the first place, the Railway Company in that emergency could not very well consult the plaintiffs as there was not sufficient address from which the plaintiffs could be found. The Court of appeal below has stated that for the omission to obtain the proper address of the plaintiffs, the Railway Company are responsible and that the failure to obtain the address of the plaintiffs constituted misconduct on the part of the railway administation. We are of opinion that this conclusion of the Court of Appeal below is wrong in law. It is duty of the consignor to furnish the address of the consignee and write the same plainly and legibly. If the consignor does not perform his duty

1. (1903, 27 Bom 195=5 Bom L R 531.

and the goods are thereby lost or delayed, the Company cannot be held responsible for the same.

It was next urged by Mr. Bose on behalf of the plaintiffs that even though the Company did no. know the address of the plaintiffs, they should have asked the consignor for the address of the plaintiffs and then consulted the plaintiffs as to the disposal of the goods. In not doing so, they committed misconduct In our opinion, this proposition cannot be accepted. First of all, we must note that the situation called for prompt action. The salvaged goods had been subjected to pressure and heat and would soon become unfit for consumption. In the circumstances of emergency it was not reasonable to expect that the Railway Company would telegraph to the consignor and obtain the address of the plaintiffs from him and would then telegraph to the plaintiffs at Calcutta and wait before the disposal of the goods for a reply from the plaintiffs. It is not improbable that if they had taken that course, the goods by that time would have become unfit for human consumption.

The next question is whether the Railway Company disposed of the goods on the instruction of Habibulla the consignor, and whether their action was right. Mr. Brahmachari on behalf of the Railway Company has argued that if Habibulla was not the owner of the goods, he was at any rate the agent of the plaintiff and as such he had authority, in the circumstances of emergency, to do everything which was necessary without notice to his principal. Habibulla, who was examined on commission on behalf of the Railway Company, tried to wriggle out of the position. The Court of Appeal below has quoted only a portion of his deposition. We think that for a proper appreciation of circumstances the whole of his deposition should be considered. In reply to interrogatories he admitted that grapes were of a perishable nature ordinarily; but when protected by ice, they could not go bad in a fortnight. He was informed of the accident by fire at Jakhal and he admitted that some one at Chaman phoned him at Quetta informing him of the waggon getting fire and asking him for instructions for disposal of the goods left. He pretended he did not know who spoke to him on the phone. The Railway Station Master at Chaman has stated that he phoned to Habibulla and Habibulla on the receipt of the phone message went from Quetta to Chaman to see him, and instructed him in the circumstances to make over the goods to Daroga Rahaman Bux at Delhi and Habibulla sent a telegram to Daroga Rahaman at Delhi to receive the goods. In these circumstances there is, in our opinion, no doubt that the Railway Company duly consulted Habibulla and disposed of the goods according to his instructions and as Habibulla was, if not the owner, at any rate, the agent of the plaintiffs, the instruction given by him to the Railway Company is binding on the plaintiffs. Having regard to all the circumstances, we are of opinion that the North Western Railway Administration were not guilty of misconduct in disposing of the salvaged goods as they did. The result is that the appeal is allowed. The decrees of the Courts below are set aside and the plaintiffs' suit dismissed with costs in all the Courts.

Lort-Williams, J.—I agree that, upon the facts proved in this case, the defendants cannot be held guilty of misconduct within the meaning of the Risk Note. The appeal therefore must be allowed with costs throughout.

K.S. *Appeal allowed.*

A. I. R. 1934 Calcutta 511

JACK AND NAG, JJ.

Haripada Roy Chowdhury and *others*—Plaintiffs—Appellants.

v.

Jagai Shao—Defendant—Respondent.

Appeal No. 1331 of 1931, Decided on 17th August 1933, from appellate decree of Second Court Sub-Judge, Howrah, D/- 23rd December 1930.

Contract Act (1872), S. 74—Interest is not penal or unconscionable merely because it is high in absence of undue influence—Interest.

In the absence of anything to show that there was undue influence, the rate of interest cannot be treated as penal or unconscionable merely because it is high and the Court has no option but to allow the rate stipulated in the contract: *Case law reviewed.* [P 512 C 2]

Bijan Kumar Mukherjee—for Appellant.

Hari Charan Ganguly, Indu Prokas Chatterji and *Dhirendra Nath Ghose*—for Respondent.

Jack, J.—This appeal arises out of a suit for arrears of rent in which interest on the arrears was claimed at the rate of one anna per rupee, per mensem in terms of a kabuliyat, i. e., 75 per cent. per annum. Both the Courts below decreed the suit for the rent claimed with interest at 25 per cent. per annum instead of 75 per cent. asstipulated in the kabuliyat.

In this appeal it is contended that the Courts below erred in law (first) in not allowing interest at the contract rate and in holding that the stipulation relating to interest amounted to a penalty under S. 74, Contract Act; (second) in holding that the rate of interest was hard and unconscionable in the absence of any evidence to that effect and that there being no case of undue influence as mentioned in S. 16, Contract Act, the Court had no jurisdiction to re-open the contract between the parties. The only point at issue in this appeal therefore is whether under S. 74, Contract Act, it was open to the Courts below to hold that the stipulation as regards interest which was in accordance with the terms of the contract was by way of penalty merely on the ground that the rate of interest was very high. This is the view taken by the Courts below. In this appeal, it is pointed out that previous to the decision of the Lordships of the Privy Council in *Aziz Khan* v. *Duni Chand* (1) there were two different views adopted by this Court. In a number of cases it was held that it is open to the Court to interfere merely on the ground that the rate of interest is high and unconscionable. In other cases it was held that in the absence of evidence of undue influence the Court is not entitled tc interfere with the terms of a contract. Authorities for the former view are to be found in *Abdul Majeed* v. *Khirode Chandra Pal* (2), *Gopeswar Saha* v. *Jadav Chandra* (3), *Chellaphroo Chowdhuri* v. *Banga Behari* (4) and *Krishna Caandra* v. *Sanat Kumar Das* (5). On the other hand there are authoties for the latter view, that even interest at 75 per cent. per annum did not constitute a penalty in the absence of undue influence: cf. *Narendra Nath Sarkar* v. *Moniruddin Howladar* (6), *Ashutosh Dhar* v. *Joy Lal Sardar* (7) and *Umesh Chandra* v. *Golap Lal* (8).

Since the decision in the case of *Aziz Khan's* case (1) Supra where their Lordships of the Privy Council have held that it is difficult for a Court of justice to give relief on grounds of simple hardship in the absence of any evidence to show that the money-lender had unduly taken advantage of his position even where the transaction appeared to be undoubtedly improvident, it has held in subsequent cases by this Court mostly, it is true, in mortgage suits, that the Court has no option but to allow the rate of interest stipulated in the bond. The above view has been adopted in the following cases: *Ektar Sikdar* v. *Wajaadi Tati* (9), *Bejoy Kumar* v. *Satish Chandra* (10). *Bhut Nath* v. *Rama Nath* (11), *Nabin Chandra* v. *Dudu Mia* (12) and *Jewan Lal Daga* v. *Nilmani Choudhurani* (13) these cases the case of *Nabin Chandra Saha's* case (12) is admittedly similar to the present case. There it was pointed out that the law had been altered by the decision in *Balla Mal* v. *Ahad Shah* (14) and it was held that the law on the subject having been altered by judicial decisions since the judgment in a previous suit, it could not operate as res judicata in that case, the law now being that in the absence of anything to show that there was undue influence, the rate of interest cannot be treated as penal or unconscionable merely because it is high. On behalf of the respondent, it has been sought to distinguish this case on the ground that there was no decision of the Courts below in that case, that the terms of the kabuliyat were hard or unconscionable, whereas in the present case there is such a finding. But apparently that finding was based merely on the fact that the rate of interest was seventy-five per cent. while there was good security. Even if it be held that the bar-

1. A I R 1918 P C 48=48 I C 933=101 P R 1918 (P C).
2. (1915) 42 Cal 690=29 I C 843.
3. (1916) 43 Cal 632=32 I C 537.
4. (1916) 31 I C 394.
5. A I R 1917 Cal 502=34 I C 609=44 Cal 162.
6. (1903) 35 C L J 209.
7. (1913) 18 I C 621.
8. (1901) 31 Cal 233.
9. A I R 1919 Cal 413=52 I C 722.
10. A I R 1920 Cal 529=56 I C 1007.
11. A I R 1921 Cal 199=57 I C 1004=48 Cal 93.
12. A I R 1925 Cal 1193=87 I C 767.
13. A I R 1923 P C 80=107 I C 337=55 I A 107=7 Pat 305 (P C).
14. A I R 1918 P C 249=48 I C 1=124 P R 1918 (P C).

gain was a hard one, according to the interpretation which has been put upon the decision of the judicial committee it must also be found that there was undue influence. The case of *Dhanipal Das* v. *Maneshwar Baksh Singh* (15), has also been referred to by the respondent, but in that case it was distinctly found that there had been undue influence. Another case which has been referred to on behalf of the respondent is the case of *Jenan Lal Daga* v. *Nilmani Chowdhuri* (13), but that case was for specific performance in which the Courts were entitled to give equitable relief and therefore it is distinguishable from the present case. Another recent decision referred to by the respondent is in the case of *Bhai Panna Singh* v. *Firm Bhai Abjan Singh* (16), but that decision is not at all relevant to the facts of the present case.

We think therefore that we must hold that the plaintiffs are entitled to a decree for arrears of rent with interest at the rate claimed in accordance with the terms in the kabuliyat. It is to be noted that there was no issue framed in this case regarding undue influence, although there was an assertion of undue influence in the written statement. This appeal is accordingly allowed and the decree of the lower appellate Court is set aside and the plaintiffs' claim is allowed in full with interest at 6 per cent. per annum from the date of the decree of the trial Court till realization. We make no order as to costs throughout.

Nag, J.—I agree.

K.S. *Appeal allowed.*

15. (1903) 28 All 570=33 I A 118 (P C).
16. A I R 1929 P C 179=117 I C 485 (P C).

* A. I. R. 1934 Calcutta 513

MUKHERJEE AND BARTLEY, JJ.

Ganesh Chandra Khan—Petitioner.

v.

Lalit Mohan Nayak—Opposite Party.

Criminal Revn. No. 1298 of 1933, Decided on 12th January 1934.

*** (a) Criminal P. C. (1898), S. 144 (1)—Question of injury to property as distinguished from danger to or safety of human life occupying the property has got very little relevancy.**

The first thing under S. 144 (1) which a Magistrate has got to be satisfied about is that there is sufficient ground for proceeding under that section and an immediate prevention or speedy remedy is desirable; and the second element which has got to be established is that the Magistrate should consider that the direction which he is about to give is one which is likely to prevent or tends to prevent, obstruction, annoyance or injury to any person lawfully employed or danger to human life, health or safety or a disturbance of the public tranquillity or a riot or an affray. [P 514 C 1]

Where *A* applied for an order under S 144 on the ground that his house has cracked due to the fact that at a distance of 20 feet from his house *B* his neighbour had started to drive piles into the soil, for the purpose of strengthening a foundation of a new building,

Held: under the circumstances that what the Magistrate had got to be satisfied about in making an order under S. 144 in so far as the second of the aforesaid elements is concerned, was that the direction was likely to prevent injury or risk of injury to human life or safety. The question of injury to property as distinghished from danger to or safety of human life occupyihg the property had got very little relevancy. [P 514 C 1]

(b) Criminal P. C. (1898), S 144 (1)—Under exceptional circumstances Court has power to pass order under this section.

Under exceptional circumstances the criminal Court would be justified in cases of emergency on being satisfied as to the urgency of the situation, to make an order under S. 144 which may have the effect of interfering with the private rights of individuals, even though such rights are being lawfully exercised. It is only in exceptional circumstances where emergency of the gravest character is made out that a Court would be justified in the exercise of its powers under S. 144 to make an order which would have the effect of interfering with the exercise of the private rights of individuals. [P 514 C 2; P 515 C 1]

Hiralal Ganguly—for Petitioner.

Satindra Nath Mukherjee—for Opposite Party.

Judgment — This Rule is directed against an order which was originally made on 7th December 1933, and thereafter affirmed on 20th December 1933, by the Additional Chief Presidency Magistrate, Calcutta. The order purports to have been made under S. 144, Criminal P. C.

The facts necessary to be stated are very few. The petitioner is erecting a building on plot No. 73-A, Bagbazar Street. His own house stands at a distance of about 10 feet from the place where the foundation is being constructed. The opposite party appears to have got a house which stands at a distance of about 20 feet from this place. The petitioner is driving piles into the soil apparently for the purpose of strengthening the foundation of his building. The opposite party thereupon applied to the Magistrate, stating that the petitioner had started to sink big wooden pins for laying the foundation withou

having taken proper precautions and that the result had been that on account of the jerk and impact due to the driving of the pins two arches on the ground floor of the opposite party's house have been cracked. On these allegations, he asked for an order under S. 144, Criminal P. C., as against the petitioner. Such an order, as already stated, was thereupon made by the learned Magistrate on 7th December 1933; and thereafter on hearing both parties the learned Magistrate on 20th December 1933, affirmed that order in these words:

"Engineers and eye-witnesses prove that the cracks in the arches of the house of Lalit Mohan, that is to say, the opposite party, are due to driving of pins in the land of the other party and other construction work, and it is not safe either for the house of the petitioner or for the occupants. Injunction made absolute."

Now, the circumstances which would justify the Magistrate in making an order under S 144 of the Code, are set out in sub-S. 1, S. 144. The first thing which he has got to be satisfied about is that there is sufficient ground for proceeding under S. 144 and an immediate prevention or speedy remedy is desirable; and the second element which has got to be established is that the Magistrate should consider that the direction which he is about to give is one which is likely to prevent or tends to prevent, obstruction, annoyance or injury to any person lawfully employed or danger to human life, health or safety or a disturbance of the public tranquillity or a riot or an affray. If one takes into consideration the facts of the present case, what the learned Magistrate had got to be satisfied about in making an order under S. 144 of the Code, in so far as the second of the afor said elements is concerned, was that the direction was likely to prevent injury or risk or injury to human life or safety. The question of injury to property as distinguished from danger to or safety of human life occupying the property, has got very little relevancy.

The findings of the learned Magistrate in so far as they may be gathered from the order which he has made on 20th December 1933, and also the explanation which he has submitted in answer to the Rule suggest that he is apprehensive that unless an order under S. 144 is made the safety of the occupants of the house would be jeopardised. We are leaving for the moment out of consideration for the reason given above, his finding that the property itself would be damaged. Now, it may be conceded that under exceptional circumstances the criminal Court would be justified in cases of emergency on being satisfied as to the urgency of the situation, to make an order under S. 144 of the Code, which may have the effect of interfering with the private rights of individuals, even though such rights are being lawfully exercised. If we turn to the facts of the present case they appear to be as follows. The engineer who is doing the work of the foundation submitted a report in which he distinctly stated that the vibrations resulting from the mere driving of the piles cannot cause any damage to the opposite party's building near by because of the distance intervening and also because the intensity of the vibrations was insignificant compared to the massiveness of the structure as a masonry building He has asserted that there can be no damage to the surrounding buildings due to the piles being driven into the soil. He has been examined as a witness in these proceedings and he has also given evidence to the above effect. He has said that from his own inspection of the premises at the time when a couple of the pins were driven into the soil. Another witness examined on behalf of the petitioner, although he did not enter the said house or go upstairs, has said that no cracks were visible on the outside of the house. He has further said that the soil was practically a loose soil and the vibration caused by the driving of pins cannot extend to more than 3 or 4 feet. He has further deposed that the walls of the opposite partys' house have bent beyond the plumb line and the cracks that are in the house may be due to that fact. On behalf of the opposite party a number of witnesses including an engineer, Mr. J. Ganguly have been examined and he has given evidence to the effect that there are cracks in the house of the opposite party and they are due to the driving of the pins in the land of the petitioner. The other four witnesses examined on behalf of the opposite party have also given similar evidence. In this state of the evidence, it is far from

clear that circumstances have been made out which would justify a Court in granting an injunction, if such an injunction was asked for, for the purpose of restraining the petitioner from driving pins in the soil. In any event it is not so very clear that unless an order under S. 144 of the Code is made, there is risk to human life or safety. It is only in exceptional circumstances where emergency of the gravest character is made out that a Court would be justified in the exercise of its powers under S. 144 of the Code to make an order which would have the effect of interfering with the exercise of the private rights of individuals.

In our opinion, the order which the learned Magistrate has made purporting to be an order under S. 144 of the Code is not justified by the circumstances which have been proved in the evidence of the case It goes without saying that if the opposite party feels that there is any real risk of human life or safety so far as the occupants of his building are concerned, it is open to him to seek for his remedies in a proper Court and one of those remedies would undoubtedly be to apply for and obtain, if he can, an injunction from the original side of this Court. It is also clear that if on account of the negligence or want of proper precaution on the part of the petitioner any damage is caused to the building the opposite party will have a right to be compensated in respect of such damage.

We are informed that the foundation is being laid in respect of a building for which no sanction has been obtained and that proceedings in connexion with this matter are also pending before the Corporation of Calcutta. Nothing that we have said in this judgment will affect any proceedings that are being or may legitimately be taken by that body. All that we are concerned with is the question of the propriety of the order which the learned Magistrate has made and on that point we are clearly of opinion that this is not a case in which the order which is complained of should have been at all made. The Rule is made absolute, and the orders complained of are set aside.

V.S. *Rule made absolute.*

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(Special Bench)

C. C. GHOSE, Ag. C. J., COSTELLO AND MALLIK, JJ.

Burn & Co, In re

Civil Ref. No. 9 of 1932, Decided on 25th August 1933.

Income-tax Act (11 of 1922), S. 34—"In any year" means year during which proceedings in assessment for that year have been started.

The expression "in any year" in S. 34 means the year during which proceedings regarding assessment for that very year should have been initiated; a notice under that section must be served within one year from the end of that year. [P 519 C 2]

L. P. E. Pugh and *S. M. Bose*—for Assessees.

A. K. Roy and *Radhabinode Pal*—for Income-tax Department.

Costello, J.—This matter came before us on a case stated by the Commissioner of Income-tax, Bengal, under S. 66 (2), Income-tax Act (11 of 1922). The assessments, out of which the questions at issue arise, are assessments of the years 1928-1929 and 1929 1930, said to have been made under S. 34 of the Act on 19th February 1932. It is necessary to relate at some length the history of the matter, in order that it may be clear how the points, which we have to determine, have arisen. Down to the year 1927-1928, assessment was made on a firm named Messrs. Martin & Co., and upon the present applicants, Messrs. Burn & Co., as separate assessees, but in that year, when it came to the notice of the Income-tax Officer that Messrs. Martin & Co., had apparently acquired by purchase the firm of Messrs. Burn & Co., the Income-tax Officer proceeded to make an assessment on Messrs. Martin & Co., on the total income of both these firms jointly. Messrs. Martin & Co., made an objection to this joint assessment and, as a result of that objection, the matter eventually came before this Court on an application under S. 66 (2), when it was held that the firm of Messrs. Burn & Co., had been purchased, not with any funds belonging to the firm of Messrs. Martin & Co., but with other funds, which were the private property of the individual persons, who happened to be the partners of Messrs. Martin & Co. and further that the acquisition of the firm of Messrs. Burn & Co., by these individuals was a separate venture, which should have no connexion with

Messrs. Martin & Co., for the purpose of assessment to income-tax.

The order of this Court was dated 16th May 1930, and, in accordance with that order, the assessment on Messrs. Martin & Co., as a registered firm, was modified and the profits of Messrs. Burn & Co,, which had been added to the income of Messrs. Martin & Co., in that year by the Income tax Officer for assessment purposes, were deducted. In view of the fact that Messrs. Burn & Co., had filed a return of income in pursuance to a notice issued under S. 22 (2) in respect of their own income for the previous year, that is, the year 1927-1928, the Income-tax Officer, on receipt of the order of the High Court, proceeded to make an assessment under S. 23 (1) on Messrs. Burn & Co., on the basis of that return. Messrs. Burn & Co., challenged the validity of that assessment [made under S. 23 (1)] and asked for a Reference under S. 66 (2) of the Act to the High Court and a Reference was duly made by the Commissioner of Income-tax. In that Reference, certain questions of law were formulated and, on 18th February 1932 all of them were decided against Messrs. Burn & Co., as assessees. While the matter of the legality of the assessment made in the year 1927-23 on Messrs. Martin & Co., based on the joint income of both the firms, were still pending before this Court, the assessments of the years 1928-29 and 1929-30 were completed. They were made—just as the 1927-23 assessment had been made—on Messrs. Martin & Co., on the joint income from the two firms. The assessees again took exception to this procedure and it was then agreed between them and the Income-tax authorities that the decision of the High Court as regards the 1927-28 assessment should govern the assessments for the years 1928-29 and 1929-30. Accordingly, when the High Court held that the 1927-28 assessment was irregular and that Messrs. Martin & Co., could not be assessed jointly on the income of themselves and Messrs. Burn & Co., the 1928-29 and 1929-30 assessments on Messrs. Martin & Co., were once more modified.

In the meantime however Messrs. Burn & Co., the present applicants, had filed returns of their separate income in respect of the years 1928-29 and 1929-30. The Income-tax Officer therefore after the judgment of the High Court previously mentioned proceeded to make an assessment under S. 23 (1) on the basis of those returns. To this, Messrs. Burn & Co. objected and the matter ultimately came before the Commissioner for Income-tax on another application under S. 66 (2) and the Commissioner of Income-tax, thereupon, came to the conclusion that those assessments were indeed irregular, in view of the fact that the returns, which had been filed by Messrs. Burn & Co., had been filed "suo motu" and not in compliance with any notice issued under S. 22 (2). The Commissioner of Income-tax, upon that, cancelled those assessments, by an order dated 30th March 1931 and further directed that the Income-tax Officer should take steps to make assessments under S. 34, Income-tax Act, on the income which should have been assessed in the years 1928-29 and 1929-30. On 31st March notices under S. 34 were duly served on Messrs. Burn & Co., and assessments were duly made. Appeals against those assessments were preferred and finally the Commissioner of Income-tax was asked, in an application under S. 66 (2), to refer certain questions of law, arising out of those assessments, to this Court and these are the questions with which we are now concerned. The Commissioner of Income tax, in his statement of the case, has set cut certain dates in connexion with the assessments of the two years, out of which these questions arise, and it may perhaps be desirable that we should here reproduce them. The material dates and events are as follows :

17*th January* 1929.—Assessment for the years 1928-29 made on Messrs. Martin & Co , on income including the income of Messrs. Burn & Co.

16*th May* 1930.—Order of the High Court cancelling the assessment for the year 1927-28 made on Messrs. Martin & Co., on the joint income from the two firms.

4*th June* 1930.—Order of the Commissioner directing the assessment of the year 1927-28 to be revised in conformity with the order of the High Court and asking also that the assessments for the years 1928-29 and 1929-30 should be revised in accordance with the agreement between the Commissioner and the assessees, viz., that the decision of the High Court in the matter of the 1927-28 assessment would govern those assessments also.

24*th October* 1930.—Revised assessment on Messrs. Martin & Co., for the years 1927-28, 1928-29 and 1929-30 excluding the income of Messrs. Burn & Co.

8*th November* 1930.—Assessment on Messrs. Burn & Co., in respect of the income of that firm only for the years 1927-28, 1928-29 and 1929-30.

30*th March* 1931.—Cancellation of the assessments for 1928-29 and 1929-30 on Messrs, Burn & Co , by the Commissioner under S. 33 of the Act on an application for a Reference to the High Court on the ground that the proceedings for assessment had not been legally initiated.

31*st March* 1931.—Issue of notice under S. 34 on Messrs. Burn & Co., in respect of the income which should have been assessed in the years 1928-29 and 1929-30.

19*th February* 1932.—Completion of these proceedings under S. 34 by the Income-tax Officer and assessment.

The Commissioner of Income-tax states that, arising out of the 1928-29 assessment, six questions of law were formulated by the assessees under S. 66 (2). The first question runs as follows :

Did the terms of the notice in this case, dated 31st March 1931 purporting to be served under S. 34 of the Indian Income-tax Act, 1922 constitute a valid notice under the said section?

That question has been referred by the Commissioner to this Court. As regards the other questions put forward by the assessees they seem to resolve themselves into these two questions : (1) In the circumstances of this case, when did the income, which should ordinarily have been assessed in 1928-29 escape assessment ? (2) Was the notice, served on the assessee in this case under S. 34, a notice served within the period of limitation allowed by that section ? These two questions relating to the 1928-29 assessments were also referred by the Commissioner to this Court. Now, as regards the 1929-30 assessment, the questions formulated were these :

Did the terms of the notice in this case, dated 31st March 1931 purporting to be served under S. 34, Income-tax Act, 1922 constitute a valid notice under the said section ?

The Commissioner points out in his statement of the case that this was an assessment which should ordinarily have been made in the year 1929-30 and he says that, even in accordance with the contention advanced by the assessees with regard to the correct interpretation of S. 34 of the Act, the notice under S. 34 was in fact served in due time, for it was served before the end of the year following the year 1929-30. It is not necessary that we should say very much with regard to the questions put forward in connexion with the assessment of the year 1929-30, because Mr. Pugh, who appeared on behalf of the applicants, quite early in his argument, admitted that the notice, dated 31st March 1931, in respect of the year 1929-1930, was served within the time limited under S. 34 of the Act and he abandoned the contention that, by reason of the actual form of the notice, it was not a valid notice under that section.

What we are really now concerned with therefore is the question whether or not the notice dated 31st March 1931, requiring Messrs. Burn & Co. to deliver to the Income-tax Officer, not later than the 5th May 1931, or within 30 days of the receipt of the notice, a return of their income from all sources which were assessable for the year ending the 31st March 1929, was in form a good notice, and otherwise, even if it were, whether it nevertheless constituted a valid notice under S. 34 of the Act. A copy of the actual notice is set out on p. 41 of the Paper Book. It is headed "Notice under S. 34, Income-tax Act 21 of 1922." The notice was however in the form of a letter, instead of being in the common form prescribed by the Central Board of Revenue, but it was nevertheless conceded by Mr. Pugh that, in fact, all the details provided for in that form of notice had, in fact, been dealt with in the letter and we gathered the impression that Mr. Pugh did not seriously desire to stress this particular point. It is to be observed that there is no standard form of notice prescribed in S. 34 itself. All that the section requires is that a notice

"containing all or any of the requirements which may be included in a notice under sub-S. (2), S. 22."

shall be served. Mr. Sundaram in his well known text book "The Law of Income-tax in India," 3rd Edn., at p. 844 says:

"If the information, on which the supplementary assessment is proposed to be made, has already been furnished by the assessee himself, though in some other connexion, and it has also been verified by him, it is strictly speaking unnecessary for the Income-tax Officer to issue a notice, though in practice the assessee is pro-

bably given an opportunity of being heard, on the analogy of the provision in S. 35."

We are quite satisfied that the form of the notice which was given on 31st March 1931, sufficiently and properly complied with the requirements of S. 34, Income-tax Act. The substantial questions which we have to decide, as regards the 1928-29 assessment, is first of all, the question whether, on the ground that the income of the year 1928-29 did not escape assessment, S. 34 can be made applicable at all. S. 34 reads as follows:

"If, for any reason, income, profits or gains chargeable to income-tax has escaped assessment in any year or has been assessed at too low a rate, the Income-tax Officer may, at any time within one year of the end of that year, serve on the person liable to pay tax on such income, profits or gains, or, in the case of a company on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-S. (2), S. 22, and may proceed to assess or re-assess such income, profits or gains, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section: Provided that the tax shall be charged at the rate at which it would have been charged had the income, profits or gains not escaped assessment or full assessment, as the case may be"

The argument advanced on behalf of the applicants, Messrs. Burn & Co., is that S. 34 ought never to have been invoked in this case at all, because the income concerned had in fact not escaped assessment. It is to be observed that S. 34 can only be brought into operation if for any reason income chargeable to income-tax has escaped assessment in any year. Mr Pugh has argued with great cogency that the income of Messrs. Burn & Co. for the year 1928-29 did not escape assessment, though the liability for the income tax may have been placed on the wrong shoulders. It is to be borne in mind from the history of the case, which we have narrated, that the assessment for the year 1928-29 was completed while the matter of the assessment for the year 1927-28 was still pending before the High Court. The asessment was made on Messrs. Martin & Co. on 17th January 1929. On 19th December 1928, Messrs. Burn & Co. had written to Mr. Martin who was then the Income-tax Officer a letter, in which they stated that they proposed to close the accounts of their firm in the month of July in each year instead of on 30th April as theretofore. They also pointed out that under S. 2, sub-S. 11 (a), they required the consent of the Income-tax Officer to do that and they asked to be informed of the conditions that the Income-tax Officer would think fit to impose on them. They concluded the letter by saying: "We propose making the alteration for the purpose of assessing tax for the year 1928 29." In reply to that letter the Income-tax Officer on 10th January 1929, informed Messrs. Burn & Co that he was prepared to allow the alteration in the accounting pericd provided the firm paid tax on 15 months profits in the assessment for 1928-29. In reply Messrs. Burn & Co., on 11th January 1929, wrote to the Income-tax Officer, Mr. Martin, a further letter, in which they said:

"With reference to your letter, No. R-F 15 of the 10th instant, we have the honour to enclose herewith return under S. 22 (2), Income-tax Act, 1922, for the official year 1928-29."

It will be seen therefore that Messrs. Burn & Co. did actually make a return for the year 1928-29. We think it not unreasonable to hold that the assessment was made in response to a notice under the Act. In the circumstances, we find it not a little difficult to understand how it came about that the Commissioner took the view that the return filed by Messrs. Burn & Co. had been filed, as he says, suo motu and it would seem that there never was any necessity for the Commissioner to have made the order of 30th March 1931, cancelling that assessment. However be that as it may, we should be inclined to hold that, in all the circumstances of the case, the income of Messrs. Burn & Co., in respect of the year 1928-29, did not escape assessment.

It is however not necessary that we should express a definite opinion on this point, in view of the conclusion we have arrived at with regard to the further point taken on behalf of the assessees in respect of the assessment of the year 1929-30. This point relates to the interpretation to be put upon the expression "in any year" for the purposes of S. 34. The argument put forward on behalf of the assessee is that no assessment could lawfully be made under S. 34 because the notice purporting to have been given under that section was served more than one year after the year in which the assessment should normally have been made and that if the income

of Messrs. Burn & Co. escaped assessment at all it escaped assessment in the year 1928 29 and therefore proceedings under S. 34 could only have been opened before the end of the year 1929 30. The view of the income-tax authorities seems to have been this, that there was an assessment of income for the year 1928 29 on the income of Messrs. Martin & Co., and that that assessment must be presumed to have been valid until it was declared to be invalid and it was only held to be invalid as a result of the order of this Court dated 16th May 1930, or by the Commissioner's order dated 4th June 1930, and his subsequent order dated 30th March 1931.

The Commissioner seems to have been of the opinion that the earliest possible date from which the period of limitation could be held to run was the date of the order of the Commissioner of 4th June 1930, to the effect that the assessment should be dealt with in accordance with the decision of the High Court of 16th May 1930. It was contended before us on behalf of the income-tax authorities that the correct view is that the period of limitation should run from 30th March 1931, that is, the date on which the Commissioner cancelled the separate assessment of Messrs. Burn & Co. and directed the Income-tax Officer to make a fresh assessment of their income under S. 34. The Commissioner seems not to have appreciated that the expression "escape assessment" is not the same as "escape from" assessment and that, upon the assumption that there was at one time an assessment of the income of Messrs. Burn & Co. at the proper time, it would scarcely be right to say that they escaped assessment in respect of that income at a later period. Mr. Pugh has argued that the expression "in any year" can only refer to the year in which the assessment would normally and properly be made or, at any rate, initiated, and as regards the year 1928-29 he has put the matter thus:

The year 1927-28 was the earning year. The year 1928-29 was the assessment year or, as we may call it, the tax year, and the year 1929-30 was the "corrective" year, so that as regards the assessment for the year 1928-29 the income-tax authorities would merely have had time up to 31st March 1930, within which to take proceedings under S. 34, supposing always that the income of Messrs. Burn & Co. had in fact previously escaped assessment. It may perhaps not inaptly be said that, in relation to the assessment year 1928 29, the year 1929 30 was as it were an annus poenitentiae available to the income-tax authorities. Mr. Pugh crystallised the whole of his argument into this proposition: If there was no escape from assessment, then S. 34 did not apply at all; if on the other hand, there was an escape, then the proceedings under S. 34 were altogether too late. It was conceded by both sides that if the expression "in any year" bears the meaning contended for by Mr. Pugh, then, without doubt, the notice of 31st March 1931 was given too late and so the income-tax authorities would be regulated to the remedies, if any, they might still have consequent on the original assessment. Mr. Pugh, in support of his argument as to the meaning of the expression "in any year" as used in S. 34, referred to a number of the other sections of the Income tax Act, 1922, notably S. 2, sub S. (2), Ss. 3, 6, 12 and 23 and he invited us to come to the opinion that the language and tenor of those sections, as well as the language of S. 34 itself, indicate that in the expression "in any year" the word year can only refer to the actual 12 months in which an assessment would normally and properly be made.

It is obvious that to hold otherwise would bring it about that if an assessment had been duly made, and, if for any reason the assessment was subsequently cancelled even after a considerable lapse of time, the right of the income-tax authorities to demand a fresh return by virtue of the provisions of S. 34 might be prolonged indefinitely Having carefully considered the matter and having given due weight to the arguments of the learned Advocate-General, we think we ought to accept the contention put forward by Mr. Pugh on behalf of the assessees and to hold that the expression "in any year" must be read as meaning the year during which proceedings in assessment in respect of that very year should have been initiated. We, accordingly, hold that the notice served on the assessees in this case under S. 34 was not a valid notice

in that it was not served within the period of limitation allowed by the section. For the reasons already given this disposes of the case in favour of the assessees. We make no order as to costs.

V.S. *Reference answered.*

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MITTER AND MCNAIR JJ.

Heeralall Chakraburtty—Appellant.

v.

Sreemutty Mansha Moyee Debi—Respondent.

Appeal No. 398 of 1932, Decided on 21st December 1933, from original order of Dist. Judge, Hooghly, D/- 28th September 1932.

(a) Guardians and Wards Act (1890), S. 41—Ward seeking relief by way of delivery of specific properties — Court has power to entertain such application.

Where the ward seeks for relief by way of delivery of specific properties which belonged to her the case falls within the purview of S. 41. This is even so where the specific property is alleged to have been converted: 5 *C W N* 207 *Dist*; *A I R* 1919 *Cal* 833, *Rel on.* [P 521 C 1]

(b) Guardians and Wards Act (1890) S. 41—Meaning of words "in his possession or control is having power of disposition."

The words "in his possession or control" must not be taken in the narrow sense as being actually in the guardian's possession or control but in the sense that he has power of disposition over it. [P 522 C 1]

(c) Pardanashin Lady — Ward a pardashin and illiterate lady—Case set up by guardian that he had handed over her property and obtained receipt under her thumb impression—Burden lies on guardian to prove that ward understood transaction—Guardian and Wards Act (1890), S. 41.

In the case of deeds and powers executed by a pardanashin lady it is required that those who rely on them should satisfy the Court that they had at the time of the execution been explained to and understood by the executant. It is the duty of every Court to see that defenceless and helpless pardanashin ladies should get the same amount of protection as is extended to the weak and infirm. This principle applies where a guardian sets up a case that on attaining majority, the properties where made over to the ward, a pardanashin and an illiterate lady, who gave a receipt under her thumb impression: 34 *All* 455 (*P C*), *Foll.* [P 522 C 2]

(d) Appeal—Practice — Issue simple — Appellate Court will not lightly disturb finding of trial Court.

Where the issue is a simple one (such as, whether the Government promissory notes were actually made over to the ward) an appellate Court will not lightly interfere with the findings of fact of the trial Court which had an opportunity of watching the demeanour of witness: *A I R* 1915 *P C* 1, *Rel on.* [P 523 C 2]

(e) Guardians and Wards Act (1890), S. 27—It is duty of guardian to take possession of ornaments of his ward—Presumption of such possession exists—But actual possession is necessary for Guardians and Wards Act (1890), S. 41.

When a guardian applies to be appointed a guardian and his application is granted it is his duty to take possession of the ornaments of his ward from whomsoever they are, and where this is not done it is undoubtedly a great dereliction of duty on the part of the guardian and the presumption further is that in the ordinary course of events he has got possession of those ornaments. But in the proceeding under S. 41 it must be shown that he is actually in possession of those ornaments. [P 524 C 1, 2]

(f) Guardian and Ward—Guardian realising sale proceeds of Government promissory notes belonging to his ward — Interest is payable on such proceeds.

A guardian realised 3½ per cent. Government promissory notes and kept the same to himself:

Held: that he should pay interest on the money realised at the rate of 3½ per cent. from the date of realisation after deducting from the principal and interest thus calculated the amount received by the ward for her maintenance. [P 524 C 2]

Narendra Chandra Bose, Panchanan Ghosal and *Durgacharan Roy Chowdhury*—for Appellant.

Bijan Kumar Mukerji, Anil Chandra Dutta and *Narendra Nath Chowdhury*—for Respondent.

Mitter, J.—This is an appeal on behalf of a person who was appointed a guardian by the District Judge of Hooghly under the Guardians and Wards Act in respect of the person and property of a minor girl Manashamoyi. The minor was born in 1904. An application for guardianship was made by the appellant on 6th March 1924 and in the said application a prayer was made that the appellant be appointed guardian to the minor's estate as given in the schedule annexed to the petition. The Ka schedule properties consist of Government promissory notes of the face value of Rs. 7,000 and of market value of Rupees 4,200. Kha schedule properties consist of twenty-one items of ornaments the total value of which was put down at Rs. 500. On 24th June 1924 the appellant Hiralal Chakravartty was appointed guardian and in May 1925 the minor girl attained majority.

The allegation which had been made in these proceedings which were started by the minor after she had attained majority under S. 41, Guardian and Wards Act, is that neither the Govern-

ment promissory notes of the face value of Rs. 7,000 nor the ornaments were made over to her by the guardian, that is the appellant. Her case is that she knew nothing about the return of the Government promissory notes to her and that the appellant fraudulently got a receipt which was signed for her by an advocate of this Court who ordinarily practices in the Calcutta Police Court—one Satis Chandra Gupta. On the other hand the case for the appellant is that the Government promissory notes were made over to her and they were received by Satis Chandra Gupta and that it was he who made over those Government promissory notes to her. On the other hand the case of the respondent is, as has already been stated, that there was a sort of conspiracy between the present appellant and persons who are under his control by which it has been made to appear that she endorsed all these Government promissory notes to one Satis and on 5th October 1926 Satis sold the notes in the office of the well-known brokers Messrs. Prosad Das Boral and Brothers and the present appellant identified the said Satis Haldar to the said brokers. In support of the respective cases of the parties oral and documentary evidence have been led and the learned District Judge after a consideration of the same has come to the conclusion that the notes were not made over to the respondent and further that the ornaments were not made over to her; and he passed an order to the effect that the sum of Rs. 7,443, which was the value with interest at 6 per cent. per annum of the Government promissory notes, should be made over by the appellant to the respondent and that so long as the sum is not made over to her the appellant is to be detained in civil jail in accordance with the provisions of S. 45 (1) (c), Guardians and Wards Act. The learned District Judge has also directed that the ornaments, the value of which has been assessed at Rs. 500, be also made over to the respondent Manashamoyi. He has further lodged a complaint under S. 476, Criminal P. C., against Hiralal Chakravarty and Nagendra Chakravarty.

Against this decision of the learned District Judge an appeal has been brought by Hiralal Chakravarty which is numbered Appeal from Original Order No. 398 of 1932. There is also an appeal by Hiralal Chakravarty against the complaint which is purported to have been made under S. 476, Criminal P. C. In support of the Appeal No. 398 of 1932 by Hiralal Chakravarty it has been contended by the learned advocate for the appellant that the order of the District Judge was made without jurisdiction as the provisions of S. 41, Guardians and Wards Act, were not attracted to the facts of the present case and that the remedy of the respondent was not by starting proceedings under S. 41, but was by the institution of a suit. In support of this contention reliance has been placed on a decision of this Court in the case of *Nabu Bepari* v. *Sheikh Mahomed* (1). An examination of this case will however show that what was laid down there was that the summary power created by the Guardians and Wards Act ceases as soon as the minority of the ward ceases and the object of that section is to give the Court as representing the interest of the minor, certain summary power for the protection of his property during minority; and that S. 41 cannot be construed into giving the Court, by summary procedure, a power to order accounts to be rendered after the termination of the guardianship. This is not a case of rendering accounts. This is a case where the ward seeks for relief by way of delivery of specific properties to wit the Government promissory notes which belonged to her; and in our view the case falls within the purview of S. 41 which so far as is material runs in these terms:

"When for any cause the powers of a guardian cease, (in the present case the power of the guardian has ceased by reason of the ward ceasing to be a minor) the Court may require him, or if he is dead, his representatives to deliver as it directs any property in his possession or control belonging to the ward or any accounts in his possession or control relating to any past or present property of the ward."

In this case according to the case made by the respondent the Government Promissory Notes were in the possession or control of the guardian, namely the appellant. It is said however on behalf of the appellant that the Government Promissory Notes had already been negotiated and converted into money. Further it is alleged that as the bank account of the appellant will show that

1. (1901) 5 C W N 207.

the entire sum representing the sale proceeds of the Government Promissory Notes has passed out of the hands of the appellant as he has spent it and consequently it cannot be said to be money representing the proceeds of the conversion of the Government Promissory Notes is in the control of the guardian. It is difficult to accede to this contention for the words "in the possession or control" must not be taken in the narrow sense as being actually in his possession or control but in the sense that he has power of disposition over it. Otherwise if the contention of the appellant is accepted it would lead to the result that the guardian by converting a specific property into money and by immediately disposing of the said property would be able to evade the provisions of the section. This could never have been the intention of the legislature. The case in *Nabu Bepari* v. *Sheikh Mahomed* (1) on which reliance has been placed is evidently distinguishable from the facts of the present case. The present case rather falls within the purview of the case of *Abdul Hasim* v. *Maleka Khatun* (2).

In that case a sum of Rs. 475 was said to be in the hands of the guardian after the ward had attained majority ; and the case of the guardian in the proceedings taken under S. 41 was that he had spent that sum for the benefit of the minor. In such circumstances this Court directed that a full inquiry should be made as to whether the balance of the proceeds of the sale of two houses, namely, Rs 1,475 was in the hands of the appellant or had been applied to the necessities or benefit of the minor. The Court further directed that if it was found that any portion of the said balance, namely, Rs. 1,475 had not been spent for the minor the Court might make an order under S. 41 (3), Guardians and Wards Act, for payment of such sum into Court, and on the appellant's failing to pay such sum, the Court might proceed under the provisions of S. 45, if it considered that the appellant should again be detained in jail. We are clearly of opinion that having regard to the language of the statute and having regard to the decision to which we have just referred, the District Judge was quite competent to entertain this matter in the proceedings under S. 41, Guardians and Wards Act. The contention therefore of the want of jurisdiction must fail.

This brings us to consider the matter as to whether the case of the appellant has been established on the evidence in this case. There is no question that the burden of establishing that these notes were made over to the ward who was admittedly an illeterate pardanashin lady lay on the appellant. The principles which are applicable to cases of deeds and powers executed by helpless pardanashin ladies also apply to the present case for here her case is that she never signed a receipt evidencing the receipt by her of these Government Promissory Notes. The receipt which has been marked as Ex. A in the case is to be found at p. 76, part 1 of the paper book. In cases of this description as has been pointed out by their Lordships of the Judicial Committee in numerous cases, to one of which reference may be made, namely, to the case of *Sajjad Husain* v. *Abid Husain Khan* (3), that it is a wellknown rule of the Committee that in the case of deeds and powers executed by a pardanashin lady it is required that those who rely on them should satisfy the Court that they had at the time of the execution been explained to and understood by the executant. This rule is based on the same principle by which protection is extended to the weak and the infirm by the Court of Chancery in England and it is the duty of every Court to see that defenceless and helpless pardanashin ladies should get the same amount of protection as is extended to the weak and the infirm in other countries. In addition to this it appears that this lady, namely, the respondent was, as the learned District Judge says when he saw her, feeble-minded ; and the Court is bound to give her protection in those circumstances. It is nowhere proved affirmatively that the thumb-impression on which reliance is placed to prove the transaction was actually her thumb-impression put upon the receipt after understanding the nature and import of the transaction.

The learned District Judge has come to the conclusion that notwithstanding her denial the thumb-impression on the

2. A I R 1919 Cal 833=49 I C 132.

3. (1912) 34 All 455=16 I C 197=39 I A 156 (PC).

receipt appears to be that of the respondent. But that is not equivalent, having regard to the case made by her, to the appellant's proving to the satisfaction of the Court that she put her thumb-impression on the paper in question after understanding that she was really giving a receipt for the Government Promissory Notes of the face value of Rs. 7,000. The burden therefore being on the appellant the question is whether he has discharged that burden. In support of the case of the appellant he has examined an advocate of this Court who ordinarily practises in the Calcutta Police Court and who is said to have written a letter on behalf of the respondent demanding from the appellant the delivery of these notes. Unfortunately for the appellant the original of this letter has not been produced. The learned District Judge rightly pointed out that the pleader's evidence on this behalf must be discounted seeing that he has not followed the ordinary practice of keeping a copy of such letter in his office. We agree with the learned District Judge that this story of the letter of demand cannot be trusted. (His Lordship considered the evidence, pointed out discrepancies and improbabilities in it and after dealing with circumstances connected with the conversion of Promissory Notes by the guardian, proceeded)

In cases of this kind where the learned District Judge had an opportunity of himself watching the demeanour of witnesses, an advantage which we have not sitting here in the appellate Court and where the issue is a simple one, this Court should not lightly interfere with the findings of fact of the trial Court. This view is in accordance with the principle which was laid down by their Lordships of the Judicial Committee in the case of *Bombay Cotton Manufacturing Co., Ltd.* v. *Motilal Shivlal* (4). The issue here was a simple one, namely, whether the notes were actually made over to this lady. We are bound to keep in mind the observations of the Judicial Committee and not to interfere with the view of the oral evidence taken by him unless a strong case is made out. For this reason and also for the reasons which we have already given we are of opinion that we should not interfere with the decision of the learned District Judge on this point. We are of opinion that the learned Judge has rightly appreciated the evidence given in this case on behalf of the defendant and rejected the same. In addition to the fact that the appellant has failed to discharge the burden which lay upon him of establishing the fact that these notes were made over to the lady we believe that the lady herself has come straightforwardly to make the case that she has never received one single of these notes. This disposes of the case with regard to the Government Promissory notes. We now proceed to deal with the ornaments which belonged to the ward and in respect of which the present appellant has made his guardianship application on 6th March 1924. He stated that the property of the ward consisted of Government Promissory Notes already dealt with and of ornaments of which the total value was Rs. 500 consisting of 21 items. With regard to these the case of the lady was that these ornaments were never made over to her. The District Judge has considered that question.

It is said on her behalf that the ornaments, as the lady herself admitted, were in the possession of one Hari Charan Roy and our attention has been drawn to a certain certified copy of petition of compromise, Ex. E, filed before the Bench Magistrate of Serampore which is to be found at p. 1 part 2 of the paper book and from which it would appear that the prayer was made that the ornaments may be kept in deposit with Babu Hari Charan Roy of Tulyan, who is a near relation of the accused. This has been consistently the case which the appellant has made throughout. It is true that when he had applied to be appointed a guardian and his application was granted it was his duty to take possession of the ornaments from whomsoever they were and that was not done. It is undoubtedly a great deriliction of duty on the part of the guardian. The presumption further is that in the ordinary course of events he has got possession of those ornaments. But it is said that in a proceeding under S. 41 it must be shown that he is in possession of those ornaments; and on this part of the case as Dr. Mukerji for the respondent has frankly admitted,

4. A I R 1915 P C 1=29 I C 229=42 I A 110=39 Bom 386 (PC).

the finding of the learned District Judge is somewhat of a halting character. The learned District Judge says this:

"Whether they were made over to the guardian at the time he took possession of the securities I am not prepared to say, as there is no evidence on the point, but at least his responsibility for the ornaments is there, and I have no doubt whatsoever that the guardian has obtained possession of the major portion of them at least. I disbelieve the story of the return of them and he is liable to account for them. On the third and fourth questions therefore, I hold that the ornaments have not been made over to the ward, that the guardian has come into possession of the bulk of them at least and that he is accountable for them."

And in another place the learned Judge remarks thus:

"Taken alone, it may have been possible to give the guardian the benefit of the doubt as far as the ornaments are concerned, but considering the unreliable evidence of it, the untrustworthiness of his main witnesses of the transactions, Hari Roy and the guardian's proved dishonesty in the matter of the securities, I have no hesitation in holding that the whole story of return of the ornaments is fictiticus and the receipt has been concocted by false pretences again."

Having regard to this finding and having regard to the circumstance that there is only the evidence of the lady who simply says that the appellant admitted before her that he had taken back the ornaments from Hari Charan Roy we do not think that we should be justified in confirming the order of the learned District Judge with regard to these ornaments. We think that the respondent has not proved beyond doubt that the possession of the ornaments was really with the appellant. The effect which the evidence leaves in our minds is that it has not been established by convincing evidence that the ornaments were ever in the possession of the appellant. The order of the District Judge with regard to the value of the ornaments must therefore be set aside. A question has been raised as to whether the learned District Judge was justified in allowing interest at 6 per cent. per annum on the proceeds of the Government Promissory Notes. The learned District Judge says this:

"On the fifth question I hold that the guardian is liable to the ward for the sum he realised on the securities in October 1926 together with interest on that sum at six per cent. per annum: this by 1st November 1932 by which I propose to require him to pay will amount to approximately Rs. 7,443 together with either the ornaments or another Rs. 500, in lieu thereof a total cash liability of Rs. 7,943."

It is said that on the face value of the notes the respondent is entitled to an interest of 3½ % per annum. If the Government Promissory Notes were made over to the lady that is the amount of interest which she would get. We think that there is much force in this contention. Taking into consideration the amount the respondent has obtained as maintenance and with a view to avoid a future protracted enquiry we think that the appellant should be ordered to pay instead of Rs. 7,443 with reference to the Government Promissory Notes a sum of Rs. 6,462. The order of the learned District Judge is therefore modified in this way: That the appellant is required to pay to the respondent a sum of Rs. 6,462. The order of the District Judge with regard to costs which is to be added to this sum will stand. So long as this sum is not paid under S. 45 (1) (c), Guardians and Wards Act, the appellant is to be detained in Civil Jail. The rest of the order of the District Judge about the issue of warrant will stand. The appeal is allowed to the extent and with the variation which we have indicated above, the order of the learned District Judge will stand. The respondent is entitled to her costs, hearing fee 8 gold mohurs. The appellant is allowed two months' time to put in the sum of Rs. 6,462 with costs to the respondent. Let this order be sent down as early as possible. No order need be made on the application in the alternative in view of what has been said above.

McNair, J.—I agree.

v.s. *Decree modified.*

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C. C. GHOSE, AG. C. J. AND
S. K. GHOSE, J.

Sahabati Gopini — Plaintiff—Appellant.

v.

Mangturan Agarwalla— Defendant—Respondent

Appeal No. 180 of 1932, Decided on 11th May 1933, from original order of Sub-Judge, Darjeeling, D/- 2nd March 1932.

Civil P. C (1908), O. 7, R. 10 — Suit ordinarily to be filed in Munsifs Court filed in Subordinate Judge's Court — Subordinate Judge having jurisdiction to entertain suit —Evidence closed and arguments being heard —Objection as to Court raised—Subordinate

Judge should deliver judgment and not direct plaint to be returned to Munsif's Court.

Where a suit which is ordinarily to be instituted in a Munsif's Court is filed i ı a Subordinate Judge's Court who has jurisdiction to entertain the suit and the evidence has been gone into and concluded on both sides but objection is raised when arguments are being heard that the suit ought to have been instituted in the Munsif's Court, the Subordinate Judge should bring the hearing to a conclusion and deliver judgment and not direct the plaint to be returned to the Munsif's Court, even though it is irregular on the part of the plaintiff to have instituted the suit in the Subordinate Judge's Court

[P 525 C 2]

Gopendra Nath Das and *Nirmal Chunder Das Gupta*—for Appellant.

Abinash Chunder Ghose and *Nripendra Nath*—for Respondent.

Judgment.—In this case what has happened is this. A suit which ordinarily would have been instituted in the Munsif's Court was instituted in the Subordinate Judge's Court at Darjeeling. Both parties put in their pleadings; issues were settled and evidence was gone into on both sides. Thereafter the defendant proceeded to argue the case. While the argument was going on an objection was taken that the suit should have been instituted in the Munsif's Court. The argument on behalf of the defendant was interrupted and the matter was gone into and the learned Subordinate Judge came to the conclusion that the only thing that could be done in the circumstances which had happened was to return the plaint for presentation to the proper Court, namely, the Court of the Munsif at Siliguri. It is against this order that the present appeal has been preferred.

It is quite clear that the Subordinate Judge had jurisdiction to entertain the present suit. No doubt it was an irregular thing on the part of the plaintiff to institute the suit in the Subordinate Judge's Court when it should have been instituted in the Munslf's Court at Siliguri; but there was no want of jurisdiction so far as the Subordinate Judge was concerned to hear the case, and in the peculiar circumstances of this case, namely, that evidence had been gone into and concluded on both sides and arguments were being heard when this question was started, we think that the Subordinate Judge would have exercised a wiser discretion if instead of directing that the plaint should be returned for presentation to the proper Court he had proceeded to bring the hearing to a conclusion and thereafter to deliver judgment. It is said that the Subordinate Judges's order is not an illegal order. That may or may not be so; but, in the circumstances which obtain in the present case and having regard to what has already been alluded to above, we think that the Subordinate Judge would have been well advised if he had adopted the course indicated above. We therefore set aside the order complained of and remit the case to the learned Subordinate Judge of Darjeeling for bringing it to a termination in the ordinary way and delivering judgment. The costs of this appeal will abide the result. The hearing fee is assessed at three gold mohurs.

K.S. *Order set aside.*

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MITTER AND GUHA, JJ.

Prasannakumar Datta—Appellant.

v.

Secy. of State—Respondent.

Appeal No. 22 of 1930, Decided on 23rd November 1933, from original decree of First Sub-Judge, Sylhet, D/- 2nd September 1929.

(a) Land Acquisition Act (1894), S. 25—Judge cannot award sum in excess of that claimed in petition.

Under S. 25 (1) it is not permissible to the Land Acquisition Judge to award a sum in excess of that claimed by the petition of the claimants provided the claimants had the notice served on them under S. 9 But where a Land Acquisition Judge awards a larger sum than is claimed by the claimants and no appeal or cross-appeal on behalf of the Secretary of State is preferred, this award necessarily stands. [P 527 C 1; P 528 C 2]

(b) Land Acquisition Act (1894), S. 9—Notice served on some of joint claimants is notice to all.

On general principles a notice, which is addressed to all the joint claimants and served on some of them, should be regarded as good service as against the persons not personally served: *A I R* 1918 *P C* 102, *Ref.* [P 527 C 2]

Quaere.—Whether notice to persons interested or believed to be interested in the land sought to be acquired is to be served personally.

[P 527 C 2]

(c) Land Acquisition Act (1894), S. 23 (4)—Owner of house, privacy of which is affected, is entitled to compensation (*Obiter*).

Obiter.—A person owning a house, the privacy of which has been affected by the acquisition of his adjoining property under the Land Acquisition Act, is entitled to compensation by reason of the acquisition injuriously affecting his property under S. 23 (4): *In re Ned's Point Battery* (1903) ; 2 *Ir R* 192 and *Blundell* v. *Rex* (1905);

1 *K B* 516, *Foll*; *In re Charles Penny and South-Eastern Ry. Co.* (18 7); 26 *L J Q B* 2-5, *Diss from*; 5 *C W N* 147; 5 *B L R* 676; 5 *W B* 208, *Ref.* [P 529 C 1]

Gunadacharan Sen and *Binayendra Nath Palit*—for Appellants.

Saratchandra Basak and *Rupendra Kumar Mitra*—for Respondent.

Mitter, J.—This is an appeal by the claimants against an award made by the Subordinate Judge, 1st Court, Sylhet, exercising the powers under the Land Acquisition Act. It appears that certain lands of the claimants were compulsorily acquired for the K. L. V. Railway line. The lands form the western portions of the claimants' homestead, as will appear from the map prepared by the pleader commissioner, which is annexed to the paper-book. The homestead of the claimants is a very large one and towards the west of the homestead there is a wall of a certain height, there is also a wall towards the north of the homestead. On notice being given for the acquisition of the land for the purpose of the railway line, one of the claimants Prasannakumar Datta wrote a letter to the Land Acquisition Collector on 26th January 1 27, in which he stated that the K. L. V. Railway line has touched the border line of the western compound wall of his residential house at Kayasthagram and the band of the line seriously disturbed the privacy of his house, having exposed it to public view. To avoid this, namely, the infringement of his privacy, the letter further states that

"he had been compelled to reconstruct the entire length of his pucca wall with greater width and height involving an extra expenditure of Rs. 2,2 0,"

On receipt of this letter, the Special Land Acquisition Officer asked for proof about the expenditure for reconstructing and raising the height of the wall. In reply, Prasanna, one of the claimants, submitted an estimate of Rs. 2,200 as being the cost required for the reconstruction of and raising of the height of the wall in question Upon this, the Land Acquisition Collector made an award allowing Rs. 524 for raising the height of the existing wall and this was awarded as compensation due to proprietor's damage under S. 23 (4), Land Acquisition Act. The petition for reference under S. 18, Land Acquisition Act, was made not only on behalf of Prasanna, but also on behalf of his two brothers, the other two claimants Purnendu and Saradindu. In para. 7 of that petition it was stated that the letter of 26th January being hurriedly written, the estimates and the calculations were made erroneously and that, since writing that letter, the claimants prepared correct estimates and calculations and they asked for time to rectify the mistakes in that letter, which was treated as a sort of petition made to the Collector under the Act claiming compensation, and they wanted compensation to the extent of Rs. 6,825 for constructing and raising the wall. On 9th July 192°, a petition for amendment of the application for reference under S 18 of the Act was made and the amount of claim was raised to Rs. 25,000 and this amount was claimed as cost for erecting the wall in question. After taking evidence on behalf of the claimants as also on behalf of the Secretary of State, the Subordinate Judge made an award for a sum of Rs. 3,445 and this award was in excess of the claim as originally laid in the letter to the Land Acquisition Officer, dated 26th January 1927.

Against this award, the present appeal has been brought by the claimants and it is contended that the award has been inadequate and that, on the evidence furnished, not only on their own behalf, but even on the evidence of the engineer examined on behalf of the Secretary of State, the claimants are entitled to a larger compensation. It is to be noticed however that, so far as this ground of appeal, viz., the claim for an excess sum over and above the sum which has already been awarded by the Court and which is in excess of the original claim by their letter of 26th January 1927, is concerned, the appellants are met by the provisions of S. 25 of the said Act. It has practically been conceded by Mr. Sen, who appears for the appellants, that S. 25 really bars the claim of the appellants, for an excess sum as made in this appeal, if his clients had the notice served on them under S. 9 of the Act. S. 25 (1) of the Act runs as follows:

"When the applicant has made a claim to compensation, pursuant to any notice given under S. 9, the amount awarded to him by the Court shall not exceed the amount so claimed or be less than the amount awarded by the Collector under S. 11."

Having regard to the provisions of S. 25, Cl. (1), it is quite clear that it was not permissible to the Land Acquisition Judge to award a sum in excess of that claimed by the petition of the claimants of 26th January 1927, provided the claimants had the notice served on them under S. 9. Mr. Sen strenuously contended that there is no proof of the service of notice on at least two of the claimants, that is, the claimants other than Prasanna and consequently S. 25 does not at any rate prevent these two claimants from pressing the appeal with regard to an amount in excess of the claim made by the petition of 26th January 1927. It appears however that there is evidence of Prasanna himself on the question of service of notice, which precludes the appellants other than Prasanna from raising this contention. Prasanna says:

"I got notice under S. 9 for land in connexion with this railway line. I also accepted the notices addressed to claimants Nos. 2 and 3."

So there is prima facie evidence of the service of notice on claimants Nos. 2 and 3 and it is significant that these two claimants have not entered the witness-box to deny service of notice under S. 9, nor they have suggested anywhere in their petition for reference under S. 18 that they had no notice. On general principles, a notice, which is addressed to all the joint claimants and served on some of them, should be regarded as good service as against the persons not personally served. Reference may be made in this connexion to a decision of their Lordships of the Judicial Committee of the Privy Council, in the case of *Harihar Banerji* v. *Ramshashi Roy* (1). That was no doubt a case of service of a notice to quit which was addressed to several joint tenants and which was accepted by some of them. In those circumstances, their Lordships laid down that:

"In the case of joint tenants, each is intended to be bound, and it has long ago been decided that service of a notice to quit upon one joint tenant is prima facie evidence that it has reached the other joint tenants."

Mr. Sen has however contended that S. 9 must be strictly construed and the principles which are applicable to notices to quit may not apply to the notice under S. 9, where it is said that notice must be served personally on each of the several persons interested or believed to be interested in the land sought to be acquired. There may be something in this contention and it is not necessary to decide the question, seeing that the evidence of Prasanna which is not contradicted by the evidence of the other claimants leads us to hold, having regard to the further circumstances, that the question of no ice was not raised by them, that notice was actually served in this case in the manner provided for by S. 9, Land Acquisition Act. It having been established that notice under S. 9 was served, under S. 25 (1) of the Act, it was not open to the claimants to claim a sum higher than Rs. 2,200. The Subordinate Judge has however awarded a larger sum, but as there was no appeal or cross appeal on behalf of the Secretary of State, this award even for a sum in excess of Rs. 2,200 must necessarily stand.

The compensation which has been awarded in this case is on the score of "injurious affection to the property" by reason of the fact that the privacy of the claimants' house has been affected by the acquisition made for the purposes of the railway, and, there is evidence that passengers travelling by trains passing by this railway, as well as people at the railway station, overlooked the premises of the claimants, which have not been acquired and which really, on the evidence, are the zenana or inner apartments used by the ladies of the family. Before the Subordinate Judge, as also before the Land Acquisition Collector it seems practically to have been conceded on behalf of the Secretary of State that the claimants are entitled to some compensation for, to quote the words of the Subordinate Judge, "throwing open the back side of the barhi to public gaze." The Subordinate Judge has stated that;

"As the learned Government pleader admits that the claimants are entitled to some compensation, namely, for the acquisition having thrown open the back side of the barhi to public gaze, he should go into the question of cost of constructing a screen for the protection of the back side of the appellant's barhi and that they should be allowed compensation."

Although it is not necessary for the purposes of the present appeal, having regard to the fact that the appeal fails on another point, to go into the question as to whether the infringement of

1. A I R 1918 P C 102=48 I C 277=45 I A 222 =46 Cal 458 (PC).

privacy entitles the claimants to compensation under the provisions of S. 23, Cl. (4), Land Acquisition Act, as the question has been debated before us and as it is a question of some importance, we should express our opinion on this question. But having regard to the course the appeal has taken, the opinion we express is not a final opinion and the question may have to be considered in some other case. It appears that there is some conflict of authority on this question, even in Courts in England. In a very early case cited in Cripps' well-known text book on the Law of Compensation, Edn. 7, 1931, at p. 212, namely, the case of *In re Charles Penny and the South-Eastern Ry. Co.* (2) it seems to have been laid down that:

"Interference with the privacy of lands through their being overlooked from a railway embankment is not a damage to a private right which would, but for statutory powers, have given a right of action and the owners of such lands are not entitled to compensation."

In this case the learned Judges expressed their views in separate judgments and it may be useful to quote the reasons which induced the Judges to take this view. Wightman, J., in delivering the judgment says:

"One of the items, in respect of which compensation has been given, is the disturbance of the claimant s privacy by his premises being overlooked by the passengers along the railway. In that a legitimate ground in respect of which compensation can be claimed ? It is not every kind of disturbance that entitles a party to compensation; it is necessary to draw the line somewhere. It is difficult to say, that for every fanciful ground for complaint, compensation is to be given, as for the obstruction of a prospect which might detract from the agreeable enjoyment of a house."

Earle, J., puts his judgment in this way:

"In this case, from the affidavits, I come to the conclusion that, in awarding compensation, the annoyance caused by persons standing on the bank of the railway and overlooking the claimant's grounds has been included. These are injuries to the amenities of his residence, and not injuriously affecting his property, so as that an action would lie."

Crompton, J., gives his reasoning in these words:

"The rule is rightly laid down, that, in order to entitle a person to compensation, there must be an injury and damages, for which, without the railway Act, there would have been a ground of action, and the act must have taken away that remedy. The overlooking of the claimant's premises, which the jury were directed to take into their consideration, was a matter for which they ought to have given compensation: it might as well be claimed for the erection of an ugly structure."

On the other hand, in a later case, *In re Neds Point Battery* (3), it has been laid down that, in considering the question of compensation under the compulsory acquisition Acts, injury to amenities and privacy can be considered. Gibson, J., in delivering the judgment of the Court says:

"Whether compensation under the Defence Act is as extensive as under the Land Clauses Code is doubtful. It certainly is not greater. Compensation can only be given under the Lands Clauses Acts for an injuriously affecting occasioned by the execution of the works. The construction and use of a camp may depreciate the value of adjoining parts of the estate; for such depreciation from loss of privacy, loss of amenity, vulgarization of the neighbourhood, and the natural concomitants of a camp, compensation may be assessed."

This decision has been followed in a later case, in *Blundell* v. *Rex* (4), which turns on the constructions of Ss. 63 and 68, Land Clauses Act of 1845, awarding compensation for injurious affection as under the Indian Act. We are not inclined to follow the earlier English decisions, having regard to peculiar conditions prevailing in India with reference to the question of privacy. In Bengal, as it appears from some of the cases referred to at the bar, the right of privacy has long been recognized in *Sri Narain Chowdhry* v. *Jodoo Nath Chowdhry* (5), *Mahomed Abdur Rahim* v. *Birju Sahu* (6) and *Sreenath Dutt* v. *Nand Kishore Bose* (7). There is also a decision which has been cited in the Allahabad report, of the Chief Justice and Mahmood, J., in *Gokul Prasad* v. *Radho* (8). In other parts in India such a right can be based on custom, as appears from Easement Act of 1882, Illustration (b) in S. 18. In this case, having regard to the fact that the Secretary of State at the very outset recognized the existence of a right of privacy, it was not necessary for the claimants to adduce any evidence of custom. At the present advised, we are inclined to think that, having regard to conditions prevailing in India, the right view would be to follow the decision re-

2. (1857) 26 L J Q B 225.

3. (1903) 2 I Rr 192.
4. (1905) 1 K B 516=74 L J K B 91=21 T L R 143=53 W R 412=92 L T 53.
5. (1900) 5 C W N 147.
6. (1870) 5 B L R 676=14 W R 103.
7. (1866) 5 W R 203.
8. (1888) 10 All 353=(1888) A W N 135.

ported in Irish Reports to which reference has already been made. But as the appeal fails on the other points, we do not say that this will be our final opinion in the case and the matter may have to be reconsidered fully when occasion demands. The result is that the appeal fails and is dismissed, but having regard to all the circumstances, there will be no order as to costs.

Guha, J.—I agree,

v.s. *Appeal dismissed.*

A. . R. 1934 Calcutta 529

GUHA AND NASIM ALI, JJ.

Prem Chand Mullik—Accused—Petitioner.

v.

Nilmani Das—Complainant — Opposite Party.

Criminal Revn. No. 939 of 1933, Decided on 4th December 1933.

(a) Presidency Towns Insolvency Act (1909), S. 102—Property acquired after adjudication—So long as Official Assignee does not interfere, undischarged insolvent is entitled to mortgage or deal with such property.

As regards after acquired property, subject to the right and claim of the Official Assignee so long as the Official Assignee does not interfere, an undischarged insolvent has the power to buy and sell and give discharge and do all other acts as he could have done and had done before the intervention of the Official Assignee. Hence an undischarged insolvent in possession of after acquired property has the right to mortgage, and to deal with it. *Herbert* v. *Sayer*, 5 *Q. B.* 965, 8 *Cal.* 556, *Rel. on.* [P 530 C 1]

(b) Presidency Towns Insolvency Act (1909), S. 102—"Obtaining credit" — Mortgage of after acquired property by undischarged insolvent is not "obtaining credit."

The transfer of the property by way of mortgage in raising the loan on hypothecation of immovable property, acquired by the insolvent after the adjudication order, does not stand on the same footing as obtaining credit merely, as mentioned in S. 102. [P 530 C 2]

Narendra Kumar Bose, Kanaidhan Dutt and *Mrigendra Nath Dutt* — for Petitioner.

Order.—The petitioner has been convicted by the learned Chief Presidency Magistrate of Calcutta, under S. 102, Presidency Towns Insolvency Act, for an offence of borrowing a sum of money from the complainant in the case, on the mortgage of some land with the knowledge that he, the accused person, was an undischarged insolvent and has been sentenced to undergo rigorous imprisonment for six months. It appears that the petitioner obtained an order of adjudication as an insolvent in an insolvency proceeding in this Court, declaring him an insolvent on 20th April 1921 and that since that order of adjudication was passed by this Court, the Official Assignee did not take possession of any asset of the petitioner. It further appears that on 23rd November 1923, the petitioner purchased property from one Ratindra Lal Mitter for a sum of Rs. 6,000 and that on 7th June 1924, the petitioner executed a deed of mortgage in favour of the complainant Nilmony Das and obtained the loan hypothecating the property purchased by the petitioner on 23rd November 1923, from Ratindra Lal Mitter. It is further to be mentioned in this connexion that according to the finding arrived at by the Chief Presidency Magistrate in this case, the petitioner did not bring to the knowledge of the complainant the fact that he was an undischarged insolvent when the mortgage was executed, on 7th June 1924. The learned Magistrate has in his judgment dealt with the facts of the case in detail, and has proceeded to observe as follows :

" It is unnecessary to decide whether accused had real title to the land he purported to mortgage. 'Credit' is defined in Wharton's Law Lexicon (Edn. 11) as a 'transfer of goods on trust in confidence of future payment.' It seems to me perfectly clear that the transaction in question is of that nature. The defence is that the accused who acquired this property two years after his adjudication, had every right to mortgage it. It is therefore urged that even if accused did not inform complainant of his insolvency, he committed no offence in mortgaging this property. S. 102 is clear. The accused undoubtedly obtained credit fraudulently. It is inconceivable that the complainant would lend Rs. 2250 to a stranger whom he knew to be an undischarged insolvent. The accused is found guilty under S. 102, Presidency Towns Insolvency Act, and sentenced to six months rigorous imprisonment."

Two questions, in our judgment, arise for consideration in this case : Whether the property mortgaged being an after-acquired property, an undischarged insolvent in possession of the property has the right to mortgage, and to deal with the property, and ss such whether the provision of S. 102, Presidency Town Insolvency Act, has any application to the present case. In the second place, whether the expression 'obtaining credit' as used in S. 102 means and includes

taking loan on mortgage of immovable property. So far as the first question goes, subject of the after-acquired property, as regards an uncertificated bankrupt has been considered in England from time to time, and the result is this, that subject to the right and claim of the Official Assignee, so long as the Official Assignee does not interfere, the uncertificated bankrupt has the power to buy and sell and give discharge, and do all other acts as he could have done and had done before the intervention of the Official Assignee. The law in England is summed up in *Herbert* v. *Sayer* (1) and the Indian Insolvency Act, has, in our judgment, to be considered on the same principle. The view as taken above is in consonance with what has been laid down in *Kristocomul Mitter* v. *Suresh Chunder Deb* (2). In the present case, the petitioner an undischarged insolvent had by way of mortgage, dealt with the property acquired by him after the order of adjudication passed in the insolvency proceedings, and had the right to do so, according to the decisions in England and in this country.

In the second place, in view of the Magistrate's expression of opinion that the accused obtained credit fraudulently it is to be observed that the decision come to by the learned Chief Presidency Magistrate overlooks the fundamental difference as between the expression "obtaining credit" used with reference to undischarged insolvents in S. 102, Presidency Towns Insolvency Act, and the positicn which has been recognized in this country and in England, that an undischarged insolvent has the power to deal with the property acquired by him after the order of adjudication, in any manner whatsoever, if the Official Assignee does not interfere with his dealings. The decision of the learned Magistrate is also not in consonance with the difference that must be recognised in law, between obtaining credit and a transaction represented by a mortgage. The mortgage of a property is to be viewed in two different aspects: regarded as a promise by the debtor to pay the loan, it is a personal obligation, but it is also a conveyance, because it passes to the creditor the real right to the property pledged to him (see in this connexion, Ghose on Mortgage, Edn. 4, Vol. 1 pp. 66). In our judgment it appears clear that the transfer of the property by way of mortgage in raising the loan on hypothecation of immovable property, acquired by the insolvent after the adjudication order, does not stand on the same footing as obtaining credit merely, as mentioned in S. 102, Presidency Towns Insolvency Act. It may be observed in this connexion that the intention of the legislature in this behalf seems to us to have been made clear in the provisions that follow S. 102, relating to the penalties dealt with by the Statute in Part 8 of the Presidency Towns Insolvency Act. Examined in the light of the propositions stated above, the conviction of the petitioner cannot be maintained on the facts and the circumstances of the case before us. In the result, the rule is made absolute. The conviction of the petitioner, and the sentence passed on on him by the learned Chief Presidency Magistrate are set aside, and the petitioner is acquitted. Let the petitioner be discharged from his bail bond.

K.S. *Rule made absolute.*

1. (1880) 5 Q B 965=2 D & L 49=13 L J Q B 209=8 Jur 812.
2. (1882) 8 Cal 556=12 C L R 253.

A. I. R. 1934 Calcutta 530

GUHA AND BARTLEY, JJ.

Beer Bikramkishore Manikya—Plaintiff—Appellant.

v.

Sonamani Sharma—Defendant—Respondent.

Appeals Nos. 1895 to 1900 of 1931, Decided on 25th August 1933, from appellate decrees of Fourth Addl. Sub-Judge, Sylhet, D/- 24th February 1931.

Bengal Landlord and Tenant Procedure Act (8 of 1869), S. 22—Suit for ejectment—Rent due for years other than year previous to suit cannot be taken into account.

Arrears, other than the arrear remaining due at the end of the year, cannot be taken into account for the purpose of a decree for ejectment as contemplated by S. 22. Thus, dues on account of rent for years other than the year previous to the institution of the ejectment suit have not to be taken into account for the purpose of passing a decree for ejectment.

[P 531 C 2]

Rameshchandra Sen and *Nripendra Chandra Das* for *Beerendrachandra Das* —for Appellant.

Priyanath Datta—for Respondents.

Judgment.—These are appeals by the plaintiff in suits for ejectment on the ground that the defendants had not satisfied the previous decrees for rent for the period from 1332 to 1334 B. S., and also on the ground that rent for year 1336 B. S. had not been paid. It appears that the plaintiff in the suits obtained decrees for rent against the defendants for the years 1332 to 1335 B. S., and in the decrees passed in favour of the plaintiff it was mentioned that the defendants could avoid ejectment, if they paid the plaintiff his dues for 1335 B. S. within the time mentioned in the decrees. The dues for the year 1335 B. S. were paid up within the time specified, but there was subsequent non-payment of rent by the defendants in the year 1336 B. S., and the dues on account of the years 1332 to 1334 were also not paid. In the suits, out of which these appeals have arisen, the plaintiff prayed for eviction of the defendants on account of non-payment of rent for the year 1336 as also for non-satisfaction of the previous decree, so far as they related to arrears of rent for the years 1332 to 1334. The Courts below have agreed in passing decrees for ejectment in favour of the plaintiff in the manner following· The defendants are called upon to pay into Court the rent for 1336 as claimed, with damages and costs, within one month; failing which the defendants will be evicted from the rent lands. The plaintiff's prayer for ejectment on account of unsatisfied portions of the previous decrees is disallowed.

The plaintiff has appealed to this Court; and it was urged, in support of the appeals, that the unexecuted portions of the decrees for the years 1332 to 1334 should have been included in the amount, for the non-payment of which the tenant-defendants could be ejected. The decision of the question raised in the appeals depends upon the construction of the Ss. 22, 27 and 52, Bengal Act 8 of 1869. It is to be mentioned at the outset that S. 52 gives the landlord a right to bring a suit for ejectment and for arrears of rent in the same action; and the section enables the landlord to adduce any unexecuted decree for arrears of rent, as evidence of the existence of such arrear in a suit for ejectment. The S. 52 therefore lays down the procedure, by which the landlord's right under S. 22 of the Act of ejecting a tenant is to be enforced. As indicated clearly in Ss. 22 and 27 the claim for rent, for the non-satisfaction of which the liability to be evicted is incurred under the law, must be on account of the arrear of rent remaining due from the tenant at the end of the Bengali year. The tenant, as mentioned in S. 22,

"shall be liable to be ejected from the land in respect of which the arrear is due."

The arrears referred to in S. 22, is the arrear to which reference has been made in the previous part of the section: "arrear of rent remaining due at the end of the Bengali year." The effect of the provisions, contained in the Ss. 22, 27 and 52 of Act 8 of 1869, is that the right is given to the landlord to eject a tenant if any arrears are due at the end of the year, i. e., for non-payment of rent for that year. The forfeiture or determination of the tenancy takes place by the operation of S. 22, when the tenant makes default in the matter of payment of rent due at the end of the year. In laying down the procedure for an action for recovery of arrears of rent and for ejectment of a tenant the mode of enforcing his rights by the landlord—mention is made of an unexecuted decree for arrear of rent. The provision thus made in S. 52 in the matter of production of evidence before the Court does not affect the substantive provisions contained in S. 22 of Act 8 of 1869, laying down the liability of a tenant to be ejected for arrear of rent due. The arrear to be taken into account has been definitely mentioned in the section itself, and arrears, other than the arrear remaining due at the end of the year, cannot be taken into account for the purpose of a decree for ejectment as contemplated by S. 22, which is the only provision in the enactment, under which the landlord can exercise his right to eject a tenant on the ground of non-payment of rent. The forfeiture or the determination of the tenancy takes place when the tenant makes default at the end of the year, and dues on account of rent for previous arrears have not to be taken into account for the purpose of

passing a decree for ejectment. As provided by S. 52 the landlord may combine a claim for ejectment, with a claim for realization of arrears of rent. There may be a decree for arrears for any period in respect of which the claim is not barred under the law; but so far as the decree for ejectment is concerned, the non-payment of dues on account of rent for a period other than the year previous to the institution of the suit cannot under the law, as contained in Ss. 22 and 27, Bengal Act 8 of 1869, be taken into account.

In view of the above conclusion arrived at by us, the decision of the Courts below, that the arrears of rent due from the tenants for the years 1332 to 1334 could not be included in the amounts, for non-payment of which the tenant-defendants were to be ejected, is in our judgment correct and must be upheld. It may be mentioned that the conclusion we have arrived at bearing upon the interpretation of Ss. 22 and 52 of Act 8 of 1869 is in consonance with the view indicated in the judgment of this Court in the case of *Jogeshuri Chowdhrain* v. *Mahomed Ebrahim* (1). Reliance was placed on behalf of the appellant on the decision of this Court in the case of *Savi* v. *Mohesh Chunder Bose* (2), for the proposition that the amount of arrear shall be specified in the decree passed by the Court on the non-payment of which eviction was to follow. The facts of the case, in which the afcresaid decision was given, do not appear from the report; and we are unable to hold that the learned Judges deciding the case meant to lay down anything, which was not provided for by the law. As indicated above, Ss. 22 and 27, Bengal Act 8 of 1869 provide for ejectment for non-payment of arrears of rent due on account of the year preceding the institution of the suit, and we do not find anything in the decision referred to above, which could enable us to overlook or disregard the provision of the law bearing upon the subject under consideration. In the result, the appeals are dismissed; the decisions arrived at by the Courts below and the decrees passed by them are affirmed. There is no order as to costs in these appeals.

V.S. *Appeals dismissed.*

1. (1886) 14 Cal 33.
2. (1864) W R Act 10 Rul 29.

A. I. R. 1934 Calcutta 532

GUHA AND NASIM ALI, JJ.

Akshoy Chandra Bose—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 875 of 1933, Decided on 23rd January 1934, from order of Presidency Magistrate, Calcutta.

(a) Penal Code (1860), S. 409—Prosecution proving receipt of money by accused and entrustment—It is for accused to prove defence and not for prosecution to prove actual mode of misappropriation.

Where the prosecution succeeds in proving receipt of money by accused for a particular purpose and makes out a case of entrustment of such money, it is for the accused to prove his defence and not for the prosecution to prove the mode of misappropriation: 33 *All* 249, *Ref.* [P 534 C 1]

(b) Penal Code (1860), S. 409—Offence of breach of trust is complete as soon as there is dishonest mis-appropriation or conversion to one's own use.

The offence of breach of trust is complete when there is dishonest misappropriation or conversion to one's own use or when there is dishonest user in violation of a discretion, express or implied, relating to the mode in which the trust is to be discharged. [P 534 C 2]

(c) Penal Code (1860), S. 409—Mere retention does not raise presumption of dishonest intention—But retention for sufficiently long period may justify such presumption.

Mere retention of money would not necessarily raise a presumption of dishonest intention; but it is a step in that direction. The fact that money entrusted to be used for a particular purpose, was not used for such purpose; that there was retention for a sufficiently long time, would justify the inference that the accused did not intend to pay: *A I R* 1915 *Cal* 266 and *A I R* 1925 *Cal* 613, *Rel on.* [P 534 C 2]

N. K. Bose, Z. A. Rahim, Satindra Nath Mukerji—for Appellant.

A. K. Bose—for the Crown.

Judgment.—This is an appeal from a conviction and sentence of the learned Chief Presidency Magistrate, Calcutta. The appellant, an Attorney-at-law, a member of the firm of Messrs. N. C. Bose & Co., was tried for the commission of the offence of criminal breach of trust as an attorney in respect of money entrusted to him. The prosecution was started on a petition of complaint filed by Mr. A. L. Collect, Registrar of this Court, in its Original Jurisdiction, in pursuance of a direction of a Special Bench of this Court, given under S. 476, Criminal P. C., relating to an offence of the following description: That the accused had been paid the sum of Rs. 16,500 by Gouri Sankar Tiberwalla and Fulchand Tiberwalla, on 30th Sep-

tember 1932, for the purpose of depositing the same in Court, in connection with the sale of a house in Calcutta by the Registrar, in the Original Side, at which the aforesaid two persons were the purchasers. That the accused had failed to deposit the said sum of money, and upon the aforesaid persons Gouri Sankar Tiberwalla and Fulchand Tiberwalla calling upon the accused to explain, he was unable to give any explanation, and informed them that he was not in a position to pay the money to them immediately. That the accused had dishonestly misappropriated or converted to his own use, the said sum of Rs. 16,500, and two other sums of Rs. 5,500 and Rs. 1,220, and that he had tampered with a sworn affidavit intended to be filed in this Court.

The charge framed by the Magistrate, under S. 409, I. P. C., which the appellant had to meet, related to the aforesaid sums of money admittedly received by him; the amount of Rs. 16,500 having been received from his clients aforesaid, on 30th September 1932, and the sum of Rs. 6,720, the proceeds of a cheque, which was made over to the appellant on 22nd February 1933, by the Registrar, High Court, Original Side. The appellant was charged with criminally misappropriating and converting to his own use, the aforesaid sums of money. There was no charge framed with regard to the other allegation made against the appellant, of his having tampered with a sworn affidavit. The learned Chief Presidency Magistrate has, upon the material placed before him, found the appellant guilty under both the counts mentioned in the charge framed against him, under S. 409, I. P. C. The findings of the Magistrate on the material questions arising for consideration in the case, are all against the appellant, who has been sentenced to three months' rigorous imprisonment and a fine of Rs. 1,000 in default three months' rigorous imprisonment, on the first charge; no separate sentence was passed on the second charge. (After discussing the prosecution and defence evidence, His Lordship proceeded.) The position, therefore upon the entire evidence in the case before us, is that the appellant retained the amount of Rs. 16,500, belonging to his clients which was entrusted to him for a certain purpose; the money was retained for a considerable period of time, and the clients were led to believe that their money was lying in deposit in Court; furthermore, the money retained by the appellant was utilised for his own purpose, without the knowledge and consent of his clients. The amount of Rs. 6,720 was also retained by the appellant from 22nd February 1933, till 20th June 1933, without the knowledge of the clients; it was being utilised for the appellants' own purposes. As has been stated already, the story of permission to utilise any of these sums for his use, has not been made out, by evidence on the side of the defence.

It may be stated here that the prosecution having succeeded in the case before us, in proving the receipt of money for a particular purpose, the case of entrustment having been made out, it was for the appellant to make out his defence as set out in his written statement filed in Court, that he had not utilised them to his purpose, without the express consent and permission of the persons by whom or on whose behalf there was entrustment. The defence of the appellant that there was permission or consent to utilise the money entrusted for his own purpose has been found to be untrue.

It was not for the prosecution in the circumstances stated above, to prove the actual mode of this appropriation of the money; it has however been established that there was retention of the money for a sufficiently long period: that there was a misappropriation for a time. There is ample evidence, clearly indicating that the clients were led to believe that the amount of Rs. 16,500 was deposited in Court, and was lying in deposit there; there was the prima facie proof by the production of the banking accounts of Messrs. N. C. Bose & Co. (Ex. 19) that the sums paid to the appellant or received by him, were being utilised by the appellant for his own purpose and further that between 30th September 1932, and 18th May 1933, there were not, according to the banking accounts, sufficient funds available for payment of the amounts to be paid to the clients, and which had been retained by him. When the prcsecution had proved that the appellant had not returned the money entrusted to him or

received by him, in accordance with his duty, it lay upon the appellant to prove his defence of having obtained permission or consent of his clients to utilise the money for his own purpose. This the appellant has failed to do. In our judgment, on a charge under S. 409, I. P. C., it is not necessary for the prosecution to prove in what manner the money alleged to have been misappropriated has actually been spent by the accused. If it be shown, as it has been established in the case before us, that money entrusted to the accused or received by him for a particular purpose, was not returned by him in accordance with his duty, it lay on the accused to prove his defence: See in this connection *Emperor* v. *Kadir Baksh* (1).

The fact that the appellant retained the clients' money for a sufficiently long time, after creating an erroneous impression in them that it had been deposited in Court, and without having obtained their permission or consent for utilising the money for his purpose, was sufficient for holding that the appellant was guilty of the offence contemplated by S. 409, I. P. C. The gist of the offence is entrustment, and dishonest misappropriation or conversion to own use; dishonest misappropriation or conversion to own use, involved wrongful gain to the accused for the period of retention of the money. There was the intention in the appellant to deprive the owners of the money temporarily, of the use of their money, and the appellant misappropriated the money for a time, intending to make it good eventually when any further retention became impossible. The amounts involved remained with the appellant for such a length of time as to justify the Court to hold taking other facts and circumstances into consideration, that the appellant had temporarily misappropriated or converted the money to his own use: see *Queen-Empress* v. *Rama Krishna* (2). The determination of the question whether the act of the accused was dishonest, so as to amount to criminal misappropriation under the law, must depend upon the proved circumstances of each case. Criminal breach of trust is not an affence which counts as one of its factors, the loss that is the consequence of the act, it is the act itself, which in law, amounts to an offence. The offence is complete when there is dishonest misappropriation or conversion to one's own use, or when there is dishonest user in violation of a direction, express or implied, relating to the mode in which the trust is to be discharged.

It may be noticed that mere retention of money would not necessarily raise a presumption of dishonest intention: but it is a step in that direction. The fact that money entrusted to be used for a particular purpose, was not used for such purpose; that there was retention for a sufficiently long time, would justify the inference that the accused did not intend to pay: see *Balthasar* v. *Emperor* (3) and *Gunananda Dhone* v. *Santi Prokash Nandy* (4). It may further be mentioned in this connexion that

" the mixture of the funds of another with one's own funds may be in many cases natural and proper, in other cases convenient but irregular, and in the third, both irregular and criminal. The distinction between these cases requires to be treated with the greatest judicial care so as, while preserving the amplest civil responsibility, to prevent the third or criminal category from being extended to mistaken though convenient acts. This is only to say that apart from constructive criminal responsibility which may be imposed by statute a court of justice cannot reach the conclusion that crime has been committed unless it be a just result of the evidence that the accused in what was done or omitted by him, was moved by the guilty mind: see the observations of Lord Shaw in *Luise Edouard Lanier* v. *The King* (5)."

Keeping in view the propositions to which reference has been made above which are in the nature of principles of general application in cases of criminal breach of trust, and after giving our anxious consideration to the facts and circumstances of the case before us, we have come to the conclusion that the result of the evidence before us is that what was done or omitted by the appellant, was moved by a guilty mind. The acts done by the appellant before us, and his omissions, as disclosed in evidence, were both irregular and criminal, so as to fall within the third category

1. (1911) 33 All 249=8 I C 627=11 Cr L J 699.
2. (1889) 12 Mad 49.
3. AIR 1915 Cal 266=26 I C 131=41 Cal 844=15 Cr L J 683.
4. AIR 1925 Cal 613=86 I C 213=26 Cr L J. 725.
5. (1914) A C 221=110 L T 326=30 T L R 53=24 Cox C C 53.

mentioned by Lord Shaw in his judgment in *Lanier's* case (5) mentioned above, involving criminal liability. The appellant is found guilty of the offence for the commission of which he was tried by the learned Chief Presidency Magistrate of Calcutta, and his conviction under S. 409, I. P. C., is accordingly affirmed.

It remains now to consider the question of sentence passed on the appellant by the learned Chief Presidency Magistrate. The position that the appellant will now in due course be proceeded against in the exercise of the disciplinary jurisdiction of this Court, as mentioned in the Rule issued by a Special Bench of this Court on 6th June 1933, cannot be ignored; and we think that when we come to consider the question of punishment, we ought to take into consideration the age of the appellant, his antecedents, as also the fact that the money which he misappropriated temporarily, was made good. In view of all these considerations, and taking into account also that the name of the appellant may be struck off the roll of attorneys, or in alternative he may be suspended from practising as an attorney, the ends of justice, will in our judgment, be met if the appellant is sentenced to one month's simple imprisonment and a fine of Rs. 1,000 in default simple imprisonment for another month. This is the sentence we pass on the first count mentioned in the charge on which the appellant was tried: no separate sentence for the second count is called for, in the circumstances of the case.

The conviction of the appellant is affirmed, and the sentence passed on him by the learned Chief Presidency Magistrate, Calcutta, is modified in the manner stated above. With the above modification as to the sentence this appeal is dismissed. The appellant must surrender to his bail bond, and serve out the sentence passed on him by this Court.

K.S. *Sentence modified.*

A. I. R. 1934 Calcutta 535

MALLIK AND JACK, JJ.

Panchu Gazi — Defendant — Appellant.

v.

Ejahar Ali Sardar and *others*—Plaintiffs—Respondents.

Appeal No. 237 of 1932, Decided on 1st February 1934, from appellate decree of Sub-Judge, Khulna, D/- 19th August 1931.

Bengal Tenancy Act (1885 as amended in 1928), S. 87 (5)—Sub-tenant who was under-raiyat at time of Amendment Act is entitled to benefit of S. 87 (5).

So long as a landlord does not choose to exercise his right of re-entry, there is no determination of the tenacy and so long as there is no determination of the tenancy the subtenant cannot be characterised as a trespasser.

[P 536 C 1]

Where the landlord attempted to enter upon the land in possession of a sub-tenant in June 1929:

Held: that before that date the New Bengal Tenancy Act came into operation and the subtenant who was an under-raiyat in February 1929 when the New Bengal Act came into force was entitled to have all the benefits which were given to an under-raiyat under S. 87 (5) of the new Act. [P 536 C 1]

Karunamoy Ghose and *Rajendra Nath Das*—for Appellant.

Gunada Charan Sen and *Hari Pada Chatterjee*—for Respondents.

Mallik, J.—This appeal arises out of a suit for recovery of khas possession of a non-transferable occupancy holding on the ground of abandonment. The allegations on which the plaintiffs brought the suit were that the land was held by one Sukchand under the plaintiffs, that Sukchand sold the land to one Monsur Ali on 17th Chaitra 1334 corresponding to 30th March 1928 without making any arrangement for payment of rent with the result that there was an abandonment of the holding by Sukchand on 13th March 1928 and that when on 25th Jaista 1346 corresponding to June 1929 the plaintiffs went to take khas possession of the land they were resisted by the defendants. The defence inter alia was that the defendant had taken a sublease of the holding from Sukchand so long ago as 1318 corresponding to 1911 and having acquired a right of occupancy by local custom he was not liable to be ejected. This defence found favour with the trial Judge and the Court of first instance dismissed the plaintiff's suit. On appeal this decision of the trial

Judge was reversed and the learned Subordinate Judge who heard the appeal gave a decree to the plaintiff holding that as the sublease of the defendant was in contravention of the provisions of S. 85, Old Ben. Ten. Act, any acquisition by the defendant of a right of occupancy by local custom would be of no avail against the landlord and could not save the defendant from eviction. The defendant is the appellant before me.

The facts that were either admitted by the plaintiffs or found in the case were these (1) the defendant took a sub-lease of the holding from Sukchand in 1911 considerably more than 12 years before the institution of the suit in 1929; (2) Sukchand transferred the holding which was not transferable and gave up possession without making any arrangement for payment of 30th March 1928 and (3) when the plaintiffs went to enter upon the land in June 1929 they were resisted by the defendant. The question is whether on these facts the plaintiffs were entitled to a decree for eviction. I am of opinion that they were not and my reasons for that opinion are as follows: Sukchand may have abandoned the land on 30th March 1928 and the right of re-entry may have accrued to the plaintiffs from 31st March 1928. But so long as the plaintiffs did not choose to exercise that right there was no determination of the tenancy and so long as there was no determination of the tenancy the defendant who was a sub-tenant of Sukchand could not be characterised as a trespasser. It was only when the plaintiffs attempted to enter upon the land in June 1929 that the tenacy terminated. But before that date the New Bengal Tenancy Act had come into operation and the defendant who was certainly an under-raiyat in February 1929 when the New Bengal Tenancy Act came into force was entitled to have all the benefits which are given to an under-raiyat under S. 87, sub-S. (5) of the New Act. Under that sub-section the defendant before he can be evicted is entitled to an offer from the landlord to hold the land at the rent paid by him to Sukchand and as in the present case there was no such offer the plaintiffs were not entitled to a decree for eviction. The result is that the appeal is allowed, the decree of the lower appellate Court is set aside and that of the Court of first instance dismissing the plaintiff's suit restored with costs in all Courts.

Jack, J.—I agree.

V.S. *Appeal allowed.*

A. I. R. 1934 Calcutta 536

MALLIK AND JACK, JJ.

Benode Behari Chatterji and *others* — Plaintiffs—Petitioners.

v.

Girindra Nath Roy and *others* — Defendants—Opposite Parties.

Civil Rule No. 1155 of 1933, Decided on 31st January 1934, from order of Second Court Sub-Judge, Faridpur, D/- 30th June 1933.

(a) Bengal Municipal Act (15 of 1932), S. 39— Dispute must be between candidates who are contesting election.

Under S. 39, action can be taken only on an application by a candidate between whom and some other candidates there is a question as to the validity of the election. The meaning of the words "in dispute between two or more candidates" is that the dispute must be between candidates who are contesting the election. [P 537 C 2]

(b) Bengal Municipal Act (15 of 1932), S. 37—Revision.

Where the Judge refuses to exercise jurisdiction under S. 37, High Court has power of revision. [P 537 C 2]

Atul Chandra Gupta, Jogesh Chandra Roy and *Promode Kumar Ghose* — for Petitioners.

Basak and *Bhupendra Chandra Roy Choudhury*—for Opposite Parties.

Jack, J.—This is a rule calling upon the opposite party to show cause why the order of the Subordinate Judge in connexion with an application under S. 36, Bengal Municipal Act, should not be set aside. The application was made in connection with an election of Commissioners by three of the voters and one of the candidates 4. The Subordinate Judge heard the application under S. 37 and dismissed it on the ground that it had not been made as required by S. 39. The ground on which the application was made was that the number of votes had not been correctly recorded. The votes were counted three times. On the first occasion opposite party No. 2 obtained 127 votes and opposite party No. 5, 131 votes. On the second occasion opposite party No. 2 obtained 130 votes and opposite party No. 5, 131 votes. On the third occasion opposite

party No. 2 obtained 128 votes and opposite party No. 5, 127 votes. It is contended that inasmuch as there was another candidate, i. e. opposite party No. 5 who had obtained more votes than opposite party No. 2, the latter was wrongly declared to be duly elected. The present application was made for a declaration that opposite party No. 5 should be declared elected instead of opposite party No. 2. The learned Subordinate Judge held that this being a matter coming under S. 39, Bengal Municipal Act, it was not maintainable inasmuch as opposite party No. 5 was not one of petitioners. S. 39 states :

"If in any case to which S. 38 does not apply the validity of an election is in dispute between two or more candidates, the Judge shall after a scrutiny and computation of the votes recorded in favour of each such candidate declare the candidate who is found to have the greatest number of valid votes in his favour to have been duly elected."

The learned Judge, accordingly, held that as this was not the case where the election is in dispute between two or more candidates, S. 39 has no application. For the petitioner it is contended that it is clear from S. 39 read with Ss. 36 and 37 that it was not intended that S. 39 should be limited to cases in which the disputing candidate was the petitioner. It is clear that under S. 36 any voter may file a petition questioning the election, and the grounds on which the election can be questioned are referred to in Ss. 38 and 39. S. 37 states :

"Where a petition has been filed under S. 36 the District Judge or Subordinate Judge may, after holding such inquiry in accordance with the prescribed procedure as he deems necessary and subject to the provisions of Ss. 38 and 39, pass an order confirming or amending the declared result of the election or setting the election aside."

If the contention made on behalf of the petitioner is given effect to, it would mean that the words in S. 39 :

"Between two or more candidates"

should be omitted as it seems quite clear that the only meaning which can be attached to the words "in dispute between two or more candidates" is that the dispute must be between candidates who are contesting the election. The fact that any voter can question the election does not mean that any voter can question it under S. 39. In S. 38 there are many points on which the election can be questioned. But it is quite clear from the wording of S. 39 which refers to the counting of votes that the election can only be questioned in that respect where the petitioner is the candidate himself and disputes the election. The fact that one of the petitioners before us happens to be a candidate does not help him inasmuch as the dispute is not between himself and any of the other candidates. It is therefore clear that the learned Subordinate Judge was quite right in holding that this application was not maintainable. The other ground on which the decision of the learned Judge is sought to be assailed is that the decision is final under S. 37 and S. 43 of the Act. There seems to be no doubt that when the Judge refuses to exercise jurisdiction under S. 37 this Court has always power in revision. However, on the merits and on the ground that S. 39 makes this application untenable this rule must be discharged with costs hearing fee one gold mohur.

Mallik, J. — I agree, that the rule should be discharged on the ground that S. 39 had no application for the case.

V.S. *Rule discharged.*

A. I. R. 1934 Calcutta 537

MITTER AND MCNAIR, JJ.

Barisal Co-operative Central Bank, Ltd.—Defendant—Appellant.

v.

Benoy Bhusan Gupta and *another*—Plaintiffs—Respondents.

Appeal No. 245 of 1932, Decided on 18th December 1933, from original decree of 1st Class Sub-Judge, Barisal, D/- 8th August 1932.

(a) Co-operative Societies Act (2 of 1912), S. 22 Bengal Bye law under R. 17 (b) —Bye-law R. 17 (b) is in excess of S. 22 and is ultra vires.

Bye-law 17 (b) is in excess of the provisions of S. 22, proviso (1), and as such is ultra vires. Hence on the death of a member his share or interest shall be transferred to his legal representative who is qualified under the Act even though he has not been duly elected as such as provided by bye-law Rule R. 17-(b).

[P 540 C 1]

(b) Interpretation of Statutes — Rules or bye-laws in excess of or contrary to or inconsistent with provisions of statute are ultra vires.

If the rules framed under the statute, or bye-laws framed under the rule, are in excess of the provisions of the statute or are in contravention of or inconsistent with such provisions then these provisions must be regarded as ultra vires of the statute and cannot be given effect to.

[P 540 C 1]

(c) Interpretation of Statute—Statute must be construed as it is expressed and intention to be gathered from words used and not with reference to underlying intention.

Whatever the intention of legislator may be, Courts have to construe the statute according as it is expressed and the intention has to be gathered from what is contained in the clear words of the statute, and it is not permissible to construe the statute with reference to the under-lying intention while the language of the statute gives rise to a different construction.

[P 540 C 1]

(d) Evidence Act (1872), S. 115—There is no estoppel against statute.

There can be no estoppel against a statute. Hence a person who has requested to allot shares on terms of a certain bye-law is not estopped from contending subsequently that the bye-law is ultra vires. [P 540 C 2]

(e) Co-operative Societies Act (1912), Bengal By-laws, S. 30 (1)—Question whether certain person is legal representative of deceased member is not one relating to business of society.

The question as to whether the persons are representatives who are entitled to be substituted in place of a deceased member is not question which relates to the business of the Society and is not a matter which should be referred to the Registrar. *AIR* 1932 *Cal* 317, *Rel on.*

[P 541 C 1]

Brojolal Chakraburty and *Surendra Nath Das Gupta*—for Appellant.

Basak, Promode Kishore Ray Amulya Ch. Sen and *Bhupendra Nath Gupta*—for Respondents.

Mitter, J.—This is an appeal on behalf of the Barisal Co-operative Central Bank Limited, the defendant in the suit brought by the plaintiffs who seek for substitution of their names as members and holders of one hundred preference shares in the register of the defendant society in place of their deceased brother on declaration of their rights to be so substituted. The Subordinate Judge has decreed the suit of the plaintiffs and hence the present appeal by the defendant society.

It is not necessary to re-state the facts as they have been stated with sufficient fullness in the judgment of the learned Subordinate Judge. Reference must however be made to the salient ones on which the questions of law, which are in controversy in the present appeal, really turn. It appears that some time in July 1913 an application was made by Mr. N. Gupta who was a well known barrister of this Court for 40 perference shares in the defendant bank on the terms of the Bye-laws of the said bank. The application is printed at page 1, part. 2, of the paper book. In September 1916 the nomination paper was filed by Mr. Gupta by which he nominated his brothers Benoy Bhusan Gupta and Indu Bhusan Gupta who are plaintiffs respondents to the present appeal as the persons to whom shall be transferred the property of the nominator in the society with reference to the loans, shares, or deposits on his death. Mr. Gupta died on 27th February 1930. He died leaving behind him a will appointing his two brothers as executors. Probate of the said will was granted to his brothers the plaintiffs-respondents, by this Court on 3rd April 1930: Vide p. 31, part 2 of the paper book. On 28th May the plaintiffs-respondents wrote to the Secretary of the defendant bank requesting him to substitute their names as executors in the register of the company in place of Mr. Gupta.

On 1st June 1930 there was a resolution of the working committee of the appellant bank on the above application by which the bank authorities refused the application for substitution but asked the plaintiffs-respondents to take back the paid up share, money and the dividend, if any, as executors. On 23rd June 1933 the plaintiffs again wrote to the Secretary of the bank for re-consideration of the matter of substitution: but on 24th August 1930 when the working committee met to consider the said application for reconsideration in addition to other applications for substitution from different persons they refused to re-consider them, as in their opinion it was in the best interest of the co-operative movement that on the death of a particular member his share should be paid up; and they further repeated their request to the plaintiffs to take back their share-money. On 25th August 1930 the above resolution of the Working Committee was forwarded to the plaintiffs-respondents. On 26th August the plaintiffs-respondents wrote again to the secretary of the bank a letter in which they characterised the resolution as ultra vires and they refused to accept the decision of the working committee and further asked for a reconsideration of their case. On 13th September 1930 the bank secretary wrote to the respondents and demanded reasons on which the reconsideration of

their claim might be based. On 17th September 1930 the plaintiffs-respondents wrote back to the Secretary in reply and they gave certain reasons as to why the previous decisions of the bank should be re-considered. On 29th October 1930 there was a letter from Mr. Donovan informing the plaintiffs that he had enquired about their case and intimating further that the matter would be referred to the Registrar of Co-operative Societies and possibly to Government for orders. On receipt of this letter the plaintiffs by their letter Ex. E which is to be found at p. 42, part 2 of the paper book, wrote to the Registrar that they understood that the matter had been referred to him for his consideration and final decision and that they had placed for his consideration a large number of grounds in support of their claim to be substituted in place of their deceased brother. After a consideration of the same it appears that the registrar came to a conclusion adverse to the present plaintiffs by an order which is dated 28th February 1931. Subsequent to that the plaintiffs filed the present suit on 7th March 1931 basing their cause of action on the fact of the society's refusing to substitute the plaintiffs in place of the said Mr. Nalini Bhusan Gupta by the proceedings of 1st June 1930. The Subordinate Judge after taking the evidence on both sides has given judgment for the plaintiffs. This decision has been impeached on behalf of the defendant on several grounds.

One of the reasons which have been given by the Subordinate Judge was that a certain rule or a certain bye-law is in contravention of the provisions of S. 22, Act 2 of 1912. The question in controversy in the appeal therefore turns on a consideration of the provisions of S. 22 read with the bye-laws which were in force at the time when Mr. Gupta took his preference shares in the defendant bank. It is contended before us on behalf of the appellant bank that the Subordinate Judge was clearly in error in coming to the conclusion that the bye-law No. 17 (b) is in contravention of S. 22 of the Act. It becomes necessary therefore to consider the provisions of S. 22 (1) which run as follows:

"On the death of a member a registered society may transfer the share or interest of the deceased member to the person nominated in accordance with the rules made in this behalf, or, if there is no person so nominated, to such person as may appear to the Committee"

to be the heir or legal representative of the deceased member, or pay to:

"such nominee, heir or legal representative, as the case may be, a sum representing the value of such member's share or interest, as ascertained in accordance with the rules or bye-laws."

Proviso (ii), S. 22 is material as it affects the case of a society with limited liability and the present bank is a society with a limited liability. Proviso (ii) runs in these words:

"In the case of a society with limited liability, the society shall transfer the share or interest of the deceased member to such nominee, heir or legal representative as the case may be, being qualified in accordance with the rules and bye-laws for membership of the society, or on his application within one month of the death of the deceased member to any person specified in the application who is so qualified."

The Subordinate Judge has referred to bye-law No. 17 of the society which is printed on the paper book and is to be found at pp. 55 to 60, part 2. Bye-law 17 (b) runs as follows:

"In the case of the death of a preference shareholder, his shares may be transferred to his heir or nominee if he or she is eligible for membership and is duly elected as such. . . ."

It is not necessary to quote the other part. Under S. 22, Co-operative Societies Act, on the death of member, it appears to us that the share or interest of the deceased member shall be transferred to his nominee or to his legal representative who may be qualified in accordance with the rules or bye-laws of the society. The qualifications of the members of the society are given in S. 6 of the Bye-laws of the Society. S. 6 runs as follows:

"The following are eligible for membership of the Association: (a) Persons or individuals above the age of 18 years residing or holding property in the District of Backergunj; (b) Co-operative Societies duly registered under the Co-operative Societies Act situated within the District of Backergunj."

We are concerned with Cl. (a), Bye-law 6. It is admitted that the plaintiffs are persons or individuals above the age of 18 years and reside in the District of Backergunj. These two persons fulfil the rapondents of eligibility or qualification for the membership of the society as is contemplated by R. 6 of the Bye-law. R. 17 (b) is as follows:

"In the case of the death of a preference share-holder his shares may be transferred to his heir or nominee if he or she is eligible for membership and is duly elected as such."

These words "and is duly elected as such" do not occur in the statute and it has been rightly contended on behalf of the respondents and that is the view which has been taken by the learned Subordinate Judge in that Bye-law 17 (b) is really in excess of the provisions of S. 22, Proviso (ii), Co-operative Societies Act. It is a well recognized principle of interpretation of statutes that if the rules framed under the statute, or bye-laws framed under the rule, are in excess of the provisions of the statute or are in contravention of or inconsistent with such provisions then these provisions must be regarded as ultra vires of the statute and cannot be given effect to. Mr. Chakraburty who appeared for the appellant has strenuously contended that the qualifications of the members are contained not only in S. 6 of the Bye-laws but also in S. 7. S. 7 states among other things the qualifications for being Members of the Association and in Cl. (a) of the said section it is enacted that persons or individuals qualified in accordance with R. 6, who have joined in the application for registration, or who may hereafter be elected according to the rules, shall be Members of the Association. It is difficult to accede to the contention of the appellant for ths qualifications of the members are contained in S. 6; and if it were the intention of the legislators that in order to be qualified to get the interest of the share of the death of a deceased member persons should also be elected as members, there was nothing to prevent the legislature from saying so.

There is a lack of such words in the statute. It has been further contended that the whole scheme of the Co-operative Societies Act is that on the death of a preference share-holder the share may be transferred to the other share-holders of the society to create a sort of federation of society. Whatever the intention of the legislator may be we have to construe the statute according as it is expressed and the intention has to be gathered from what is contained in the clear words of the statute and it is not permissible to construe the statute with reference to the under lying intention while the language of the statute gives rise to a different construction. In this view we are of opinion that the contention of the appellant on this ground must fail.

It may further be added that if the intention of the legislator was that the transfer of shares of a deceased member would be to a person who had actually been elected as a member, there was nothing to prevent the Bye-laws being so framed and in the section which deals with the eligibility of the members of the Association it might have been stated that the qualifications for such eligibility would be that he must have joined in the application for registration that he might be elected a member according to the rules. Even then the Bye-laws have not been so framed. It is next contended with regard to the application that having regard to the application, which was made by Mr. Nalini Bhusan Gupta when he made this application for preference share and which is to be found at p. 1, part 2 of the paper book wherein it was distinctly stated that he was requesting the bank to allot 40 preference shares of Rs. 50 each on the terms of the Bye-laws of the Bank, his representatives are now estopped from contending that the rules or the Bye-laws are ultra vires of the statute. It is well established that there can be no estoppel against the statute, and the same principle must be applied to the present case. Mr. Chakraburty has sought to differentiate this case on the footing that it was really a case of contract, that this contract was entered into with the society which is a creature of the statute and that any rule or Bye-law which was in excess of the statute must be ultra vires of the statute and would not certainly bind a person with the Association which is a creature of the statute. This contention must also fail.

The next contention which has been raised is that the question as to whether the persons are representatives who are entitled to be substituted in place of the late Mr. Nalini Bhusan Gupta is a question which relates to the business of the society and consequently the decision of the registrar to whom a reference was made in this case must be taken to be final; and reference must be made in this connexion to the rules

and Bye-laws in particular to Bye-law No. 30 and Bye-law No. 57 and to R. 22, Cl. (1) of the Rules of 1912. The Subordinate Judge however has come to the conclusion that the question as to whether these persons as legal representatives of Mr. N. Gupta are entitled to have share in the bank and to be registered as share-holders in the bank in place of the late Mr. N. Gupta is a question which does not relate to the business of the company. The duties of the Board of Directors are mentioned in S. 30 of the Bye-laws. It has been sought on behalf of the appellant to bring this case within S. 30 (1) and (9) of the Bye-laws. Cl. (1) refers to the Board's duties to deal with application for membership and to allot shares. Cl. (9) refers to the Board's duties to transact all other business incidental to the management of the Association. So far as Cl. (1) is concerned we are clearly of opinion that this application was not an application for membership and for allotment of shares. Nor are we satisfied that this application relates to any other business incidental to the management to the Association. As has been pointed out recently in a judgment of this Court by Sir George Claus Rankin, C. J., with reference to this Act :

" the terms of the Indian Act and of the Bengal Rule thereunder are certainly somewhat different from the enactments considered in these cases."

The learned Chief Justice continued and remarked this :

" But I cannot regard a question whether the plaintiff is or is not a share-holder, whether the Society's new constitution is valid or invalid, whether it is in effect of the " mixed " or " pure " type as a mere dispute between members or between a member and an officer touching the business of the Society : Vide the case of *Ramendra Nath* v. *Balurghat Central Co-operative Bank Ltd.* (1)."

We are in entire agreement with this view and we are of opinion that this is not a matter which should have been referred to the registrar. It was next contended that under S. 57 of the Bye-laws any dispute which cannot be decided by the General Meeting or by arbitration shall be referred to the registrar, whose decision shall be final. In the first place it has not been shown to us that this was a dispute which was not decided by the General Meeting or by the arbitrators. Nothing has been placed before us which can show that the matter ever came before the General Meeting and that the members of the General Meeting said that they could not decide it. On the other hand from the proceedings of the Annual General Meeting which was held about three months after the institution of the suit it would appear that they rather confirmed the proceedings of the Working Committee at an earlier date. The Working Committee dealt with this question on 1st June 1930 : see p. 19, part 2 of the paper book, and it was confirmed by the Board of Directors later on : see p. 28 of the same part of the paper book. Then a reference was made from the Secretary of the Bank to the Registrar of the Co-operative Societies of Bengal on 8th November 1930: see p. 40 of the same part of the paper book, and the general meeting was held as has been pointed out, on 21st July 1931, nearly three months after the institution of the suit when they confirmed the proceedings in substance of 1st June 1930. A question has been raised on behalf of the respondents as to the irregularity or otherwise of the reference. It is unnecessary to deal with that question in the view that we have taken of the matter. The allocation of the shares to the nominee or legal representatives of the deceased is not a business within the meaning of the Bye-laws or rules of the Society. All the grounds in this appeal having failed the appeal is dismissed with costs.

McNair, J.—I agree.

K.S. *Appeal dismissed.*

1. A I R 1932 Cal 317=139 I C 506=59 Cal 1165.

A. I. R. 1934 Calcutta 541

LORT-WILLIAMS AND M. C. GHOSE, JJ.

Indra Bhusan (Roy) Sardar—Applt.

v.

Ram Kissen Bindhani and *others*—Respondents.

Appeal No. 6 of 1933, Decided on 12th February 1934.

Civil P. C. (1908), O. 21, R. 97—Order passed in dispute between auction-purchaser decree-holder and party to the suit—Such order is appealable by virtue of its coming under Civil P. C. (1908), S. 47.

There is no provision of appeal in the Code on an order passed under O. 21, R. 97. But if an order is passed under that rule in a dispute between the auction-purchaser who is the decree-holder himself and a person who was a

party to the suit, such an order falls under the provisions of S. 47 and is therefore appealable. [P 542 C 2]

Bankim Chandra Banerjee—for Appellant.

Rupendra Kumar Mitter and *Kshetra Mohan Chatterjee*—for Respondents.

M. C. Ghose, J.—This is an appeal by the opposite party No. 1 in an application by the decree-holders in a Title Execution Case under O. 21, R. 97, Civil P. C. The decree was obtained against Kali Pada Roy Sardar who had borrowed goods from the decree-holders upon leaving in deposit the title-deed of a shop, house and land. As the deed appeared to be in the name of Kali Pada's wife's brother, Surendra, the said Surendra was impleaded, but he did not appear and defend the suit. Kali Pada's son Indra Bhusan, the present appellant, was also impleaded in the suit. He filed a written statement disclaiming any interest in the shop. In the result, the suit against him was dismissed and the suit was decreed against Kali Pada who however did not pay the decretal sum. Then the shop and the land on which it stood, were sold in execution of the decree. Thereupon the judgment-debtor Kali Pada vainly applied to set aside the sale. After he had failed, his son, the present appellant, opposed the decree-holders. Thereupon the decree-holders filed the present application.

The learned Subordinate Judge has found, on the evidence of the two sides, that though the title-deed of the land was in the name of Kali Pada's wife's brother Surendra and the said Surendra had afterwards purported to execute a deed of gift transferring his rights to his nephew, the present appellant, in fact the property belonged to Kali Pada who prepared the two benami deeds for the purpose of defrauding the creditors, if and when occasion arose, for the same. The trial Court found that the appellant and the opposite party No. 2 offered resistance to the delivery of possession at the instigation of the judgment-debtor. The trial Court, accordingly, ordered that the decree-holders do get possession of the property. In this appeal, a preliminary objection is taken by the learned advocate for the respondents that as this order having been made under O. 21, R. 97, there is no appeal allowed by the Code. It is conceded by the appellant that the Code does not directly provide an appeal from an order passed under R. 97, O. 21. But in this case the auction-purchaser was not a third person but the decree-holder himself, and the opposite party Indra Bhusan was a party to the suit as he had been impleaded as a defendant and the suit against him had been dismissed. Therefore the dispute between them comes under the provisions of S. 47 of the Code, and as all orders passed under that section operate as decrees, there is an appeal in this case. In support of this view, the Full Bench case of *Kailash Chandra* v. *Gopal Chandra* (1) has been cited. This ruling is binding on us. We must therefore hold that an appeal lies in this case.

Upon the facts it has been urged by the learned advocate for the appellant that the Court below was wrong to find that the two deeds in this case were benami, and that upon the evidence it should be held that the property was purchased by Surendra and he really and truly made a gift of it afterwards to the present appellant. Upon hearing the learned advocates upon consideration of all the facts and circumstances of this case, we are of opinion that the trial Court was right to hold that both the documents were benami, and that they were fictitious and colourable deeds prepared simply for the purpose of defrauding creditors, if occasion arose. It is next urged that even if the opposite party No. 1 be said to have acted at the instigation of his father, the judgment-debtor Kali Pada, the Court committed an error in awarding delivery of possession to the decree-holders against the opposite party No. 2 whom the decree-holders stated in their petition to be a tenant-at-will under the judgment-debtor. It is urged that the opposite party No. 2 should be kept as a tenant under the decree-holders. As to this, it is pointed out by the other side that the opposite party No. 2 has not filed an appeal to this Court, and therefore this point does not arise. In the result this appeal is dismissed with costs, hearing-fee three gold mohurs.

Lort-Williams, J.—I agree.

v.s. *Appeal dismissed.*

1. A I R 1926 Cal 798=95 I C 494=53 Cal 781 (F B).

A. I. R. 1934 Calcutta 543

BUCKLAND AND COSTELLO, JJ.

Brijlal Ganeriwalla—Plaintiffs—Appellants.

v.

Gireendrashekhar Basu—Defendant—Respondent.

Appln. No. 1523 of 1932, Decided on 11th December 1933.

Limitation Act (1908), S. 12 (2)—Delay in obtaining copy of decree for which delay appellant is responsible cannot be excluded.

Any delay in obtaining a copy of the decree or order for which delay the appellant is responsible is not to be excluded in computing the time requisite for obtaining such a copy. Thus, where a draft decree was settled and passed but could not be signed and filed because of the negligence of the appellant to rectify an error in the application for amendment of the plaint, under the Court's order, the time occupied thereafter in completing the order for amendment is not time requisite for obtaining a copy of the decree. The delay thus caused cannot be excluded in computing the period of limitation. [P 545 C 1]

S. N. Banerjee and *N. C. Chatterjee*—for Appellants.

N. N. Sircar and *R. C. Ghose*—for Respondent.

Buckland, J.—This is an application made on behalf of the plaintiffs-appellants, for an order that the memorandum of appeal, which has been tendered and rejected on the ground that it is out of time, be filed, and, in the alternative, that, if necessary, the time for filing the memorandum of appeal be extended. The time, within which an appeal has to be filed from this Court in its Ordinary Original Civil Jurisdiction, is 20 days from the date of the judgment or order, appealed against, as is well-known, and the question which arises in this case is whether the appellants are within time, having regard to the terms of S. 12 (2), Lim. Act.

The circumstances and relevant dates are as follows: Shortly before the suit came on for hearing and on 15th June 1933, an order for amendment of the plaint was made and, on the same day, the requisition to have the order completed was filed. On 16th June, that order was settled and passed. Nothing remained to be done but to make and verify the amendments and have the order signed, sealed and filed. Hariprasad Ganeriwalla, one of the plaintiffs, attended at the office of the Registrar for the purpose of verifying the amended plaint. He was not however allowed so to do, because he proposed to sign the verification at the Court house, whereas the verification of the amendment stated that the verification had been signed at No. 9, Old Post Office Street. This has been referred to in affidavits filed as "a defect in the petition," though it is common ground that the defect was as I have stated. But for this I have little doubt that the completion of the order for amendment of the plaint would have gone through at once, and the question which now arises for determination would not have arisen. On 19th June, the suit came on for hearing, and, on 20th June, a decree was made, the decree against which it is desired to appeal. Between 22nd June and 31st July, all proper steps to have the decree drawn up and filed appear to have been taken and nothing turns upon anything that happened or that was omitted to be done between those dates.

On 31st July, the draft decree was settled and passed and it could, in the normal course of events, have been signed and filed within a day or two. A difficulty however arose, because the plaint had not been amended in accordance with the Court's order of 15th June and, until that had been done, the decree could not be completed. On 7th August, Mr. A. N. Das, the solicitor for the respondent Gireendrashekar Basu, wrote to the Registrar a letter, in which he set out the facts and the circumstances up to that time, complaining that he was informed by the decree department that, unless the order of 15th June had been filed and the cause title and register had been amended, the decree of 20th June could not be filed and no office copy thereof could be issued. He, being the solicitor for the successful party, as he wrote, required office copies of the order and the decree, for the purpose of taxing his bill of costs to be realized from the plaintiffs, and, accordingly, he requested the Registrar to take whatever steps might be necessary to fill the order and the decree.

Thereupon, the Registrar took the matter in hand and, on 8th August, issued a notice to the solicitors for the plaintiffs, informing them that the order for amendment of the plaint made on 15th June could not be completed, because of the defect in the am-

ended verification clause in the exhibit to the petition filed on that date, that is to say, the petition praying that the amendment should be made, and exhibiting, I conceive, a fair copy of the plaint in the form in which it was desired to amend. The Registrar, accordingly, requested the solicitors to rectify the defect by the 16th of that month, failing which he proposed to place the matter before the Acting Chief Justice for directions. The Registrar however drew the attention of Ameer Ali, J., to the matter and he gave the necessary directions. The defect was remedied and, on 18th August 1933, the order for amendment was signed. It was sealed on the following day and filed on 22nd August. This obstacle being out of the way, the decree was signed on 25th August and filed on 28th August. On the following day, the plaintiffs supplied the stamps necessary to obtain an office copy of the decree, which was ready for delivery on 4th September, and the memorandum of appeal was tendered on 13th November. The Court was closed for the vacation from 1st September until 11th November. The 12th was a Sunday and the memorandum therefore was tendered on the first day on which that could be done after the reopening of the Court.

It is argued on behalf of the appellants that the time between 31st July and 22nd August should be excluded as that period was occupied in relation to the order of 15th June. On behalf of the respondents it is submitted that, had the appellants taken all necessary steps immediately their attention was drawn to the error in the verification of the amended plaint, the order for amendment would have been settled, passed and filed with ordinary expedition and, in any circumstances, before the decree was signed and filed, but, instead of dealing with the two matters simultaneously, the appellants delayed the completion of the decree by neglecting to take the steps necessary to have the order for amendment completed, by reason of which they should not be allowed to exclude from the time requisite for obtaining a copy of the decree the time occupied in drawing and completing the order for amendment in computing the period of limitation. I do not think anything turns upon any question of procedure in the office. Mr. Banerjee was disposed to argue that the actual amendment of the plaint, which is done by an officer of the Court and initialed or signed by the Registrar and has again to be verified, was a different matter to the completion of the order under which that is done, but it appears that the completion of the order itself and giving effect to it in the manner stated are all performed simultaneously.

It does not seem to me that it is open to Mr. Banerjee to suggest, and it was no more than a suggestion, that, whether or not the verification was corrected, the order should have been drawn up and that, in those circumstances, the delay in drawing up the order is to be charged to the office of the Court and not to his client. Even if such a distinction could be made, the fact remains that it was due to the plaintiffs' delaying in remedying a defect in a document, for which they were responsible, that the decree was not completed. The Deputy Registrar, when the memorandum was first tendered, dealt with the matter. He pointed out in his order of 18th November that

> "though the draft of the order for amendment of 15th June last was settled and passed the next day it could not be completed till 22nd August last because of certain defects in the petition for amendment,"

which, as I have explained, refers to the error in the form of verification,

> "which was rectified only on 17th August last with the sanction of the Hon'ble Mr. Justice Ameer Ali."

These are the facts and circumstances of this matter. It is contended that applying S. 12 (2), Lim. Act, which provides that

> "in computing the period of limitation prescribed for an appeal, ... the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree . . . . appealed from shall be excluded,

the period between 31st July and 22nd August was not time requisite for obtaining a copy of the decree appealed from. The matter of the exclusion of time requisite for obtaining a copy of decree appealed from has been considered by this Court on more than one occasion, but the leading authority on the point, which has been followed during the last 11 years, is the well-known case of *Pramatha Nath Roy* v. *Lee* (1).

1. AIR 1922 P C 352=68 I C 900=49 I A 307 =49 Cal 999 (P C).

In delivering the judgment of the Board, Lord Buckmaster observed:

"No period can be regarded as requisite under the Act, which need not have elapsed if the appellant had taken reasonable and proper steps to obtain a copy of the decree or order."

It is now established that it is not sufficient to say that there is no decree or order in existence of which a copy can be obtained. The principle upon which the judgments have proceeded is that any delay in obtaining a copy of the decree or order for which delay the appellant is responsible is not to be excluded in computing the time requisite for obtaining such a copy. In my experience, cases which have come before the Court where such delay has taken place have been cases where the delay has been due to neglect in filing an application for a copy or in filing the decree or order complained of or in supplying the requisite stamps, something relating to the decree or order itself. The circumstances before us on this appeal are novel to me, but, nevertheless, if the principles laid down by their Lordships of the Privy Council in the case referred to are applied, the appellants, in my judgment, are within the rule there formulated.

No doubt, they applied at once for a copy of the decree. They did so on 22nd June. Once the decree was signed and stamps for the copy had been furnished they would have received a copy. That, in the ordinary course, would have been shortly after 31st July. But that could not then be done, because there was then no decree in existence, of which a copy could be supplied to them, nor did any decree come into existence until 25th August. Had they taken steps promptly to have the error, which was found to exist, rectified at once, upon it being brought to their notice, there can be no question that the order for amendment of the plaint would have been completed in every respect by the time when the decree was ready to be filed, which was 31st July. Consequently, for such delay the appellants must be held responsible, and if the time from 31st July to 22nd August is excluded, there can be no question that the appellants are out of time. A suggestion was made at one time before the Registrar that, in any view, the appellants only lost 17 days, that is to say, between 31st July and 17th August, because, on 17th August, the order for amendment dated 15th June was signed. But that order was not filed until 22nd August, and it was only upon that order being filed that the decree could be signed. Actually, it would appear that the time occupied in rectifying the order for amendment was the period between 7th August and 22nd August, a matter of about a fortnight, and the appellants cannot possibly contend that, had the matter been taken in hand during the six weeks or so which elapsed between the making of the decree and the date when it was settled and passed, the order for amendment could not have been completed in time. In my judgment, the memorandum of appeal was rightly rejected and this application should be dismissed with costs, i. e., the costs of this application and any costs in relation thereto properly incurred.

Costello, J.—I am of the same opinion.

V.S. *Application dismissed.*

A. I. R. 1934 Calcutta 545

MUKERJI AND BARTLEY, JJ.

Kusha Mondal and *others*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1052 of 1933, Decided on 9th January 1934.

Criminal P. C. (1898), S. 139-A—Effect of section as amended in 1923 considered—If there is reliable evidence of denial of right, person moving Court has got to go to civil Court and not person against whom order is made.

Under the Criminal P. C., before its amendment in 1923 the question whether the claim of the person against whom an order is made is bona fide or not or in other words is a mere pretence or not, was of vital importance, but now it is no longer so. Under S. 139-A what has to be seen is whether the denial of public right by such person is supported by any reliable evidence. If it is, the Magistrate has to stay his hands until the matter of the existence of such right has been decided by a competent civil Court. Under the law as it is at present, it is the person moving for proceedings under S. 133 or some body interested in asserting such right, who has got to go to the civil Court to establish its existence. Therefore a Magistrate's order directing the person against whom the order is made to go to the civil Court is not one which can any longer be made under the law.

[P 546 C 2]

Bir Bhusan Dutt—for Petitioners.

Judgment.—We are of opinion that this Rule should be made absolute. It appears that the order which the learned

Deputy Magistrate made on 5th July 1933 was an order intended to be made under S. 139-A, sub-S. (2) of the Code. This provision of the law has been expressly referred to by the learned Magistrate in his said order. Now, what happened was that on notice being served upon the petitioners, they denied that the alleged pathway was a public one and produced some evidence in support of such denial and the learned Magistrate, referring to that evidence and also to the evidence of the party who had moved the Court for proceedings under S. 133 of the Code, came to the conclusion that it was not sufficiently established that there was a public pathway with regard to which proceedings under S. 133 of the Code were necessary. He then passed an order in the following terms :

" The witnesses of the second party stated that there was no such public path there and that the villagers of Char Khukshia use another U. B. road to the west. The alleged path was not recorded in the settlement map. In such case I consider it desirable to stay proceedings under S. 139-A (2), Criminal P. C., and refer the parties to the civil Court for the decision of the matter. Accordingly I stay proceedings until the matter of existence of any such public right is decided by the civil Court. The second party should move the civil Court for the assertion of his claim that there is no such public pathway over their lands."

The petitioners who were the second party in the proceedings did not move the civil Court within a reasonable time, and upon that the Magistrate, at the instance of the first party, took up the proceedings and began to proceed with them. The learned Magistrate in his explanation in answer to this Rule has sought to justify his action, stating thus :

"I found that the claim of the second party might not be a mere pretence and that the second party might be given a chance as enjoined under S. 139-A (2), Criminal P. C., to establish their claim in the civil Court."

The Sessions Judge has declined to interfere holding that the course adopted by the Magistrate is quite in accord with the decision of this Court in *Manipur Dey* v. *Bidhubhusan* (1) and that although that decision was under the law as it stood prior to the amendments of 1923, the law in this respect has undergone no alteration by the said amendments. We are of opinion the view taken by the Courts below is not right. The law was in fact altered by the introduction of S. 139-A of the Code and the question whether the claim of the second party is bona fide or not or in other words is a mere pretence or not, a question which under the case law prior to the amendments was of vital importance, is no longer so. What has now to be considered is very different from what was necessary to be determined then. Under S. 139-A what has to be seen is whether the denial of public right by the second party is supported by any reliable evidence. If it is, the Magistrate has to stay his hands until the matter of the existence of such right has been decided by a competent civil Court. Under the law as it is at present, it is the party moving for proceedings under S. 133 or some body interested in asserting such right, who has got to go to the civil Court to establish its existence. The Magistrate's order directing the second party to go to the civil Court is not one which can any longer be made under the law.

What we have to see therefore is whether there was reliable evidence in support of the denial. We are satisfied upon what the Magistrate himself has said that there was such evidence. In our judgment therefore the Magistrate should have stayed his hands altogether until the right of the public which was set up on behalf of the first party was established in a competent civil Court. The Rule is accordingly made absolute. All proceedings taken subsequent to the order of 5th July 1933 are set aside, and it is further ordered that the said order be regarded as one passed under S. 139-A (2) of the Code.

V.S. *Rule made absolute.*

1. (1915) 42 Cal 158=15 Cr L J 698=26 I C 146.

A. I. R. 1934 Calcutta 546

COSTELLO, J.

Ramdit Mall—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeals Nos. 821 and 822 of 1933, Decided on 19th December 1933.

(a) Factories Act (1911), Ss. 35 and 41 (h) — Employment register should contain particulars required by S. 35—Such entries must be up to date—Failure to do this brings case under S. 41 (h).

In order that the employment register can properly be said to be up to date, it is necessary

that it should contain, day by day, the names of persons employed in the factory, their hours of work and the nature of their employment. Therefore where the employment register is not kept up to date, in the sense that there was no entry at all in the register at the time the inspector visited the factory, covering a period of three days prior to such visit, the matter falls within the purview of S. 41 (h).

[P 548 C 1, 2]

(b) Factories Act (1911), S. 2 (2)—Person working in factory whether with or without wages is employee.

Under S. 2 (2) a person who works in a factory, whether for wages or not, in any of the ways enumerated in that clause, shall be deemed to be employed in that factory. [P 548 C 2]

Surajitchandra Lahiri for *Sureshchandra Talukdar*—for Appellant.

Anilchandra Ray Chaudhuri—for the Crown.

Costello, J.—These two appeals arise out of a judgment, given by the Chief Presidency Magistrate, in connexion with two cases brought against the present appellant Ramdit Mall. In those cases the appellant was charged, under S. 22 and under S. 35, Factories Act, 1911. S. 22 provides for a weekly holiday of persons employed in factories and it enacts that:

"No person shall be employed in any factory on a Sunday, unless: (a) he has had, or will have, a holiday for a whole day on one of the three days immediately preceding or succeeding the Sunday, and (b) the manager of the factory has previous to the Sunday or the substituted day, whichever is earlier, given notice to the inspector of his intention so to employ the said person and of the day which is to be substituted, and has at the same time affixed a notice to the same effect in the place mentioned in S. 36,"

that place being some conspicuous place near the main entrace of the factory. S. 35 provides:

"In every factory there shall be kept, in the prescribed form, a register of all the persons employed in such factory, of their hours of work and of the nature of their respective employment:

and in R. 69 (i), Bengal Factories Rules, 1928, it is laid down:

"In all factories, subject to the exception permitted under S. 35 of the Act, there shall be kept correctly and up to date a register of all the persons employed. The register prescribed for each factory or class of factories shall be in the form shown in the schedule annexed to these rules. In factories where children are employed, the register shall be maintained in two separate parts, viz., Part 1 to include all children. Such registers shall be called in all prescribed communications the "Employment Register."

The two charges against the appellant were dealt with by the learned Chief Presidency Magistrate in the judgment now appealed against, dated 14th October last and, as a result of the conclusion to which the learned Magistrate arrived, he convicted the appellant on both the charges and sentenced him to pay a fine of Rs. 500 or in default to undergo three months' simple imprisonment in respect of each charge, so that the appellant has to pay a total fine of Rs. 1,000 or in default to undergo a total of six months' imprisonment. It appears that the Inspector of Factories visited the premises, known as the Punjab Fine Art Press, of which the present appellant was the manager, on Sunday, 27th August 1933, at 11-30 in the morning; and, according to the evidence which he gave in support of the complaints which he made under the two sections I have mentioned, he found the whole factory, including the machinery, working. He managed to take the names of thirteen men, who were working; but others were sent away before he could take their names and the machine room was closed before he could get to it. He also stated that he had examined the employment register and found not only that it was not up to date, in that it was written only up to 24th August 1933, but also that the names of three book-binders—Pandwal, Oudhinudin and Munostim—and the names of four duftries — Hossain, Ramimaddin, Abdul Latif and Kalo Miyan—were not entered in the register at all, though the men themselves were working on the premises on that day—Sunday, 27th August. He apparently also stated that two men, named Bhattacharjya and Biswas, were found by him working on a hand-press. The defence set up was that no work was being done on that particular day, and two of the duftries were called as witnesses for the defence, that is to say, Kalo Miyan and Hossain. They admitted that they went to the factory on the Sunday in question, but they declared that it was only to deliver some work done by them at home and to receive payment. The inspector's evidence, as I have stated, was that they were actually working in the factory itself. The learned Presidency Magistrate stated his conclusion in these terms:

"It has, therefore, been conclusively established that the factory was working on a Sun-

day and that the employment register was not up to date and did not show the names of the persons employed that day."

Now, it is quite true that these are appeals in which it is open to the appellant to ask this Court to reconsider the matters of fact; but one would hesitate a long time before deciding that a Magistrate of such experience as the present learned Chief Presidency Magistrate is has gone wrong on any pure question of fact. The learned advocate for the appellant invited me to examine the evidence which was given before the learned Chief Presidency Magistrate and that I have done, and I am bound to say that, upon a scrutiny of the evidence given in the course of the two cases, it is impossible to come to any other conclusion than that the findings arrived at by the learned Chief Presidency Magistrate are amply justified; indeed, such findings were inevitable, having regard to the evidence given. Now, upon the assumption that the findings of fact arrived at by the learned Chief Presidency Magistrate are correct this Court has to see whether there is any point of law available to the appellant. The learned advocate for the appellant sought to argue at the outset that the section of the Act, which imposes penalties for violation of the provisions of the Act, namely S. 41, does not, in terms, impose any penalty for failure to enter in the register the names of the persons employed; in effect, he said that S. 41 contains no penalty for violation of S. 35 other than that laid down in S. 41 (h), which says that if the register, prescribed by S. 35, is not kept up to date, then the occupier and manager shall be liable to a fine which may extend to Rs. 500.

In the present case the employment register was not kept up to date, in the sense that there was no entry at all in the register at the time the inspector visited the factory on 27th August, covering the dates 25th, 26th and 27th August, and, therefore, the matter obviously falls within the purview of S. 41 (h). But, even if there had been some entries relating to 25th August or 26th August or 27th August, if those entries did not contain all the particulars required by S. 35, still it could not be said to be up to date. In order that the employment register can properly be said to be up to date, it is clearly necessary that it should contain, day by day, the names of the persons employed in the factory, their hours of work and the nature of their employment. It follows, therefore, that the appellant is clearly guilty of the offence dealt with by S. 35 read with S. 41 (h) of the Act. As regards the other charge, the learned Magistrate, having accepted the inspector's statement that the factory was working on the Sunday, that would in itself be sufficient to conclude the matter. The learned advocate for the appellant sought to argue that there would be no offence if certain persons happened to be doing some kind of work within the four walls of the factory on a Sunday, unless it were also shown that those persons were actually employed by the owners of the factory. In that connexion, however, it is important to bear in mind the definition given in S. 2 (2) of the Act, which provides that a person who works in a factory, whether for wages or not in any of the ways enumerated in that clause, shall be deemed to be employed in that factory. The inspector stated quite definitely that the persons, whose names he mentioned, as well as a number of other persons, were actually engaged in work in the factory on that Sunday, 27th August. In these circumstances, it must be presumed, I think, that they were actually employed in the factory, having regard to the nature of the work mentioned in the complaint, which was of the kind included in the definition given in S. 2 (2). In my opinion, therefore, the appellant was rightly convicted on both the charges.

The learned advocate for the appellant has asked me to consider the question of the sentences imposed. It has been pointed out that, although the breaches of the two sections were comparatively trivial in their nature, the learned Magistrate has thought fit to impose the maximum penalty. It is to be borne in mind, however, that legislation, such as the Factories Act, is designed for the protection of persons working in factories and to secure for them reasonable and decent conditions of labour. The employers and managers of factories must have it impressed upon them that a breach of a piece of legislation of this kind is a very serious

matter. In the present case, moreover, as the learned Chief Presidency Magistrate pointed out, the appellant had been convicted and fined Rs. 300 for similar offences as recently as June last, that is to say, only about two months before the date I am now considering. One would have thought that the imposition of a comparatively heavy fine might have had a deterrent effect upon this man Ramdit Mall, but apparently it had not. Therefore, the learned Chief Presidency Magistrate, in my opinion, quite rightly came to the conclusion that the only thing to do was to impose the maximum penalty under each of the sections. Having regard to the fact that the appellant was convicted after previous convictions for similar offences, I do not feel called upon to interfere with the sentences imposed by the Court below. These two appeals are accordingly dismissed.

V.S. *Appeals dismissed.*

A. I. R. 1934 Calcutta 549

LORT-WILLIAMS AND M. C. GHOSE, JJ.

Surath Chandra Saha — Plaintiff—Appellant.

v.

Kripanath Chowdhury and *others*—Respondents.

Appeal No. 622 of 1932, Decided on 30th January 1934.

Negotiable Instruments Act (1881), Ss. 8 and 78—Holder of promissory note selling his rights, title and interest without indorsing it—Assignee is holder and can sue in his own name.

Where a holder of a promissory note sells his right, title and interest in the note to another but without indorsing it, the assignee is within the definition of holder in S. 8. He can sue in his own name and he is entitled in his own name to possession, and to receive or recover the amount due on the hand-note from the parties thereto. The difference between transfer by assignment, and a transfer by indorsement and delivery is, that in the former case the transfer is subject to all equities, whereas in the latter it is not: *Case law referred.*

[P 549 C 2; P 550 C 1]

Gopal Chandra Dass and *Bhuban Mohun Saha*—for Appellants.

Krishna Kamal Maitra—for Respondents.

Lort-Williams, J. — The document upon which this case turns is described as a hand-note. The maker of the hand-note, Kirpa Nath Chowdhury, was the father of defendants 1, 2 and 3. The holder was Banwari Lall Shaha, the father of the pro forma defendants 5 to 8. The note was given in exchange for a loan of Rs. 325 and was payable on demand. The holder without indorsing it, sold his right, title and interest in the hand-note along with other property to the plaintiff by a registered kabala. The main point for decision was whether the plaintiff could sue the defendants and recover the amount of the hand-note. Both Courts below have dismissed the suit, on the ground that the rights arising upon such a document can be transferred only by indorsement and delivery.

The hand-note is promissory note, and a promissory note is a written acnowledgment of debt with a promise to repay. It is also a memorandum of contract, and evidence of a chose in action or actionable claim. Thus, it may be transferred by assignment, and the assignee thereby gets such title as the assignor had in the note, and, in addition the right to have the indorsement of the assignor. In India, this has always been held to include the right to sue on the assignment in his own name; cf. Gour's Law of Transfer, 6th Edn., p. 2157. The assignment transfers the legal right to the chose in action to the assignee with power to give a good discharge. It passes all legal and other remedies for the chose in action, but subject to all equities. A promissory note is also a negotiable instrument, and according to the law merchant, as codified in the English Bills of Exchange Act, 1882, and the Negotiable Instruments Act, 1881, it is transferable merely by indorsement and delivery. As such, it is clothed with certain incidents intended to facilitate the business of merchants.

Owing to some confusion of thought, it has been suggested that the Negotiable Instruments Act in some way has affected the transferability of such a document by assignment as a chose in action. This contention was shown to be fallacious in *Muthar Sahib* v. *Kadir Sahib* (1); *Binode Kishore* v. *Asutosh Mukhapadhya* (2) and *Akhoy Kumar* v. *Haridas Bysack* (3). But in the later cases there occur observations in the

1. (1905) 28 Mad 544=15 M L J 384.
2. (1912) 14 I C 720.
3. AIR 1914 Cal 566=22 I C 500.

nature of obiter dicta which seem to suggest the contrary view with the result that in *Broja Lal* v. *Budh Nath Pyrialal & Co.* (4); *Har Kishore* v. *Guru Mia* (5); *Reoti Lal* v. *Manna Kunwar* (6); *Subha Narayan Vathiyar* v. *Ramaswami Aiyar* (7); *Sewa Ram* v. *Hoti Lal* (8) and *Sarjug Singh* v. *Deosaran Singh*, *A. I. R.* 1930 *Pat.* 313, confusion has arisen again from time to time.

These decisions are however irrelevant to the issue raised in the present case, because in them there were no assignments, and they turned upon the question whether a person whose name did not appear on a negotiable instrument had the right to sue upon it in the absence of an assignment. The wording of Ss, 8 and 78, Negotiable Instruments Act, seems to have been the cause of the confusion to which I have referred. S. 8 provides:

"The 'holder' of a promissory note, bill of exchange or cheque means any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto."

Section 78 provides:

"Subject to the provisions of S. 82, Cl. (c) payment of the amount due on a promissory note, bill of exchange or cheque must in order to discharge the maker or acceptor, be made to the holder of the instrument."

It has been suggested that the effect of S. 78 is to prevent an assignee, such as the plaintiff in the present case, from suing because he does not come within the definition of "holder" in S. 8, and therefore cannot discharge the maker or acceptor, as contemplated in S. 78. This argument seems to be erroneous. The plaintiff is within the definition of "holder" in S. 8. He can sue in his own name, and he is entitled in his own name to possession, and to receive or recover the amount due on the hand-note from the parties thereto.

The difference between transfer by assignment, and a transfer by indorsement and delivery is, that in the former case the transfer is subject to all equities, whereas in the latter it is not. The scope of the rule has been explained by Willis, J., in *Whittler* v. *Forster* (9). In the present case, no equities have arisen and the plaintiff is entitled to a decree. The appeal is allowed with costs here and below. The judgments of both the lower Courts are set aside. Defendants 1 to 4 must pay into the Court of first instance the amount claimed to the extent of any assets inherited by them from Kripa Nath Choudhury, and defendants 5 to 8 must indorse the note in favour of the plaintiff. When that has been done, the amount thus paid into Court will be paid out to the plaintiff. In case any difficulty arises in carrying out this decree there will be liberty to apply.

M. C. Ghose, J.—I agree.

K.S. *Appeal allowed.*

4. AIR 1928 Cal 148=105 I C 549=55 Cal 551.
5. AIR 1931 Cal 387=131 I C 570=58 Cal 752.
6. AIR 1922 All 70=65 I C 785=44 All 290.
7. (1907) 30 Mad 88=16 M L J 508 (F B).
8. AIR 1931 All 108=130 I C 698=53 All 5.
9. (1863) 14 C B (N S) 248=32 L J C P 161=11 W R 648=8 L T 317.

A. I. R. 1934 Calcutta 550

COSTELLO, J.

Mukundalal Ray—Petitioners.

v.

Sudarshan Mukherji—Opposite Party.

Civil Revn. Nos. 1134 and 1135 of 1933, Decided on 22nd December 1933.

Bengal Tenancy Act (1885), Ss. 26-F (1)—Two ways of serving notice—Ordinarily by registered post—If special acknowledgment cannot be obtained, it can be effected by being displayed in Collector's office for one month.

There are only two ways of effecting service of notices for the purpose of S. 26-F, viz., serving the notice on the landlord by means of registered post and the displaying of the notice in the Collector's office for the period of one month. Normally, notices will be effected by registered post. And if the special acknowledgment referred to in R. 27 (1) of the rules framed under Ss. 39 and 189 cannot be obtained whether by refusal or by reason of the address being wrong, service can then take place by the notice being displayed in the office of the Collector for a period of one month. [P 551 C 2; P 552 C 1]

Sharatchandra Basak, Jahnabicharan Das Gupta and *Guruprasanna Sen Gupta* —for Petitioner.

Rajendra Chandra Guha, Ambiyakumar Som and *Praphullachandra Nag*—for Opposite Party.

Order.—These two rules are directed against an order made by the Munsif of Munshiganj, dated 30th June 1933, whereby he rejected two applications made by the present petitioner, Mukundalal Ray of Nagarnandi, under S. 26-F, Ben. Ten. Act (8 of 1885, as amended by Act 4 passed by the Bengal Legislative Council in 1928). The applications were opposed by the opposite party in the present proceedings, Sudarshan

Mukherji (who was the purchaser of the holdings to which the applications refer), on the ground that the applications were made beyond the limit of time provided for by the terms of S. 26-F. There was also a subsidiary ground that the applicant could have no relief without paying off the mortgage debts, which the purchaser had paid off after he had purchased the holdings in question. The applications were filed on 1st December 1932. One of the kabalas effecting the transfer of one of the holdings was dated 9th April 1932. The other kabala was not filed in the proceedings before the Munsif. A notice of the transfer of the holdings was affixed on the notice board of the appropriate Collectorate on 30th May 1932. It was kept on the notice-board for a period of one month and then on 30th June 1932, an order was recorded to the effect that notice had been served by being displayed on the notice-board. The learned Munsif came to the conclusion that the applicant "should have come within sixty days from 30th June 1932" and he accordingly, held that, as the applications were only filed on 1st December 1932, the applicant, as the landlord of the transferred holdings, had not "come" within the prescribed period from the date of the service on the notice-board. The applicant's case was that by reason of the notices having been sent to a wrong address he had never received them. The learned Munsif took the view that the law prescribes service by affixation on the notice-board under certain conditions and that such service was a proper service.

Section 26-F (1) so far as relevant for our purpose, says that:

"The immediate landlord of a holding or the transferred portion or share may, within two months of service of notice issued under S. 26-C or S. 26-E, apply to the Court that the holding or portion or share thereof shall be transferred to himself."

It is necessary therefore to ascertain what is meant by service of notice for the purpose of this section. The manner of service is laid down in Ch. 5 of the Bengal Government Rules, which were made in the exercise of powers conferred by sub-S. (7) of S. 39 and S. 189 of the Act and were published on 28th March 1929. R. 25 (1) runs as follows:

"Notices under Ss. 12, 13, 15, 18 (1) (a), 26-C, 26-E, 26-F, 26-H and 48-H of the Act shall contain, so for as may be possible, the particulars given in forms Nos. 2 to 7 appended to these Rules."

And the relevant form, in a matter of the kind under consideration, is form No. 3Rule No. 27 (1) says:

"In each case, under R. 25, notices, other than those to be served on the Collector, shall be forwarded by post, registered under Ch. 6 of Indian Post Office Act, 1898. (6 of 1898), and the fee required for a special acknowledgment shall be paid."

The procedure as regards the drawing up of the notice and the direction as to how it is to be served on the landlord, is contained in S. 26-C, sub-S. (3) of the Act, which says that:

"When any such instrument (that is an instrument of transfer) is admitted to registration, the registering officer shall send to the Collector the landlord's transfer fee, the prescribed cost of transmission thereof and the notice of the transfer in the prescribed form, and the Collector shall cause the landlord's fee to be transmitted to and the notice to be served on the landlord named in the notice or his common agent, if any, in the prescribed manner."

Now the prescribed manner is as laid down in R. 27 (1): so that normally notices will be effected by registered post. R. 27 (2) seems to be intended to cover all cases where the sending of notices by registered post has not the effect of bringing to the knowledge of the landlord the fact that a transfer has taken place. R. 27 (2) runs as follows:

"If an acknowledgment for a notice, sent by registered post, cannot be obtained, the notice shall be served by affixing a copy in the office of the Collector, for a period of one month, and such notice shall thereupon be deemed to have been duly served."

It follows therefore that if the special acknowledgment referred to in R. 27 (1) cannot be obtained, service can then take place by the notice being displayed in the office of the Collector for a period of one month. Dr. Basak, on behalf of the present petitioner, has argued that that sub-rule cannot apply in a case, where no acknowledgment has been obtained by reason of the fact that the notice was sent to a wrong address. I am unable however to hold that there is any real distinction between the failure to obtain an acknowledgment because the post office has been unable to deliver the registered cover by reason of it having been wrongly addressed and the case where there has been a failure to obtain an acknowledgment by reason of the addressee landlord refusing to give

any such acknowledgment. As the matter stands at present, it would seem that there are only two ways of effecting service of notices for the purpose of S. 26-F, viz., serving the notice on the landlord by means of registered post and the displaying of the notice in the Collector's office for a period of one month. Dr. Basak however argues that R. 27 (2) would not apply where the prescribed form, that is to say, form No. 3 has not been properly or accurately filled in in in the first instance. It is to be observed that in that form spaces are provided for the names of the landlords and their postal addresses and in the schedule to the form there is a column, in which is to be entered the khatyian number of the landlord of the tenancy transferred. There is nothing to show in the present case, how it came about that the notice was sent to a wrong address. But, even if it could have been shown that the particulars given in form No. 3 were not accurate, I think it would still have been necessary to hold that the matter is covered by the provisions of R. 27 (2).

That being so, it follows that the landlord had lost his right of pre-emption on the expiry of two months from the end of the month during which the notice had been displayed in the Collectorate. In the present instance therefore in my opinion I am bound to hold that the learned Munsif was right in coming to the conclusion that the applications made to him were too late. As regards the other ground, on which the applications were based, the learned Munsif said as follows:

" As regards the amount paid for redemption of the mortgage it must be included in the consideration of the kabala. Of course the applicants must get their proportionate landlord's fees on the amount."

It appears that, in the applications then before the learned Munsif, there was no claim for the payment of the landlord's fees. The matter therefore really did not arise. Therefore it is clear that nothing that happened in the proceedings before the learned Munsif will operate to prevent the landlord from obtaining such fees as he is entitled to under the provision of Ss. 26-C and 26-D. The rules must be discharged with costs, hearing fee one gold mohur in each case.

K.S. *Rules discharged.*

A. I. R. 1934 Calcutta 552

PATTERSON AND MCNAIR, JJ.

Official Assignee, Calcutta — Defendant—Appellant.

v.

Jagabandhu Mullick and *others*—Plaintiffs—Respondents.

Appeal No. 1348 of 1931, Decided on 13th February 1934, from appellate decree of Sub-Judge, Burdwan, D/- 27th January 1931.

Civil P. C. (1908), S. 11—First mortgagee made pro forma defendant by subsequent mortgagee in his suit on mortgage — No allegation in plaint derogatory to first mortgagee's title by purchase in execution of his decree—First mortgagee not contesting suit —Later on declaratory suit brought by first mortgagee—This suit is not barred by constructive resjudicata — Doctrine of lis pendens does not prevail over rule of res judicata — Transter of Property Act (1882), S. 52.

A first mortgagee instituted a mortgage suit against the mortgagor and having obtained a decree purchased the property in suit in execution of his decree. Meanwhile, that is after the first mortgagee had instituted his mortgage suit, but before he had obtained his decree the mortgagor mortgaged the property to the second mortgagee who also instituted a mortgage suit against the mortgagor making the first mortgagee a pro forma defendant; but nothing was alleged in the plaint in derogation of first mortgagee's priority. That suit was decreed and the 2nd mortgagee purchased the property in suit in execution of his decree and he having obtained possession in due course, dispossessed the first mortgagee who instituted the present suit for declaration of his title and recovery of possession.

Held : (1) that the doctrine of lis pendens could not prevail over the rule of res judicata, in case the latter rule applied; [P 553 C 2]

(2) that the first mortgagee's paramount title was outside the scope of the controversy in the 2nd mortgagee's suit therefore the rule of constructive res judicata did not apply to the present suit: *AIR* 1920 *P C* 81 *Foll.* [P 554 C 1]

Bijan Kumar Mukherji and *Apurbadhone Mukherji*—for Appellant.

Atul Chandra Gupta and *Panchanan Chowdhury*—for Respondents.

Patterson, J.—This is an appeal by the Official Assignee, representing one of the defendants and arises out of a suit for declaration of title in, and recovery of possession of a one-third share of a certain tank. The facts leading up to the institution of this suit are no longer in dispute, and may be briefly stated as follows: The property in suit belonged originally to one Gopesh Pada Datta who mortgaged it to the plaintiff Jagabandhu Mallik along with other

properties on 29th June 1909. On 20th April 1920, the plaintiff instituted a mortgage suit against Gopesh, and obtained a decree sometime in 1922, and on 7th November of that year purchased the property in suit in execution of his decree. Meanwhile on 28th October 1920 (that is to say, after the plaintiff had instituted his mortgage suit, but before he had obtained his decree), Gopesh mortgaged the property to the defendant Apurba Krista Roy, (now represented by the Official Assignee) and on 17th July 1924, Apurba instituted a mortgage suit against Gopesh, making the present plaintiff, Jagabandhu, a party. That suit was decreed on 13th September 1924, and on the 13th January 1926 Apurba purchased the property in suit in execution of his decree, and obtained possession in due course, thus dispossessing the plaintiff, who, on 27th February 1927 instituted the present suit with a view to the establishment of his title and recovery of possession. From the above statement of facts, it is clear that the plaintiff acquired a clear title in the property in suit by his purchase of 7th November 1922, and that the defendant acquired nothing by his purchase of 13th January 1926, Gopesh's title having already been extinguished by the plaintiff's prior purchase.

The main contention of the defendant throughout these proceedings has been that the suit is barred by the rule of constructive res judicata inasmuch as the plaintiff was made a party to the defendant's suit of 1924 and was duly served with notice, but nevertheless did not appear and contest. Both the courts below have found that the rule of constructive res judicata applies in the present case, and they have also referred in their respective judgments to the question of the applicability of the rule of lis pendens. The trial Court refused to allow the question of lis pendens to be raised, on the ground that no such case had been set up in the plaint, and accordingly dismissed the suit, but the lower appellate Court allowed this question to be raised, as all necessary facts had been stated in the plaint, and holding that the rule of lis pendens should prevail over the rule of constructive res judicata allowed the appeal and decreed the plaintiff's suit.

Before us it has been conceded on behalf of the plaintiff respondent that the view of the lower appellate Court, that the doctrine of lis pendens should prevail over the rule of res jugicata cannot be supported, but it is contended that the rule of constructive res judicata has been wrongly applied to the present case, inasmuch as nothing was alleged by Apurba in the suit brought by him in 1924, in derogation of the plaintiff's title. This aspect of the matter appears to have been entirely overlooked by all concerned in both the Courts below, and it has been canvassed for the first time in this Court. The question is however a pure question of law, and the facts out of which the question arises being no longer in dispute, there is, in my opinion no bar to the question being considered by this Court. Both the Courts below appear to have assumed that the plaintiff's title and the priority of his mortgage had been called in questfon by Apurba in the suit instituted by the latter in 1924, but on looking into the plaint in that suit, it appears that this is not the case. All that Apurba alleged in that suit with regard to Jagabandhu's title was that

> "after the mortgage to the plaintiff, the pro forma defendants 2, 3 and 4 came into possession on the basis of purchase and mortgage"

that it had therefore been thought necessary that the trial should take place in their presence, and that they had accordingly been made parties as proforma defendants. This paragraph of the plaint does certainly suggest that the present plaintiff, Jagabandhu, was a subsequent mortgagee, but the plaint does not say so in so many words; and this being so, it seems to me that the contention of the learned Advocate for the respondent is correct namely, that nothing was alleged in the plaint in Apurba's suit, in derogation of the present plaintiff Jagabandhu's title.

The position is therefore that the present plaintiff was a prior mortgagee and purchaser, and nothing was alleged in the plaint in Apurba's suit in derogation of his priority: his paramount title was outside the scope of the controversy in that suit, and in these circumstances, it must, in my opinion, be held, (as was held by their Lordships of the Judicial Committee of the Privy Council in

Radha Krishna v. *Khurshid Hussein* (1), that the rule of oonstructive res judicata does not apply. I would accordingly dismiss the appeal, and decree the suit with costs in all the Courts.

McNair, J.—I agree

V.S. *Appeal dismissed.*

1. A I R 1920 P C 81=55 I C 959=47 I A 11=47 Cal 662 (P C).

A. I. R. 1934 Calcutta 554

LORT-WILLIAMS AND M. C. GHOSE, JJ.

Ramendra Mohan Tagore—Plaintiff—Appellant.

v.

Keshab Chandra Chanda and *another*—Defendant 1—Respondents.

Appeal No. 736 of 1932, Decided on 31st January 1934, from appellate decree of Sub-Judge, Dinajpur, D/- 19th August 1931.

Civil P. C. (1908), O. 6, R. 17 — Suit brought on promissory note — Promissory note was found to be inadmissible—Application to amend plaint so as to enable plaintiff to sue on original debt righly allowed after payment of. costs—Costs accepted without protest, whether estops party from questioning amendment in appeal—Estoppel.

On an adjustment of accounts between the parties to the suit, a certain sum was found to be due from the defendant to the plaintiff; whereupon the defendant executed a promissory note for the amount in favour of the plaintiff. The plaintiff brought a suit on this promissory note but in the plaint he also stated the facts regarding the adjustments of account. The promissory note was found to be inadmissible owing to its having been insufficiantly stamped. The plaintiff then applied for an amendment of the plaint in order to enable him to sue upon the original debt which arose out of the account. The original debt was barred by limitation when this application was made but not when the suit was instituted. The defendant opposed the amendment on various grounds but not on the ground of limitation. The amendment was allowed on payment of costs which was accepted by the defendant without protest.

Held: that as the facts upon which the amendment was founded already appeared with sufficient clarity in the plaint, the trial Court was right in allowing the amendment. [P 555 C 2]

Per *Lort-Williams, J.*—That as the costs were not accepted under protest nor was the defendant under any obligation or compulsion to receive them, he could not be heard on his objection that amendment ought not to have been allowed: 8 *I C* 79, *Rel. on.* [P 555 C 2]

Per *M. C. Ghose, J.*—That on the facts of this case the receipt of costs did not operate as an estoppel preventing the defendant from raising the question of the validity of the amendment. [P 556 C 2]

Amarendra Nath Bose and *Nripendra Chand Das*—for Appellant.

Sitaram Banerjee and *Sudhansu Kumar Sen*—for Respondents.

Lort-Williams, J. — The plaintiff's case was that defendant 1 had acted as agent, and that on balance of account, a sum of Rs. 643 was due to the plaintiff. This account appeared in a hatchitta upon which there had been adjustments from time to time, the last being on 25th December 1926. On that date according to the plaint, the account was adjusted at the figure of Rs. 643 and on that day, the defendants took a loan from the plaintiff for that sum by executing in his favour a promissory note, thereby making a part payment towards the satisfaction of the debt due on account. They agreed to repay the principal amount due on the hand-note with interest. The account was stated to have arisen in respect of some misappropriations of cash made by the defendants. The cause of action was stated to have arisen on the date when the promissory note was executed, namely, 25th December 1926, and the plaintiff asked for a decree for Rs. 643 with interest upon the hand-note. At the end of the prayer, the plaintiff concluded with the following paragraph:

"Be it declared that both the defendants have executed a hatchitta on account of the amount misappropriated, as found on a subsequent adjustment suit will be instituted, if necessary, later on for the same."

It is agreed by both parties that this paragraph refers to other misappropriations and is not relevant to the present issue. The suit was instituted on 12th July 1929.

The defendants raised the defence of coercion and undue influence and other defences, but both Courts have decided these issues in favour of the plaintiff. The promissory note was not properly stamped and, was therefore inadmissible in evidence. Thereupon, the plaintiff on 27th March 1930, prayed to be allowed to amend his plaint in order to enable him to sue upon the original debt which arose out of the account to which I have referred. This was opposed by the defendant's pleader on various grounds, but not on the ground that the plaintiff's claim on the original debt was barred by limitation. The Subordinate Judge came to the conclusion that the amendment would not pre-

judice the defendants in such a way that it could not be compensated by costs, and he allowed the amendment on payment of Rs. 10 as compensation to the defendants. This sum was paid over at once and accepted without protest by the defendants. At this date the plaintiffs claim on the original debt was barred, the last adjustment having been made on 25th December 1926, but it would not have been barred at the time he instituted the suit. On appeal the Subordinate Judge came to the conclusion that the amendment ought not to have been allowed and he therefore allowed the appeal, reversed the decree of the trial Court and dismissed the plaintiff's suit. 'The reasons for the conclusion to which the Subordinate Judge arrived were, that the amendment set up a claim different to the original claim upon the promissory note and further, it allowed the plaintiff to rely upon a claim which had become barred by limitation at the time of the amendment.

The questions which we have to decide are, whether the amendment ought to have been allowed, and secondly, whether in any case, the defendant can raise this point and object to the allowance of the amendment, in view of the fact that he accepted a benefit under the order made by the trial Judge, namely, the benefit of the costs which were awarded to him. There is no doubt that the general rule is correctly stated in Mulla's Civil Procedure Code, 9th Edn., at p. 499. Leave to amend ought to be refused, where the effect of the amendment would be to take away from the defendant a legal right which has accrued to him by lapse of time and this general rule ought not to be departed from except in very special cases. Upon this point the plaintiff has relied upon the case of *Charan Das* v. *Amir Khan* (1), where their Lordships of tne Privy Council refused to interfere with the discretion exercised in allowing such an amendment. In that case it was clear that the claim which the party sought to raise by his amendment had been sufficiently indicated in the pleadings, but the presentation of it had been bungled by the pleader. In the present case, the facts about the account and the hatchitta and the adjustments of the account appear clearly in the plaint. The whole story is set out there, except that the actual details of the account have not been reproduced. The amendment allowed the plaintiff to sue for the original debt without any further amendment of the plaint. In my view, no further amendment was necessary because the facts upon which the amendment was founded already appeared with sufficient clarity in the plaint. For this reason, I am of opinion that the trial Judge was right in allowing the plaint to be amended.

I do not think that in circumstances such as exist in the present case, the plaintiff is debarred from suing upon the original debt. Whether when a bill or note is found to be inadmissible in evidence, the payee can sue on the original consideration depends upon whether the cause of action with regard to the original consideration is one which is complete in itself and the debtor then gives a bill or note to the creditor for payment of the money at a future time. If this be so, then the plaintiff may disregard the promissory note if he chooses and sue upon the original debt. Where however the original cause of action is a bill or note itself and does not exist independently of it, then the plaintiff cannot disregard the note and sue for the original consideration. This difference has been well and clearly explained by Garth, C. J., in the case of *Sheikh Akbar* v. *Sheikh Khan* (2).

Upon the last question whether the defendant can now be heard to object to this amendment having been allowed, I am of opinion that he can no longer raise that objection. The principle was laid down so far back as 1849 in the case of *Tinkler* v. *Hilder* (3), the head note of which is as follows :

"Where a party accepts costs under a Judge's order which, but for the order, would not at that time be payable, he cannot afterwards object that the order was made without jurisdiction."

Pollock, C. B., in his judgment says that

"the present Rule must be discharged on the ground that the party who makes the application to rescind the order, having taken something under that order, must be considered to

1. A I R 1921 P C 50=57 I C 606=47 I A 255 =48 Cal 110 (PC).

2. (1881) 7 Cal 256=8 C L R 528.

3. 4 Ex R 187=7 D & L 61=13 Jur 684 = 18 L J Ex 429.

have adopted it, and cannot be now heard to impeach it."

In *King* v. *Simmonds* (4) it was decided that

"where a Judge having ordered, on summons by the plaintiffs that they should be at liberty to amend the record and that they should pay the defendant his costs occasioned by such amendment, the defendant cannot, after taking and receiving his costs, apply to set aside the order for amendment, as made without jurisdiction."

These cases were considered in *Manilal Guzrati* v. *Harendra Lal* (5), where Mookerjee, J., while accepting as an undoubted principle that a party who has adopted an order of the Court and acted upon it, cannot after he has enjoyed a benefit under the order contend that it is valid for one purpose and invalid for another. But he distinguished the cases to which I have referred, because, in the case with which he was dealing, the plaintiff had accepted payment of costs under protest and the learned Judge came to the conclusion that the defendant had no alternative but to obey the order of the Court and accept the costs. It is clear that in the present case, the costs were not accepted under protest nor was the defendant under any obligation or compulsion to receive them. In fact, although he resisted the amendment, he did not do so on the ground of limitation, because he had not appreciated that point at the time when the amendment was made. In my opinion therefore the defendant cannot be heard on his objection that this amendment ought not to have been allowed ; and for this reason as well as for the reason that I have already given about the amendment itself, this appeal must be allowed, and the judgment and decree of the Court of first instance restored with costs.

M. C. Ghose, J. — The case was that defendant 1 owed a sum of Rs. 643 on adjustment of account to his master, the plaintiff, and he satisfied the account by payment of a sum of Rs. 643 which he borrowed from his master on a promissory note. The suit was instituted on the promissory note. It was found out that the promissory note was insufficiently stamped and, as such, could not be received in evidence. Thereupon, the plaintiff filed an application praying that the sum claimed in the plaint might be allowed on the basis of the original debt. The defendants objected to the amendment. The trial Court overruled the defendant's objection and ordered that the amendment prayed for by the plaintiff would be allowed upon his paying Rs. 10 as compensation to the defendants. The said compensation of Rs. 10 was paid to the defendants and the amendment was allowed. Thereupon the plaintiff proved the original debt by a hatchitta which was in the handwriting of defendant 1 himself and signed by him. The suit was decreed on contest against defendant 1 and dismissed against defendant 2. On appeal by defendant 1, the learned Subordinate Judge found that the amendment was unjust and ought to have been refused.

I agree with my learned brother in the particular circumstances of this case that the trial Court was right to allow the amendment. As to the argument of the learned advocate for the appellant that the defendant is estopped by the fact that he took Rs. 10 as costs for the allowing of the amendment from raising the validity of the amendment in this Court, I am of opinion, on the facts of this case, that the receipt of Rs. 10 does not operate as an estoppel preventing the defendant from raising the question of the validity of the amendment. But as stated above the amendment was rightly made and the decree of the appellate Court should be set aside and that of the Court of first instance restored with costs.

v.s. *Appeal allowed.*

4. 7 Ad & Ellis Q B R 289.
5. (1910) 8 I C 79.

A. I. R. 1934 Calcutta 556

GUHA AND NASIM ALI, JJ.

Tarini Mohan De Sarkar and *another* —First Party.

v.

Dwarak Nath Banikya Poddar and *others*—Second Party.

Criminal Ref. No. 187 of 1933, Decided on 7th December 1933.

Criminal P. C. (1898), S. 147 (2) — S. 147 (2) contemplates only prohibitory order but not mandatory one.

Section 147, sub-S. (2) really contemplates a prohibitory order and not a mandatory order to do some positive Act. [P 557 C 1]

Narendra K. Bose and *Satindra Nath Mukerji*—for First Party.

Asitaranjan Ghose and *Saroj K. Maity* —for Second Party.

Nasim Ali, J.—This is a Reference under S. 438, Criminal P. C., made by the Additional Sessions Judge of Mymensingh, in the matter of a proceeding under S. 147, Criminal P. C., recommending that the order of the Sub-Divisional Magistrate of Tangail in the said proceeding so far as it directed the second party to remove a part of the tin chapra in question, should be set aside. The recommendation of the learned Sessions Judge is supported by the words of sub-S. (2), S. 147, Criminal P. C., which run as follows :

"If it appears to such Magistrate that such right exists, he may make an order prohibiting any interference with the exercise of such right."

The words used in the subsection contemplate only a prohibitory order and not a mandatory order to do some positive act. This interpretation of the section is supported by the decision of this Court in the case of *Hari Mati Dasi* v. *Hari Dasi Dasi* (1) in which the reasonings in support of the said interpretation have been given in full. Our attention has been drawn by the learned advocate appearing for the first party to a recent decision of this Court in Criminal Revision No. 562 of 1933, headed *Khajir Naskar* v. *Tabraj Naskar* (2) which has not been reported in any of the authorized reports. We have looked into the facts of that case and the judgment passed therein. It appears however that the attention of the learned Judges was not drawn to the decision reported in *Hari Mati Dasi* v. *Hari Dasi Dasi* (1), referred to above. We therefore hold that S. 147, sub-S. (2) really contemplates a prohibitory order and not a mandatory order. In this view of the matter, we accept the Reference and direct that the concluding portion of the order of the learned Magistrate, directing the second party to remove any part of the tin chapra that may be within four feet of the west wall of the dispensary by 7th September 1933, be set aside.

Guha, J.—I agree.

K.S. *Reference accepted.*

1. A I R 1925 Cal 991=88 I C 1041=26 Cr L J 1265.
2. A I R 1933 Cal 752=1933 Cr C 1254=146 I C 223=34 Cr L J 1230.

A. I. R. 1934 Calcutta 557

GUHA AND NASIM ALI, JJ.

Enayet Ali—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 641 of 1933, Decided on 18th December 1933.

(a) Penal Code (1860), Ss. 457 and 459—Lurking house trespass and grievous hurt caused in courtyard—Court yard whether part of house doubtful—Accused is guilty only under S. 457 and not under S. 459.

Where the accused commits lurking house trespass and also grievous hurt in a courtyard but it is not proved on evidence that the courtyard is part of the house, accused can be convicted only under S. 457 and not under S. 459. [P 558 C 1]

(b) Criminal Trial—Trial by jury—Statement of person not examined as witness treated as evidence for prosecution placed before jury—Judge warning jury that they are entitled to raise presumption that if such person were examined, his evidence would be against prosecution—There is no misdirection.

Where a statement made by a person who has not been examined as a witness has been treated as evidence in the case for the prosecution and the Judge places it before the jury with the warning that they are entitled to draw the presumption that if such person were examined, his deposition would be against the prosecution, there is no misdirection. [P 559 C 1]

Surajit Chandra Lahiri for *Suresh Chandra Talukdar*—for Appellant.

Nirmal Chandra Das Gupta—for the Crown.

Guha, J.—The appellant in this case Enayet Ali, has been found guilty by a majority verdict of the jury, and has been convicted by the learned Additional Sessions Judge, Dacca, under S. 459, I. P. C., and sentenced to undergo rigorous imprisonment for four years. The jury were divided in their verdict. Three of the jurors were of opinion that the appellant was guilty under S. 459, I. P. C., while two of them came to be of opinion that the appellant was not guilty of the charge framed against him. The learned Judge's charge to the jury has been read to us; and a portion of the evidence bearing upon the material points adverted to by the learned Judge in his charge to the jury has also been placed before us by the learned advocate appearing for the appellant. It has been, in the first place, sought to be made out that the facts of the case to which reference has been made by the learned Judge in his charge to the jury, do not constitute an offence, under

S. 459, I. P. C., and on this part of the case it has been argued before us by Mr. Lahiri, that there was misdirection so far as the learned Judge's charge was concerned.

The point made in argument before us relates to this, that grievous hurt might have been caused by the appellant at a time when criminal trespass, so far as the appellant was concerned had terminated when the appellant was struggling with the complainant in the case, on the court-yard of the house. The Judge placed the evidence bearing upon this part of the case. So far as the case for the prosecution was concerned, it is at least difficult to distinguish in which part of the house the hurt was inflicted by the appellant or the part of the house relating to which there was a criminal trespass. On the facts disclosed in the case, the court-yard could have been taken to be a part of the house, and in that view of the case, on the facts placed before the jury, the offence committed by the appellant certainly amounted to an offence under S. 459. Regard being however had to the position indicated before us by the learned advocate for the appellant, as also by the learned Advocate representing the Crown in the case, and as it was not perhaps possible to make out on the evidence before the Court as to whether the court-yard was a part of the house in which there was criminal trespass, we are inclined to hold, on the facts placed before the jury, that the appellant ought to have been convicted in this case, under S. 457, I. P. C., namely of lurking house-trespass by night, in order to commit an offence punishable with imprisonment.

There are two other points placed before us in course of argument of the case by the learned advocate appearing for the appellant. Mention was made of the lamp by which the accused was identified by the complainant and his wife. It was placed before us for consideration that the learned Judge should have pointed out to the jury that the police produced a kupi lamp which in point of fact was not the kupi which was said to have assisted the complainant in identifying the appellant. The material part of the evidence on this part of the case was placed before us; and we find that the complainant's wife did not state that the kupi lamp which was exhibited in the case was the lamp which was burning at the time of the occurrence by the light of which the appellant was identified by the complainant. On a careful consideration of the learned Judge's charge to the jury, it does not appear to us that any specific reference had been made to the kupi which was made an exhibit in the case. The learned Judge placed the point before the jury for consideration whether it was at all likely that the complainant would have left the light burning; could the jury believe the story that the light was burning, and that the appellant was recognized by the light of the lamp. The learned Judge proceeded to state :

> " If you think that the story of burning of the lamp is false then you will have seriously to consider whether those witnesses who made palpably false statements on such a material point, can be believed with regard to their other statements of their recognition of the accused during the struggle outside the hut by the light of the stoves."

Taking the learned Judge's charge to the jury on this part of the case, in its entirety, it appears to us that no weight was attached to the particular exhibit before the Court, namely the kupi lamp; and the question of fact before the jury was, and which the jury were asked to decide, whether there was any such light in the hut which could help the complainant and his wife to identify the accused. In view of the statements made by the learned Judge in his charge to the jury, we are unable to hold that there was any misdirection or non-direction in the charge relating to the kupi lamp which was exhibited in the case. The last point placed before us for consideration, by the appellant, was that certain statements of one Khalil made to other people, had been treated as evidence in the case, although Khalil was not examined as a witness for the prosecution. The learned Judge has made it abundantly clear in his charge to the jury, that although there was this statement sought to be brought in on the side of the prosecution this Khalil has not been examined as a witness and the learned Judge gave the necessary warning to the jury said :

> " From his non-examination you may presume that if he had been examined in the case, for the prosecution, his deposition would have gone against the prosecution."

On this warning to the jury, we are unable to come to the conclusion that there was any misdirection in the matter of bringing to the notice of the jury, the evidence affcrded by Khalil in his statement to other persons. We are unable to hold that there was such misdirection in the case or non-direction, by virtue of which we can come to the conclusion that any retrial of the appellant should be directed by us. As indicated above, we are of opinion that the evidence in the case was properly placed before the jury by the learned Judge, and that upon these facts the offence was committed under S. 457, I. P. C. In the above view of the case before us, we hold that the appellant is guilty under S. 457; and we direct that the appellant should undergo rigorous imprisonment for a period of two years. The appellant is convicted under S. 457, I. P. C., and the sentence passed on him by the learned Judge is reduced to two years rigorous imprisonment.

Nasim Ali, J.—I agree.

K.S. *Order accordingly.*

A. I. R. 1934 Calcutta 559

PANCKRIDGE, J.

Gourgopal De Sarkar and *others*—Creditors—Applicants.

v.

Kamalkalika Datta and *others*—Non-Applicants.

Civil Appln. Nos. 2442 and 1916 of 1932, Decided on 21st November 1933.

(a) Civil P. C., (1908), S. 73— Attachment before preliminary decree in administration suit—Attaching creditor is not entitled to priority.

A creditor who has obtained attachment on the judgment-debtor's property prior to a preliminary decree made in an administration suit is not entitled to priority over other creditors: 15 *Cal* 202, *Foll.* [P 560 C 1]

(b) Civil P. C. (1908), S. 73—S. 73 is to be read subject to Civil P. C. (1908), S. 63.

Attachments by the High Court and the Court of Small Cause, stand on the same footing. The Small Causes Court decree need not be transferred to the High Court where the execution proceedings are pending. S. 73 must be read subject to S. 63 : 21 *Cal* 200: *AIR* 1928 *Rang* 157 and *AIR* 1933 *P C* 134, *Ref.* [P 560 C 2]

S. M. Bose—for Applicants.

H. C. Mazumdar, S. C. Ray, I. P. Mukherjee, Pugh, N. C. Chatterjee and *B. C. Ghose*—for Creditors.

J. C. Sett—for the Infant Defendants.

Facts.—One Nirmalkanta Datta, a Christian, died on 12th August 1932, leaving behind him Kamalkalika Datta, his widow, Khoka Datta, his only son, and Auruna Datta, Purnima Datta and Ira Datta, his three daughters, as his heirs and legal representatives. Among the assets left by the deceased was a policy of insurance for Rs. 15,000 with the Great Eastern Insurance Company, Limited, but the whole estate was not sufficient for payment to all his creditors in full. After Nirmalkanta's death one of his creditors, Narendranath Pal filed a suit, No. 1916 of 1932, at the High Court against the heirs and legal representatives of the deceased. Subsequently, on 14th December 1932, another creditor, Goureopal De Sarkar, on behalf of himself and other creditors, filed a suit (No. 2442 of 1932) at the same Court against the same defendants in which he prayed for administration of the estate of the deceased.

On 9th January 1933, the applicant obtained a decree for Rs. 1,883-0-3 in the suit (No. 22298 of 1932) filed in the Court of Small Causes against the said heirs and legal representatives, and, in execution of this decree, on 19th January 1933, attached the insurance money payable by the Great Eastern Insurance Company, Limited, to the heirs of Nirmalkanta. On 18th May 1933, Narendranath Pal's suit was decreed and, in execution, on 31st May 1933, he also levied attachment on the insurance money for Rs. 4,500 which represented the amount of his decree and estimated costs. In this suit, on 27th June 1933, an order was made directing the insurance company to pay the entire amount payable under the policy to the sheriff. In the administration suit, a receiver was appointed on plaintiff's application on 10th July 1933, of all properties of Nirmalkanta including the amount payable by the insurance company after deducting from the latter the amount payable to satisfy the decree in favour of Narendranath Pal.

Immediately afterwards, on 11th July 1933, the Sheriff at Narendranath Pal's instance attached the moveable property of the insurance company in execution of the order made on 27th June 1933. On the following day, the attachment was released on the company undertaking to carry out the order. On 21st July 1933 a preliminary decree was made in the administration suit and the usual

inquiries were directed. On 27th July 1933 certain other creditors of the deceased, who had obtained decrees in the Court of Small Causes. applied for attachment of the insurance money. On 28th July 1933 the insurance company, in accordance with its undertaking given on 12th July, paid Rs. 14,750 to the Sheriff. It was when attempt was being made by some of the creditors to take practically the whole of this amount in satisfaction of their own decrees to the exclusion of all other creditors of the deceased that the present application was made.

Judgment.—The history of the circumstances which have occasioned this application is set out in detail in the applicant's petition, and there is no need to repeat it. The question for decision concerns the effect of the preliminary decree made on 21st July 1933, in suit No. 2442 of 1932 (*Gourgopal De Sirkar* v. *Mrs. Kamalkalika Datta*) filed by the plaintiff on behalf of himself and the other creditors of Nirmal Datta, deceased. At the date of the decree the applicant had attached the insurance money lying with the insurance company and payable to the heirs of Nirmal Datta, in execution of a decree for Rs. 1,883-0-3 made by the Court of Small Causes on 9th January 1933, the actual date of attachment being 19th July 1933. The plaintiff in suit No. 1916 of 1932. *Narendranath Pal* v. *Mrs. Kamalkalika Datta* had served the insurance company with a garnishee notice for Rs. 4,500, being the amount of his decree in that suit and his estimated costs. On 11th July 1933, the movable property of the garnishee proceedings directing payment of the entire policy money (Rs. 15,000) to the Sheriff.

On 11th July 1933, the movable property of the insurance company was attached by the Sheriff at the instance of Narendra Pal. On 12th July 1933, this attachment was set aside on the company's undertaking to carry out the order of 27th July 1933. Such being the facts, it appears to me that, when the administration decree was made, all the attaching creditors stood on the same footing and that none of them had acquired any interest in the insurance money. The observations of the Judicial Committee in the recent case of *Anantapadmanabhaswami* v. *Official Receiver of Secunderabad* (1) certainly cannot have the effect of overruling the decisions which lay down this principle, and by which I am bound.

In my opinion, the position is not affected by anything that has happened subsequently to the administration decree. Further, I think that the attachment by the High Court and the Small Cause Court stand on the same footing, and the fact that the Small Cause Court decrees have not been transferred to the High Coutt, and that the money is now lying in the High Court is of no consequence. This seems to be the effect of *Clark* v. *Alexander* (2) which has been followed by the High Court of Burma in *Kwai Tong Kee* v. *Lim Chaung Ghee* (3). In other words S. 73, Civil P. C., must be read subject to S. 63 of the same Code. As to the general effect of the administration decree, the circumstances seem to me to be parallel to those in *Soobul Chunder Law* v. *Russick Lall Mitter* (4) and I therefore consider that, by reason of the provisions of O. 20, R. 13, which reproduce those of S. 213 of the Code of 1882, the applicant's contentions are sound.

Mr. Pugh has argued that, as R. 6 Ch. 18 of the Rules and Orders provides that payment under a garnishee order is a valid discharge of the garnishee, the company's debt has been extinguished and is no longer part of the estate of the deceased Nirmal. Whatever be the merits of this line of argument, it cannot, in my opinion, have any application where, as here, the administration decree is passed before the payment is made. The application therefore succeeds, but I think that all that is necessary will be done if I make an order in terms of Cl. (c) of the notice of motion and an order for the payment of the applicant's costs by the second and third parties to the notice.

V.S. *Application allowed.*

1. A I R 1933 P C 134=60 I A 167 = 56 Mad 4C5=142 I C 552 (PC).
2. (1893) 21 Cal 200.
3. A I R 1928 Rang 157 = 110 I C 744 = 6 Rang 131.
4. (1888) 15 Cal 202.

A. I. R. 1934 Calcutta 561

MALLIK AND JACK, JJ.

Rai Kiran Chandra Roy and *others*—Plaintiffs—Appellants.

v.

Prosanna Kumar Chakravarti and *others*—Respondents.

Appeal No. 1479 of 1931, Decided on 22nd January 1934, from appellate decree of Dist. Judge, Jessore, D/- 25th November 1930.

Specific Relief Act (1877), S. 9 — Mere previous possession is not sufficient except in suit under S. 9 to decree for recovery of possession though such previous possession of peaceful nature for long time may be sufficient against trespasser—Possessory Title.

So far as Calcutta High Court is concerned mere previous possession will not entitle a plaintiff to a decree for recovery of possession except in a suit under S. 9, even though peaceful possession for a long period of time may, under certain circumstances, give rise to an inference of title in the plaintiff as against a trespasser who has no right to possession whatsoever: *Case law referred.* [P 562 C 2]

Gunada Charan Sen, *Hemendra Chandra Sen* and *Surendra Nath Basu* (*senior*)—for Appellants.

Radhabenode Pal and *Holiram Deka*—for Respondents.

Mallik, J.—This appeal arises out of a suit for recovery of possession of some lands, about 150 bighas in area, on a declaration of title thereto. The allegations on which the suit was instituted were briefly these. The lands in suit were re-formations in situ of some lands in the plaintiff's state Towji No. 178 of the Jessore Collectorate in villages Sripur and Britti Bardaha which were on the left bank of the river Kumar, the village Fulbari being on the right bank thereof. A diluvion on the left bank of the river began in the year 1893 and the river Kumar began to wash away the lands in Sripur and Britti Bardaha. The diluvion continued till the lands diluviated began to reform on the other side of the river Kumar in 1904 and the lands in suit which were re-formed lands of the plaintiff's estate became fit for cultivation in 1915-16. In 1918 the plaintiffs settled tenants on the lands and these lands were in the possession of the tenants until they were dispossessed by the defendant in 1919. The defence was a denial of the plaintiff's story of diluvion and re-formation and according to the defendant the lands in suit were the asali lands of Mouza Fulbari. A Commissioner was appointed to relay the thak and the revenue-survey and settlement maps and to ascertain whether the lands in suit were originally the asali lands of Mouza Sripur and Britti Bardaha within the plaintiff's estate. The Commissioner prepared a map and submitted his report. According to this map and report the lands in suit were the asali lands of Mouzas Sripur and Britti Bardaha. But in the mouzas there were some chaks also which were outside the estate of the plaintiffs and which appertained to estates other than the plaintiffs' estate.

The Court of first instance on the basis of the Commissioner's map and report held that the plaintiffs had not succeeded in establishing their title to the land inasmuch as there was nothing to show that the lands in suit appertained to the plaintiffs' estate, and not to the chaks lying within the Mouzas Sripur and Britti Bardaha and finding also that although the plaintiff's suit was not barred by limitation the lands on re-formation were taken possession of by the defendants first and that after them the plaintiffs took kabuliyats from the tenants dismissed the plaintiffs' suit. This decision was affirmed on appeal, the learned District Judge holding that the plaintiffs' title had not been established and that the plaintiffs had failed to prove any possession at all. The plaintiffs are the appellants before us. The Commissioner's map and report which were accepted as correct by both the Courts below can leave no room for doubt that the lands in suit were within Mouzas Sripur and Britti Bardaha. But as within those two mouzas there were some chaks (appertaining to other estates) besides the estate of the plaintiffs, the lower Courts, in my opinion, were perfectly justified in holding that the plaintiffs had failed to prove that the lands in suit were parts of their estate and thus to establish their title to the lands. Mr. Sen for the appellants contended that as the defendants according to the Commissioner's map and report had no title whatsoever to the lands in suit they were clearly trespassers and the plaintiffs having had previous possession of the lands were entitled to a decree for possession against the defendants in the

present case. This contention, in my opinion, is wholly untenable. The lower Appellate Court found the question of possession clearly against the plaintiffs. Mr. Sen contended that this finding was wrong based as it was on incorrect data. He drew our attention to the observation of the learned District Judge at p. 16 of the paper book where the Judge says,

"from the evidence adduced by the defendants the view is more acceptable that river action was more or less continuous till the source of the river Kumar silted up. Any subsequent river action seems improbable. The plaintiffs' definite allegations that diluvion took place about 1300 B. S. and the reformation took place in 1321 and the suit lands became culturable in 1323 are improbable and not come out by evidence,"

and contended that there was nothing on the record to show that the source of the river Kumar Silted up in such a way as to make it impossible for any river action taking place even during the rainy season. That may be so. But it was not on this ground that the lower Appellate Court found the point of possession against the plaintiffs. The learned Judge observed that the kabuliyats from the plaintiffs' tenants were obviously unreliable as proving actual possession. It was said that there was nothing so obvious in the case. But if one would look a little carefully into the kabuliyats one would have no difficulty in holding that the learned District Judge was not unjustified in saying that the documents were obviously unreliable. The kabuliyats were all executed only a a few days before a criminal case was instituted in which the plaintiffs' men were convicted for rioting and tresspassing and the documents were all executed within a period of four or five days. The lower appellate Court was therefore in my judgment not very wide of the mark when it found that the plaintiff's had had no possession of the lands in suit.

Conceding for the sake of argument that the finding of the lower appellate Court on the question of possession was not satisfactory and cannot therefore be maintained there would remain on the question of possession the finding of the Court of first instance. That finding is that when the land reformed it was the defendants who first possessed it and after them the plaintiffs took kabuliyats from the tenants of the disputed land. Mr. Sen contended that this was sufficient for the plaintiffs obtaining a decree for possession and in support of this contention he relied on a number of decisions of the Allahabad, Bombay, Madras and Patna High Courts and also to a certain extent on some decisions of this High Court. It is well known that on the point whether a plaintiff can apart from S. 9, Specific Relief Act, obtain a decree for possession on previous possession alone there is a conflict of decisions between the High Courts of Bombay, Allahabad, Madras and Patna on the cne hand and the High Court of Calcutta on the other. So far as this High Court is concerned it is well settled by decisions which are binding upon us that mere previous possession will not entitle a plaintiff to a decree for recovery of possession except in a suit under S. 9, Specific Relief Act: See the cases in *Parmeshur Chowdhury* v. *Brojolal Chowdhury* (1), *Nisa Chand* v. *Kauchiram* (2), *Shama Churn Roy* v. *Abdul Kabeer* (3) and *Manik Barai* v. *Bani Charan* (4). Mr. Sen wanted to place reliance on the decisions of this Court in *Mohabeer Pershad* v. *Mahabeer Singh* (5), *Banka Behary* v. *Raj Chandra Pal* (6) and *Satish Chandra De* v. *Madan Mohan* (7) for the proposition that previous possession alone may entitle a plaintiff to obtain a decree for recovery of possession. But in all these cases the previous possession had been of a peaceful nature and had been for a long period of time. Peaceful possession for a long period of time may, under certain circumstances, give rise to an inference of title in the plaintiff as against a trespasser and entitle him to obtain a decree for recovery of possession against such a trespasser who has no right to possession whatsoever. But in the present case the plaintiffs' possession, if the plaintiffs had had any possession at all, was not only for a short period of time, but was far from peaceful. As observed before, the kabuliyats the plaintiffs obtained from the tenants were all executed only a few days before the institution of the criminal proceeding which resulted in the

1. (1890) 17 Cal 256.
2. (1899) 26 Cal 579=3 C W N 568.
3. (1911) 3 C W N 158.
4. (1911) 10 I C 469.
5. (1881) 7 Cal 591=9 C L R 164.
6. (1910) 2 I C 202.
7. A I R 1931 Cal 483=132 I C 906=58 Cal 29.

conviction of the plaintiff's men. The cases of this High Court relied upon by the learned advocate for the appellants cannot therefore be of any avail to them.

As a last resort Mr. Sen on behalf of the appellants while admitting that his clients had been ill advised by their pleaders in not having made the owners of the chaks in Mouzas Sripur and Britti Bardaha parties to the suit suggested that the case might be sent back to the Court of first instance for a decision after making the owners of those chaks parties in the case offering at the same time to pay to the respondents all costs incurred by them in the present litigation. Mr. Sen's contention was that it would be in the interest of justice if the case be thus sent back to the first Court now. This prayer however does not commend itself to me in view of the fact that it is made at a very late stage of the proceeding. The suit, it appears, was instituted so long ago as 1923 and the prayer which is made now is made in this Court for the first time about 10 years after the institution of the suit. The result is that the appeal fails and it is, accordingly, dismissed with costs.

Jack, J.—I agree.

K.S. *Appeal dismissed.*

A. I. R. 1934 Calcutta 563

BUCKLAND, J.

Eastern Tavoy Minerals Corporation, Ltd., In re.

Original Civil Appeal, Decided on 18th December 1933.

Civil P. C. (1908), O. 3, Rr. 1 and 2—Recognized agent as such has no right of audience.

To plead is not to make or do an appearance, or an application or an act, and is not within O. 3, Rr. 1 and 2. Therefore, a recognized agent as such has no right of audience: 28 *I C* 838, *Rel on.*

The right of audience was claimed on behalf of a company by one of the directors of the company, who held a power-of-attorney, authorising him "to appear for and on behalf of the company, to conduct and represent the company in the proceedings, etc."

Held: that he had no right of audience.

[P 563 C 2]

Clough—for Applicants.

Judgment.—On an application made on behalf of Clyne Gordon Stewart under S. 38, Companies Act, for the rectification of the register of the Eastern Tavoy Minerals Corporation Limited, Mr. Harcourt, who says that he is a director of the company, has claimed the right of audience on behalf of the company by virtue of a power-of-attorney executed in his favour by two persons, who, as directers of the company, have sealed it with the common seal of of the company. The power-of-attorney nominates and constitutes

"F. L. Harcourt, a director of the company, to appear for and on behalf of the company, to conduct and represent the company in the proceedings in an application made by C. G. Stewart in the High Court and for the proper prosecution of the said proceedings to do all such acts and deeds as he may deem necessary and the company hereby agrees to ratify all his acts and deeds as made for and on behalf of the company."

It has been objected on behalf of the applicant that this gentleman has no right of audience. Mr. Harcourt has informed me, though he has not produced the Court Minutes or any judgment by my learned brother, that Panckridge, J., in a suit against the Eastern Tavoy Minerals Corporation, Limited, allowed him to plead, basing his decision upon O. 3, R. 1, Civil P. C. That order and rule provide that

"Any appearance, application or act in or to any Court may . . . . be made or done by the party in person or by his recognized agent."

Rule 2 says that

The recognized agents of parties by whom such appearances, applications and acts may be made or done are:

(a) persons holding powers-of-attorney, authorising them to make and do such appearances, applications and acts on behalf of such parties."

To plead is not to make or do an appearance, or an application or an act and is not in my judgment within the order and rules cited. I am glad to find that in this matter I am supported by so high an authority as the late Sir Lawrence Jenkins, C. J., who held that a recognised agent as such has no right of audience. The matter on which he had to consider the question was *Hurchand Ray Gobourdhan Das* v. *B. N. Ry. Co.* (1). In the Small Cause Court, Sealdah, the plaintiff was represented by his authorized agent. The Judge of the Small Cause Court held that though a recognised agent may appear, act and apply on behalf of a plaintiff or defendant "the law does not give him any power to "plead on behalf of his principal." The learned Chief Justice and Chatterjea, J., held that a recognized

1. (1915) 28 I C 838.

agent as such has no right of audience. I hold that Mr. Harcourt has no right of audience and I cannot hear him on this application. This does not prevent his filing an affidavit which he desires to do under the power-of-attorney produced by him. The power-of-attorney and the affidavit may therefore both be filed.

V.S. *Order accordingly.*

A. I. R. 1934 Calcutta 564

LORT-WILLIAMS AND M. C. GHOSE, JJ.

Maheshchandra Shaha — Defendants —Appellants.

v.

Anandachandra Shaha—Plaintiffs—Respondents.

Appeals Nos. 2342 and 2343 of 1931, Decided on 20th December 1933, from appellate decree of Dist. Judge, Noakhali, D/- 2nd April 1931.

(a) Evidence Act (1872), S. 92—Compound interest payable under deed—Oral agreement that stipulation will not be enforced cannot be proved.

Plaintiffs sued on mortgage bond, which stipulated for payment of compound interest. The defendant's case was that, when he came to sign the bonds, he objected to this stipulation and refused to sign. Later, he was persuaded to sign, on plaintiffs promising not to enforce the stipulation.

Held: that such evidence was inadimissible. [P 566 C 1]

(b) Evidence Act (1872), S. 92—Admissibility of oral agreement to vary etc. terms of written contract— Law must be ascertained only from section.

The law in India on the point of admissibility of oral agreement to vary, etc. terms of a written contract must be ascertained only from the terms of the section and not otherwise: *AIR* 1917 *P C* 207, *Rel. on.* [P 564 C 2]

Amarendranath Basu and *Bhagirthchandra Das*—for Appellants.

Atulchandra Gupta and *Nagendrachandra Chaudhuri*—for Respondents.

Lort Williams, J.—The point raised on these two appeals is short and simple. Plaintiffs sued on mortgage bonds, which stipulated for payment of compound interest. The defendant's case was that, when he came to sign the bonds, he objected to this stipulation and refused to sign. Later, he was persuaded to sign, on plaintiffs promising not to enforce the stipulation. The District Judge held that such evidence was inadmissible and allowed the claim. No principle of law is clearer than that, when the terms of a contract have been reduced to the form of a document, no extrinsic evidence is admitted to contradict, vary, add to, or subtract from its terms. This principle is embodied in S. 92, Evidence Act. It is true that evidence may always be given, which tends to show that the document is invalid, such as evidence of fraud, error, or incapacity. This is stated in the first proviso to the section. That is to say, a party may show by such evidence that his signature to a document was procured by means of fraud: Or, in other words, that there was fraud in its inception. Thus, evidence would be relevant to show that the plaintiffs always intended to enforce the stipulation, and obtained defendant's signature by means of a misrepresentation of fact, namely, their intention at the time of signature. But evidence that plaintiffs, at some later date, sought to enforce the stipulation is not evidence sufficient to prove that they had this intention when the document was signed. The cases, which have been mentioned and which are relevant, do not support any different or more extended proposition of law. The law on this point in India must be ascertained from the terms of the section and not otherwise: *Balkishen Das* v. *Legge* (1), *Maung Kyin* v. *Ma Shwe La* (2). The decision in *Nadia Chand Saha* v. *Birendra Chandra Dutt* (3) can be supported on the ground that the Judges found misrepresentation at the time of signature, though it is difficult to discover any evidence in support of that fact. They refer to Sir Richard Couch's judgment in *Pertap Chunder Ghose* v. *Mohendranath Purkait* (4), which purports to be based upon the sound proposition that

"where one party induces the other to contract on the faith of representations made to him, any one of which is untrue, the whole contract is, in a Court of equity, considered as having been obtained fraudulently.

It is true that both these decisions appear to go further and to suggest that, where the plaintiff told the defendant that a certain stipulation in a document would not be enforced, they cannot be held to have assented to it, as the document is not the real agreement between

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1. (1899) 22 All 149=27 I A 58=7 Sar 601 (PC).
2. AIR 1917 P C 207=42 I C 642=44 I A 236=45 Cal 320 (P C).
3. (1916) 37 I C 126.
4. (1889) 17 Cal 291=16 I A 233=5 Sar 444 (P C).

the parties, and the plaintiff cannot sue upon it. But this means, obviously, that a document may be invalid or a person entitled to a decree or order relating thereto, on the ground of mistake in fact or law, as stated in the first proviso, because the Judges in the former case say that the test is whether the defendant can maintain a suit for rescission, cancellation or variation of the contract. Moreover, this case is clearly distinguishable, because it turned upon the question upon what terms the defendant had held over after the termination of the period of his lease, and in the other case it was found that the defendant's signature to the document had been procured by means of a fraudulant misrepresentation about the existing law. For these reasons, I am of opinion that the decision of the District Judge was correct, and the appeals are dismissed with one set of costs. The cross-objections are not pressed and are dismissed.

M. C. Ghose, J.—These are two appeals by the defendants in a mortgage suit. The only question in the two appeals is whether compound interest could be claimed on the deed by the plaintiff mortgagee. The deed shows that interest was to run at Re. 1-6 per cent. per month with yearly rests. Defendant pleaded that the deed was written before the defendant appeared and, when the defendant came to know about the compound interest, he protested and refused to take the loan, unless the plaintiff agreed not to take compound interest. That, thereupon, the plantiff agreed not to take any compound interest and, upon that assurance, the defendant executed the deed. The trial Judge found on the evidence that the defendant's plea was true. The Court of appeal held that, having regard to S. 92, Evidence Act, oral evidence was inadmissible to prove the alleged plea of the defendant.

It has been urged by the defendant that the plaintiff's action in demanding compound interest in the suit, after having told the defendant that he would not charge compound interest, amounted to fraud and, following the decision in the case of *Lincoln* v. *Wright* (5), decided by the Court of Chancery, it is urged that the real agreement between the plaintiff and the defendant was that no compound interest should be charged. Therefore it is fraud on the part of the plaintiff to insist on compound interest. I may note that in the case of *Lincoln* v. *Wright* (5) the question was whether the deed, which purported to be an absolute conveyance, was really a deed of mortgage. On the part of the debtor, evidence was given to show part performance of the bond on the basis of the mortgage and the Court held in the circumstances that it was a deed of mortgage.

I may note that in the case of *Balkrishen Das* v. *Legge* (1) their Lordships stated:

> The cases in the English Court of Chancery which were referred to by the learned Judges in the High Court have not, in the opinion of their Lordships, any application to the law of India as laid down in the Acts of the Indian legislature.

In the case of *Pertap Chunder Ghose* v. *Mohendranath Purkait* (4), it was held that the landlord had obtained the kabuliyat by means of misrepresentation and therefore it was held that the kabuliyat was not binding on the tenants.

Much reliance was placed on the case of *Nadia Chand Saha* v. *Birendra Chandra Dutt* (3), decided by Mookerjee and Richardson, JJ. In that case, the tenant executed a kabuliyat for one year, agreeing that, on default of punctual payment of rent, the arrears would carry interest at 75 per cent. per annum. After the one year, the tenant held over and, on a subsequent suit for rent, the landlord claimed interest on arrears at 75 per cent. The tenant pleaded that the landlord assured him that interest at 75 per cent. would not be enforced. The trial Court found the allegation to be true. The High Court, in the circumstances, held that the interest at 75 per cent. was not the real agreement between the parties. It is to be observed that there it was a question, not so much on the terms of the kabuliyat, which was only for one year, but upon what terms the tenants held over at the end of that year.

Reference was also made to the case of *Maung Kyin* v. *Ma Shwe La* (2). In that case their Lordships followed the decision in the case of *Balkishen Das* v. *Legge* (1) and held that oral evidence was not admissible for the purpose of ascertaining the intention of the parties

5. (1859) 4 De G & J 16.

to written documents. In that case, the real point was whether there had been fraud in reference to matters antecedent to the deed in question and, on that basis, oral evidence was admitted to show the circumstances.

The latest decision in point of time is that in the case of *Abdul Aziz* v. *Amanmal Bathra* (6). The facts of that case were exactly similar to those of the present case. That was a mortgage suit and the deed stipulated compound interest. The defendant pleaded that the mortgagee orally agreed not to take compound interest. The High Court held that oral agreement, varying the deed, was not admissible, having regard to the provisions of S. 92, Evidence Act. That section provides that when the terms of a contract have been reduced to the from of a document, no evidence of any oral agreement or statement shall be admitted as between the parties to the contract or their representatives in-interest for the purpose of contradicting, varying, adding to or subtracting from its terms. In this case, the defendant clearly wants to subtract from one of the terms of the written contract, namely the term as to the compound interest. The first proviso of S. 92 provides that any fact may be proved, which would invalidate a document such as fraud, intimidation, illegality, etc. In this case, it is stated that there was fraud on the part of the plaintiff, inasmuch as he agreed not to take compound interest, but, afterwards in the suit, claimed compound interest. If this allegation be considered to amount to a fraud, then anything may be alleged that there was a verbal agreement varying, adding to or subtracting from the terms of the written document and S. 92 would be rendered futile.

In our opinion, the Court of appeal below rightly rejected the oral evidence, by which the defendant attempted to subtract from the terms of the mortgage bond.

The appeals are dismissed with costs, hearing-fee one set. The cross-objections are not pressed and are dismissed.

K.S. *Appeals dismissed.*

6. AIR 1925 Cal 276=78 I C 742.

A. I. R. 1934 Calcutta 566

LORT-WILLIAMS AND M. C. GHOSE, JJ.

Tarak Gobinda Choudhury—Applicant.

v.

Tara Gobind Choudhury and *others*—Opposite Parties.

Civil Ref. No. 9 of 1933, Decided on 19th February 1934, from order of Dist. Judge, Pabna and Bogra, D/- 7th September 1933.

Civil P. C. (1908), O. 46, R. 1— Reference can be made in case of doubts arising only in suit or appeal — Proceedings under S. 93, Ben. Ten. Act, are in nature of application —Hence no reference to High Court is competent—Bengal Tenancy Act (1885), S. 93.

Proceedings under S. 93, Ben. Ten. Act, do not amount to a suit, but are in the nature of an application. Therefore doubts as to question of law arising out of such proceedings cannot be referred to the High Court under Civil P. C., O. 46, R. 1, for the rule applies to cases of doubts arising only either in a suit or an appeal. [P 566 C 2]

Bijan Kumar Mukerji — for Applicant.

Lort-Williams, J.—This is a reference purporting to be under O. 46, R. 1, Civil P. C. That order provides that where, before or on the hearing of a suit or an appeal in which the decree is not subject to appeal any question of law arises on which doubt is entertained, a Court may draw up a statement of facts on any point of doubt arising and refer it for decision to the High Court. This reference arises out of an application under S. 93, Ben. Ten. Act, for appointment of a common manager. Although it is true, as the learned Judge states in his letter of reference, that the Civil Procedure Code applies to proceedings under S. 93, Ben. Ten. Act, yet it is clear that the proceedings under that section do not amount to a suit, but are in the nature of an application, as has been pointed out by the learned advocate. In every suit there must be a plaint and there must be a decree, and both these are absent in an application under S. 93, Ben. Ten. Act. It is clear therefore that the point which has given difficulty to the learned Judge has not arisen out of a suit, within the meaning of O. 46, R. 1 of the Code and consequently, the reference is not competent and must be rejected.

M. C. Ghose, J.—I agree.

V.S. *Reference rejected.*

A. I. R. 1934 Calcutta 567

LORT-WILLIAMS AND M. C. GHOSE, JJ.

Durga Das De — Defendant—Appellant.

v.

Bagalananda De and *others*—Respondents.

Appeal No. 722 of 1932, Decided on 5th February 1934, from appellate decree of Dist. Judge, Bankura, D/- 9th October 1931.

Civil P. C. (1908), S. 66—Karta of joint family purchasing with family funds property at auction sale in name of his son—His nephew bringing suit for recovery of his share in this property—Suit is not barred by S. 66.

Plaintiff and his uncle, defendant 1, jointly purchased the property in suit, in adjustment of a debt due on a mortgage bond for a loan made by the plaintiff's grandfather. The property was subject to a rent charge. Defendant 1 who was the karta of the joint family, fraudulently defaulted in payment of this amount of rent and had the property sold in Court sale for arrears of rent and purchased it out of the joint family fund in the name of his second son, defendant 2. In a suit brought by the plaintiff for declaration of title and recovery of possession, the defence was that the suit was barred by S. 66.

Held : that S. 66 was no bar to such a suit and that even if sub-S. (1), S. 66 applied to the plaintiff, he was protected by sub-S. (2) : 19 *W R* 356 and *AIR* 1915 *P C* 81, *Rel on*; *AIR* 1917 *P C* 12, *Dist.*; 43 *All* 711 and 50 *All* 572, *not Foll.* [P 568 C 1]

Braja Lal Chakraburty and *Panchanan Ghose*—for Appellant.

Atul Chandra Gupta, *Urukram Das Chakraburty*—for Respondents.

Ramendra Chandra Ray—for Deputy Registrar.

Lort-Williams, J.—For the purpose of this appeal the facts may be stated as follows : Plaintiff claims a declaration of title to certain property which he alleges to be joint, and recovery of possession thereof. Defendant 1 is his uncle, and defendant 2 is the son of defendant 1. All three used to live jointly, plaintiff and defendant 1 each having an eight annas share in the Ejmall property. Defendant 1 was karta of the joint Hindu family. According to the Dayabhaga system, defendant 2 was not in law a member of the joint family. In 1324 B. S. plaintiff and defendant 1 jointly purchased the property in suit, in adjustment of a debt due on a mortgage bond for a loan made by the plaintiff's grandfather. The property was subject to a rent charge, and was sold in execution of a rent decree. As karta, it was the duty of defendant 1 to see that the rent was paid. At thv auction sale, the property was purchased by defendant 1 benami in the name of defendant 2. In 1331 the parties separated in mess, and the joint property was partitioned by arbitrators. Defendant 1 prepared the list of properties and did not include the property in suit. The award, upon which a decree was passed, contained a reservation of any property accidentally omitted from the partition and subsequently discovered. The defence was that the property in suit was not joint, and had been purchased out of private funds belonging to defendant 1. The facts have been found by both Courts below in favour of the plaintiff, and it is unnecessary to refer to them further. But the defendants rely upon the point of law, that the suit is barred by reason of the provisions of S. 66, Civil P. C.

The section is as follows: (1) No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims. (2) Nothing in this section shall bar a suit to obtain a declaration that the name of any purchaser certified as aforesaid was inserted in the certificate fraudulently or without the consent of the real purchaser, or interfere with the right of a third person to proceed against that property, though ostensibly sold to the certified purchaser, on the ground that it is liable to satisfy a claim of such third person against the real owner.

In my opinion, this section has no application to the facts of this case. It is intended to discourage benami purchases at execution sales held by the Court, by penalizing the person who purchases benami in the name of another. The penalty applies equally to any one claiming through him. It does not apply where the name of the benamidar has been inserted in the sale certificate fraudulently or without consent of the real purchaser. It is designed to prevent fraud on third parties resulting from the collusive acts of the real and the certified purchaser. This view of the object of the section is confirmed by the observations of their Lordships of the Privy Council in *Bodh Singh* v.

Gunesh Chunder Sen (1), at p. 358, and in *Ganga Sahai* v. *Kesri Lal* (2). If this object is kept firmly in mind, no confusion will arise, as apparently has arisen from time to time in applying the words of the section to particular facts. There would be neither justice nor reason in penalizing an innocent person such as the plaintiff in this case. He was no party to the proceeding, which the legislature seeks to discourage on the contrary; his case is that defendants 1 and 2 acted dishonestly and in fraud of him.

The purchase was not made on his behalf within the meaning of the section, but on behalf of defendant 1, if on behalf of any one. These words in the section refer to private agreements or understanding between the benamidar and the person who employs him: *Bodh Singh* v. *Gunesh Chunder Sen* (1). Plaintiff does not claim the property on the ground that it was bought on his behalf, or even on behalf of the joint family. His case is, that the joint family, in fact, bought it, because it was bought with funds belonging to the joint family by defendant 1 who, as karta, was, in the words of Mayne in his work on Hindu law, acting as its mouth-piece. The karta is not the agent, or trustee of the joint family, but his position has been described as like that of a Chairman of a committee.

The purchase being made out of joint family funds, ipso facto it became immediately the property of the joint family, by operation of law. *Bodh Singh* v. *Gunesh Chunder Sen* (1). Nor does the plaintiff claim through defendant 1, in the sense indicated in the section. His title is not derivative, like that of an heir, legatee, assignee or purchaser, and, even if it could be argued that the plaintiff however unfortunately, did fall within the words of sub-S. (1), if read literally and strictly, he is protected under the provisions of sub-S. (2). It is clear that the name of defendant 2 was inserted fraudulently and without the consent of the joint family which was the real purchaser, or of the plaintiff who was a member of it.

For these reasons, in my opinion, the Allahabad cases, *Baijnath Das* v. *Bishan Devi* (3) and *Ram Rup Teli* v. *Khaderu Teli* (4), were wrongly decided. In any case, they are not binding on this Court. They seem to be in conflict with the observations made in *Bodh Singh* v. *Gunesh Chunder Sen* (1) and *Ganga Sahai* v. *Kesri Lal* (2), and the former decision was expressly dissented from in *Nataraja Mudaliyar* v. *Ramasami Mudaliyar* (5), in which the law was definitely and correctly stated and with which decision I fully agree. The only difficulty is raised by the case of *Suraj Narayan* v. *Ratan Lal* (6), in which apparently a contrary view was taken. That was a decision of the Privy Council under the old S. 317, Civil P. C., 1882, the wording of which differs materially from that of S. 66. This decision therefore is clearly distinguishable. Moreover the point raised under S. 317 which affected part only of the claim, was disposed of by their Lordships within six lines of the report, and the relevant facts are nowhere stated. No decisions are mentioned in the judgment nor does there seem to have been much discussion on the matter. The result is that this appeal must be dismissed with costs.

M. C. Ghose, J.—I am of opinion that S. 66, Civil P. C., is not a bar to the success of the plaintiff in the particular circumstances of this case. The grandfather of the plaintiff had taken mortgage of this property and it was afterwards purchased from the mortgagors by the plaintiff and defendant, 1 the heirs of the plaintiff's grandfather. The facts found by the Courts below show that afterwards, defendant 1 who was the karta of the joint family, fraudulently defaulted in payment of a small amount of rent and had the property sold for arrears of rent and purchased it out of the joint family funds in the name of his second son, defendant 2. In these circumstances having regard to the observations of their Lordships of the Privy Council in the cases of *Bodh Singh* v. *Gunesh Chunder Sen* (1) and *Ganga Sahai* v. *Kesri Lal* (2), S. 66 is no bar to the success of the suit.

1. (1873) 19 W R 356=12 Beng L R 317=3 Sar 253 (P C).
2. AIR 1915 P C 81=30 I C 265=42 I A 177=37 All 545 (P C).
3. AIR 1921 All 185=63 I C 676=43 All 711.
4. AIR 1928 All 619=108 I C 130=50 All 512.
5. AIR 1922 Mad 481=73 I C 478=45 Mad 856.
6. AIR 1917 P C 12=40 I C 988=44 I A 201=40 All 15 (P C).

I agree with my learned brother that the appeal should be dismissed with costs.

V.S. *Appeal dismissed.*

A. I. R. 1934 Calcutta 569

JACK AND BARTLEY, JJ.

Mohendra Nath Banerjee—Judgment-debtor—Appellant.

v.

Roy Satish Chandra Choudhury Bahadur and *another*—Decree-holders—Respondents.

Appeal No. 529 of 1933, Decided on 17th April 1934.

Civil P. C. (1908), S. 145—Where there is doubt about construction of security bond it must be considered in light of order directing security to be given—Evidence Act (1872), S. 95.

The rule that a security bond must be strictly construed according to its own terms is certainly true where there is no ambiguity in the terms, but where there is a contradiction in terms, S. 95, Evidence Act, allows a reference to antecedent circumstances. Thus where there is any doubt about the true construction of the security bond the bond must be considered in the light of the order directing the security to be given : *A I R* 1932 *P C* 131, *Rel on.*; *A I R* 1917 *P C* 23 and *A I R* 1929 *P C* 34, *Ref.* [P 570 C 1]

Kali Kinkar Chakravarty — for Appellant.

Sita Ram Banerjee, Anil Chandra Dutt and *Indir Chunder Ghose* — for Respondents.

Jack, J.—This appeal has arisen out of an application under S. 47 Civil P. C., in an execution case in which it is sought to realize from the petitioner Mohendra Nath Banerjee, Rupees 6106 due under a mortgage decree by enforcing a security bond executed by him. Mohendra was a puisne mortgagee. The decree-holders in March 1929 obtained a mortgage decree for sale of the property mortgaged for the realization of Rs. 59,984 with interest up to the date of payment. Mohendra appealed against the decree and obtained a stay of execution on condition of executing a security bond for Rupees 5,000 as security for the increase of interest which would be due owing to the stay of execution pending the appeal. The appeal was dismissed and the property was sold in March 1932 for Rs. 65000 the decretal amount having in the meantime mounted up to Rs. 70,446 with further interest.

The order of the Court dated 20th December 1929, shows that the petitioner was ordered to execute a security bond making himself liable to the extent of Rs. 5,000 for interest accumulating during the stay of execution but the bond he actually executed only makes him liable for what should be payable by him under the appellate decree. Now as the appellate decree merely dismisses the appeal and as the petitioner as puisne mortgagee was not liable at all under the original decree the petitioner maintains that he is not liable for any payment under the security bond. The terms of the security bond are as follows :

"I of my own free will will stand security to the extent of Rs. 5,000 mortgaging the properties specified in the schedule hereto annexed and covenant that if the decree of the First Court be confirmed or varied by the appellate Court then I shall duly act in accordance with the decree of the appellate Court and pay whatever may be payable by me thereunder and if I should fail therein then any amount so payable shall be realised from the properties hereby mortgaged and if the proceeds of the sale are insufficient to pay the amount due I will be personally liable to pay the balance."

Two points are noteworthy in these terms : (1) The surety contemplates a payment to be made by him in the case in which the decree of the first Court is merely confirmed. (2) He only makes himself liable for whatever the appellate decree orders him to pay. Thus the statement that he will pay whatever may be payable by him if the decree is confirmed is unmeaning with reference to the existing facts since, if the decree is confirmed, no amount could be payable by him since he only binds himself to pay whatever he is ordered to pay by the appellate Court decree. This appears to be therefore a case coming under S. 95, Evidence Act, which states that when the language used in a document is unmeaning with reference to existing facts evidence may be given to show that it was used in a pecuilar sense. We are entitled therefore to look into the record of the circumstances in which the bond was executed. Now the order of the appellate Court dated 12th December 1929 makes it clear that the security bond was executed to indemnify the decree-holders for the interest accumulating on account of the postponement of the sale, by making the surety personally liable up to Rs. 5,000 and it is therefore clear that this is what is meant by the statement in the

security bond that the surety will duly act in accordance with the appellate decree and that, though he is not directed to make any payment by the decree, he is rendered liable for interest to the extent of Rs. 5,000 by the confirmation of the First Court's decree by the appellate Court.

None of the rulings which have been cited to us for the petitioner are directly in point. The cases of *Manindra Chandra Nandi* v. *Durga Prosad Singh* (1) and *Bomanji Ardeshir Wadia* v. *Secy. of State* (2) merely lay stress on the fact that a security bond must be strictly construed according to its own terms. This is certainly true where there is no ambiguity in the terms, but where there is a contradiction in terms, as in the present case, the law allows a reference to antecedent circumstances. As pointed out for the respondents their Lordships of the Privy Council have even held in the case of *Raghunandan Prosad Singh* v. *Kirtyanand Singh* (3) that where there is any doubt about the true construction of the security bond the bond must be considered in the light of the order directing the security to be given. This is the course we have had to adopt in the present case and the order directing security to be given makes it clear that the appellant is liable to the extent of Rs. 5,000 since the amount of interest which accumulated during the stay of sale between 1929 and 1932 much exceeded this amount. Under the provisions of S. 145, Civil P. C., the amount can be realised in the execution proceedings. The decree-holder is however not entitled to realize Rs. 6,106-13-9 (the difference between the proceeds of the sale and the amount of the decree) and the order of the lower Court will be modified accordingly. In default of payment of Rs. 5,000 within three months the property mortgaged by the security bond will be sold and if the sale proceeds are less than Rs. 5,000 the decree-holder will be entitled to recover the balance as a personal decree. They will also be entitled to costs of this appeal—hearing fee two gold mohurs.

Bartley, J.—I agree.

v.s. *Decree modified.*

1, AIR 1917 P C 23=38 I C 929 (P C).
2. AIR 1929 P C 34=114 I C 1=56 I A 51=53 Bom 230 (P C).
3. AIR 1932 P C 131=136 I C 629 (P C).

A. I. R. 1934 Calcutta 570

AMEER ALI, J.

G. G. Ritchson—Petitioner.

v.

W. L. D. Ritchson—Respondent.

Matrimonial Suit Nos. 94 and 4 of 1933, Decided on 26th June 1933.

Divorce Act (1869), S. 3 (1)—Parties having no fixed home—Last residence of husband and wife for however short a time gives Court jurisdiction.

In a petition for judical separation by the wife against her husband it was found that the husband who was employed on the railway had no permanent place of residence. He took leave and came to Calcutta to spend it with his wife's parents. But the parties separted, the husband leaving after five days:

Held: that the parties did last reside in Calcutta within the meaning of S. 3 and that the Court had jurisdiction to entertain the petition: 36 *Cal* 964; *AIR* 1921 *Bom* 211, *Ref*; 32 *All* 203, *Dist*. [P 570 C 2]

N. Barwell and *P. Tagore*—for Petitioner.

Clough—for Respondent.

Order.—This petition was filed in January 1932 for the relief of judicial separation and for permanent alimony. The parties were married in Calcutta, but the husband's employment is on the E. I. Railway in connection with the permanent way and as such he has no permanent place of residence. In point of fact his last period of duty appears to have been in Bihar. In August 1932 he was under orders for transfer, he took leave and came to Calcutta and spent that leave with the parents of his wife, the petitioner. The parties had previously done so on several occasions. Although the parties had intended to spend the whole month's leave as stated the parties separated, the husband leaving the house after five days.

The point arises whether this Court has Jurisdiction under S. 3, Divorce Act. Mr. Barwell appearing for the petitioner has called evidence and has put before me the reported cases and also an unreported case of this court *Ross-Hurst* v. *Ross-Hurst*, the other cases being *Bright* v. *Bright* (1), *Murphy* v. *Murphy* (2) and the case on the other side *Flowers* v. *Flowers* (3). I am satisfied that the last case *Flowers* v. *Flowers* (3), is distinguishable upon the facts from the present case and hold that upon the circumstances disclosed

1. (1909) 36 Cal 964=4 I C 419.
2. AIR 1921 Bom 211 = 76 I C 633 = 45 Bom 547.
3. (1910) 32 All 203=5 I C 871.

in the evidence the parties did last reside in Calcutta within the meaning of the section. In *Flowers* v. *Flowers* (3), there was a permanent home or a fixed home in Hyderabad, Sind, to which the parties intended to return. In the present case the parties have no fixed home.

In addition to the facts in support of the jurisdiction of this Court Mr. Barwell has called evidence of adultery which I accept. Mr. Barwell has also called my attention to the fact that there was an informal deed of separation between the parties dated 17th August 1932 but the facts relied upon by the petitioner are subsequent to that date and the form of the deed is not such as to prevent the parties from relying upon subsequent matrimonial offences.

Mr. Barwell asks for alimony at the rate of Rs. 100 a month on the materials contained in the answer to the petition for alimony pendente lite. I make that order and the plaintiff will be entitled to a judicial separation.

The alimony decree is for permanent alimony at the rate mentioned and for costs on scale No. 2. All sums already paid or deposited would be taken into account and any sums deposited may be withdrawn by the petitioner.

K.S. *Order accordingly.*

A. I. R. 1934 Calcutta 571

MITTER AND PATTERSON, JJ.

Sourish Chandra Roy Bahadur—Defendant—Appellant.

v.

Saroj Ranjan Singha and *others*—Plaintiffs—Respondents.

Appeals Nos. 205 to 208, 210 and 211 of 1930 and 8 of 1933, Decided on 16th April 1934, from original decrees of Addl. Sub-Judge, Nadia, D/- 30th April 1930.

(a) Patni Regulation (8 of 1819) — Preamble—Patni taluq—Cardinal incidents mentioned — Mere use of expression "patni taluq" in document before regulation does not give meaning in preamble—Presumption that it was used in its technical meaning is rebuttable.

– The power of sale to the zamindar for arrears of rent and his power to make the other properties of the defaulter liable for any balance of arrears of rent which may remain after the sale of the tenure in question are cardinal incidents of the "patni taluq" tenures. And the mere use of the expression "patni taluq" in a document before the regulation did not give the above meaning given in the preamble. Even if the use of the words had acquired the technical meaning given in the preamble, the use of such expression raises only a strong presumption that it had been used in its technical sense; but the presumption can be displaced by the terms in the document.

[P 574 C 1, 2; P 575 C 2]

(b) Deed—Word must be taken in its actual meaning of parties and not in its technical sense.

The term in a document should not be taken in its technical sense in opposition to the actual meaning of the parties. Preference should be given to intent, over technical import and form : *Cholmondeley* v. *Clinton*, (1820) 2 *J & W* 81, *Ref.* [P 575 C 2]

(c) Deed—Construction of—Ancient deed —Contemporaneous usage may be resorted to.

One of the most settled rules of law for the construction of ambiguities in ancient instrument is that resort may be had to contemporaneous usage to ascertain the meaning of the deed : *Attorney-General* v. *Drummond*, 1 *Dr. & War* 353, *Watcham* v. *Attorney-General of the East Africal Protectorate*, (1919) *A C* 533, *Ref.* [P 576 C 2]

(d) Practice—High Court should pronounce opinions on all important issues.

It is the duty of the High Court Judges to pronounce their opinions on all important issues in cases before them : *A I R* 1922 *P C* 405 and 10 *M I A* 476 (*P C*), *Ref.* [P 577 C 1]

(e) Patni Regulation (8 of 1819), S. 13 (1) —Tender to collecter is valid.

The word "Court" should not be strictly construed and tender to collector is valid : 8 *Cal* 954, *Rel on.* [P 578 C 1]

(f) Patni Regulation (8 of 1819), Ss. 8 and 10—Notice must be self-contained one.

Section 10 contemplates a self contained notice which comprises not only a specification of the arrears and notification that the sale will be held on the 1st Agrayan if the amount claimed be not paid before that date but also a statement of the lots proposed to be sold in the order in which the sale will be held. [P 578 C 2]

(g) Patni Regulation (8 of 1819), Ss. 8 and 10—Notice must contain specification of balance due to zamindar from all patnidars under him—Irregularity in notice vitiates sale.

The effect of Ss. 8 and 10 is that the notice that will be stuck up in the cutchery of the Collector, like the petition, must contain specification of the balance that may be due to the zemindar concerned from all the Putnidar under him and that a copy or extract of such part of the notice as may apply to an individual defaulter shall be sent by the zemindar to be similarly published at the cutchery or at the principal town or village upon the land of the defaulter. The rule applies irrespective of the number of patnis. And an irregularity in the notice which does not contain specification of balance due from all putnidars vitiates sale : *A I R* 1921 *Cal* 296 and *A I R* 1925 *P C* 297, *Rel on.* [P 578 C 2; P 579 C 1]

(h) Patni Regulation, Ss. 8 and 10—Non-publication of notice in patnidar's cutchery within defaulting tenure renders sale void.

The non-publication of the notice in the Putnidar's Cutchery within the defaulting tenure is a non-compliance within the provisions of the regulation which renders the sale void : 14 *Cal* 365 (*P C*), *Rel on.* [P 579 C 2]

Sarat Chandra Basak, *Radha Binode Pal*, *Sudhanshu Mauli Choudhury*, *Paresh Chandra Mitter*, *Sarat Chandra Basu*, *Santimoy Majumdar*, *Mani Lal Bhattacherjya*, *Pulin Behary Das*, *Sourindra Narayan Ghose*, *Urukram Das Chakraverty*, *Rama Prosad Mukherjee*, *Pradulla Chandra Nag*, *Hemanta Kumar Das*, *Narendra Nath Banerjee*, *Panchanon Ghose*, *Durga Das Roy* and *Girija Bhusan Sanyal*—for Appellant.

A. Quasem for *Deputy Registrar*, *Rajendra Bhusan Bakshi* and *Brojo Lal Chakravarty*—for Respondents.

Mitter, J. — These seven appeals arise out of seven suits instituted in the Court of the Additional Subordinate Judge of Nuddea for the setting aside of a sale held under the provisions of the Putni Regulation (Reg. VIII of 1819.) The Suit No. 174 of 1927 to which the
re-numbered 3 of 1930
First Appeal No. 205 relates was brought by Saroj Ranjan Sinha and others, now respondents, who are cosharers to the extent of eight annas in the patni tenure which has been sold, the other eight annas cosharer, a lady of the name of Joy Durga Dasi, having been impleaded as a pro forma defendant as she did not join in the suit. The principal defendant to the suit was the Hon'ble Maharaja Khaunish Chandra Roy of Krishnanagar, who died pending suit on 22nd May 1928, leaving behind him an infant son Kumar Sourish Chandra Roy whose estate was taken charge of by the Court of Wards and the suit was defended by the Collector of Nadia through the Manager Birendra Nath Roy at all subsequent stages.

Appeal No. 206 arises out of Suit No. 152 of 1928 which was
renumbered 4 of 1930
commenced by the Haldars who are Darputnidars of some of the patni properties and Seputnidars in respect of others, against the original principal defendant, the Maharaja. Appeal No. 207 arises out of Suit No. 169 of 1928, re-numbered 5 of 1930, which was commenced by the Chetlangeas who are Darputnidars in respect of some of the villages and Seputnidars in respect of others. Appeal No. 208 of 1930 arises out of Suit No. 171 of 1927, re-numbered 2 of 1930, commenced by the Sircars who are the Darputnidars in respect of some villages included in the patni. Appeal No. 210 of 1930 arises out of Suit No. 161 of 1928, re-numbered 6 of 1930, commenced by one Durga Bala Dassi who is Darputnidar in respect of some of the villages. Appeal No. 211 of 1930 relates to Suit No. 162 of 1928, re-numbered as 7 of 1930, commenced by Ratan Lal Halder, one of the Darputnidars. Appeal No. 8 of 1933 arises out of a suit which was instituted by Rati Kanta one of the Darputnidars.

The Maharaja of Krishna Nagar was the common principal defendant in all these suits being the Zemindar of the Revenue paying estate under which the Taluk in question is held by the putnidars the plaintiffs in the suit to which appeal No. 205 relates, and their cosharer Putnidar Joy Durga Dassi. The sale in question was held for arrears of rent due from the putnidars for the Aswin Kist of 1334 B. S. for a total demand of about Rs. 13,000. It was held by the Zemindar under the summary procedure laid down in the Putni Regulation, and the putni was purchased by the Zemindar the Maharaja for a sum of Rs. 10,000 as nobody else was present to bid at the sale. It is admitted on behalf of the zemindar that the property has fetched a very inadequate price, and the manager of the Court of Wards, Birendra Lal Roy, has admitted that the putni in question (Taraf Mahatpur) was a very valuable property, and in fact the biggest Putni Mehal in the Raj Estate, and that the Maharaja's income would increase to the extent of Rs. 40 to 60 thousand a year if the mahal could be made khas, and that the Manager Kanti Babu used to try zealously to increase the Maharaja's income. It is by reason of the extreme inadequacy of price fetched at the sale that these eight suits (one of which to which appeal No. 209 of 1930 relates is not before us just now) have been commenced by the several grades of tenants who have joined in attacking the sale on common grounds. The plaint in the suit of the Putnidars, the Sinhas, to which appeal No. 205 re-

lates, has been taken as the type as representing the case of the plaintiffs in the other suits in the argument before us.

The validity of the sale has been attacked on a variety of grounds. The grounds of attack as formulated in the plaint of the putnidars fall under two broad heads: (1) the sale is void as on a proper construction of the putni kabuliyat which regulates the rights of the zamindar and tenant, the tenure in question is not a putni tenure at all and the provisions of the Regulation 8 of 1819 are not attracted to it, and the summary sale by the zamindar cannot be sustained .(2) Assuming the tenure was a putni tenure there has been non-compliance with the provisions of the Regn. 8 of 1819 which render the sale invalid. Under this second head several irregularities are described in the plaint but it is not necessary to refer to all of them as some of the defects have been held by the trial Court not to affect the sale. I will only refer to such irregularities as have formed the foundation of the decision of the Subordinate Judge in setting aside the sale. They are:

A That the sale was held by the Collector notwithstanding the attempt made by the Darputnidars Mr. M. Pal Choudhury to avoid the putni sale by tendering to the Collector the amount of the arrears of the patni in accordance with the provisions of S. 13 of the Regulation. *B* That the Maharaja filed a separate petition for sale for each separate Putni in arrears and purported to have caused to be stuck up at the Collector's Court and at his own Sadar Kutchery a separate sale notice for each such putni and there was contravention of S. 8 read with S. 10 of the Regulation. *C* That there was no service of the publication of the sale notification on the Cutchery upon the land of the defaulting putnidar at Chapra-one of the putni villages and this was sufficient to vitiate the sale. *D* That further that there has been no publication of the sale notice in the Mofussil. *E* That the rules prescribed in S. 10 of the Regulation were not duly observed in that (1) the lots were not called up successively (2) that the Revenue Peshkar did not look into the kabuliyat in order to see that the balance remaining unpaid exceeded a four annas proportion of the demand up to the date of the sale and (3) that the Collector did not give sufficient opportunity to bidders other than the Maharaja to bid. All these grounds of attack have been traversed by the defendant in his written defence. These allegations and counter allegations have given rise to issues 6, 8, 9 and 14 which run as follows: 6. Is the putni mahal saleable under Regn. 8 of 1819 under the terms of the putni patta? 8. Were the provisions contained in S. 13 Cl. (2) of the putni Regulation complied with? 9. Were the provisions of S. 8. Cls. 2 and 3 of the putni Regulation complied with? 14. Was the sale properly conducted?

The Subordinate Judge after taking oral and documentary evidence has found for the plaintiffs on all these issues and has set aside the sale basing his decision on the findings on these four issues. Against the decrees the seven appeals have been preferred by the representative of defendant 1 who has assailed the findings of the Subordinate Judge on these issues as erroneous. Issue 6. We proceed now to the consideration of issue 6 which raises the question of the inapplicability of the provisions of Regn. 8 of 1819 to the tenure in suit. The Subordinate Judge has held that Regn. 8 cannot govern the incidents of the tenure and if his view is right it affects seriously the right of the zamindar to realise his rent by sale of the tenure in accordance with the summary procedure laid down in the Regulation. The effect of his finding is that the zamindar cannot, for all time to come, have recourse to the summary sale, and thus prevents him in future from adopting the method for speedy realisation of any arrear of rent of the patni. This issue therefore requires very serious and careful consideration at our hands. The determination of this issue depends on the construction which is to be put on the putni kabuliyat dated 24th of Pous 1224 B. S. corresponding to 6th January 1818 a certified copy of which has been marked as Ex. "E" in the case and is printed at p. 1, Part 2 of the Paper Book. The material portions of the kabuliyat are as follows:

To The High Indignity Srijut Ratneswas Roy Talukdar of Taraf Mahatpur and others. This kabuliyat in respect

of Putni Taluk is executed by us Sanatan Pramanik and Radha Madhab Pramanik in the year 1224 B. S., to the following effect : That on receipt of the total sum of rupees one lac fourteen thousand (sicca) as consideration money you have executed a kabala settling us as Putni Talukdars of the Mahal Taraf Mahatpur consisting of 57 Mouzas within your Taluk in the District of Nadia, at a total annual jama together with Foujdari tax of (sicca) Rs. 19,000 and we also have accepted it of our own free will. Excepting Debutter, Brahmattar and Mahatran Malik, Lakhraj, etc., as they exist within the present boundaries of the Mahal given in the schedule we shall take into our control and possession all the Mouzas and Mahals lying within the boundaries given in the schedule, consisting of rayati, Khamar or Chakran, cultivated, waste and jungle, Jalkar, Bankar, Nalkar, Falkar and garden, lands, trees, rivers, channels, khals, beels, jhils, tank and others, that is the entire zamindari together with land and water therein situate to which you are entitled shall enjoy the same with our sons and grandsons in succession on payment of the said entire rent as per Kistibundi year after year at the Kutchery of your Taluks at Krishnanagar. This shall never be cancelled. We shall have no concern with the Sarkari Habeli, tank or garden which are in your khas possession. There will never be any increase or decrease of this jama.

If I neglect to pay the entire rents at the close of the year then you shall at your pleasure take khas possession of this Putni Taluk at the end of the first month of the following year. If we grant the Mehal in Darputni settlement to any body else then that Darputnidar shall act according to the terms and conditions of this kabuliyat given by us. We and our heirs shall act according to this kabuliyat. To this effect we of our own accord, on payment of the entire consideration money and receipt of the Kobala of the Putni Taluk, execute this kabuliyat.

It appears from a plain reading of this document that although the document is described as a kabuliyat of a Putni Taluk it does not contain any stipulation giving the power of sale to the zamindar for arrears of rent nor does it give the zamindar the power to make the other properties of the defaulter liable for any balance of arrears of rent which may remain after the sale of the tenure in question. It will appear from para. 7 of the preamble to Regn. 8 of 1819 that these two rights of the zamindar were the cardinal incidents of the tenures which were usually denominated as Putni Taluks prior to the enactment of the Putni Regulation, for the Preamble states:

"By the terms also of the engagements interchanged, it is amongst other stipulations provided that in case of an arrear occurring, the tenure may be brought to sale by the zamindar and if the sale does not yield a sufficient amount to make good the balance of rent at the time due, the remaining property of the defaulter shall be further answerable for the demand. These tenures have usually been denominated Putni Taluks."

Exhibit "E" which was executed a year before the enactment of the Putni Regulation merely empowers the zamindar tc take possession of the Putni if there are arrears of one full year, but does not contain any stipulation for sale. S. 3, Cl. 3 of the Putni Regulation enacts that in case of an arrear upon any tenure of the description alluded to in Cl. 1 of this section, the tenure shall be brought to sale by public auction and Cl. 1, S. 3 refers to the tenures known by the name of Putni Taluk as described in the Preamble to the Regulation which has already been referred to. S. 8 of the Regulation provides that zamindars shall be entitled to apply in the manner following for periodical sales of any tenures upon which the right of selling or bringing to sale for arrears may have been specially reserved by the stipulation in the engagements interchanged on the creation of the tenure.

In the case of *Sahebuddin* v. *Fatia* (1), Sir Barnes Peacock, C. J., observed that S. 8 of the Regulation applied to the sale of those tenures only upon which the right of selling or bringing to sale for arrears of rent has been specially reserved by the stipulation in the engagements interchanged on the creation of the tenure. The learned Chief Justice pointed out that under Regn. 7 of 1799 S. 15 there were two classes of tenures saleable for arrears of rent: (1)

1. (1867) 7 W R 260 = B L R Sup Vol 646 (FB).

those in which the tenure was saleable by the stipulations in the title deeds and (2) those which were saleable by the established usage of the country and that it was the first class of tenures which came within the purview of S. 8, Putni Regulation. It was argued for the appellant that the use of the expression 'Putni Taluk' at the beginning of the document implied prima facie that it was a Putni taluk of the character designated as putni taluk in the preamble to the regulation and that the right to take khas possession was merely an additional right.

In other words it was said that instead of describing the leading characteristics of Putni taluk as described in the preamble to the regulation viz., the right of sale by the zemindar for arrears and the right to make other properties of the defaulter liable in case the sale does not fetch a sufficient price to liquidate the entire rent, the idea of those incidents is conveyed by the use of the compendious expression 'putni taluk.' It was said that the word 'Putni taluk' had by 1818 acquired a certain technical meaning and in construing the deed if significance is attached to the words 'putni taluk' then it must be held that the parties intended to convey by the use of the two words the idea of the saleability of the tenure for arrears of rent at the instance of the Zemindar. In the first place it is to be noticed that before the enactment of the Regulation it cannot be said that every taluk which was described as putni taluk had the meaning attached to it as is described in the preamble to the Regulation. The meaning of the word 'putni' according to Harrington's "Analysis" is 'settled:' see Vol. 3 p. 549. In Field's "Land holding and the Relation of Landlord and Tenant," Edn. 2, p. 715, the following note occurs, the derivation of the word 'putni' is according to Wilson uncertain. Mr. Harrington says it may be rendered "settled or established" which Professor Wilson pronounces very questionable. There is a word 'pattan' which I have met in several districts, used as settling with, letting to, a tenant, which is doubtless connected with Mr. Harrington's explanation. This is a literal meaning of the word 'putni.' The Regulation was therefore careful, enough to state in the preamble that the tenures which carried with them the right of the Zemindar to sell were usually designated putni taluks. The preamble does not suggest that every taluk without exception which was designated as putni taluk would be a taluk within the meaning of the preamble to the Regulation even if the terms creating the taluk show that no right to sell was reserved in the Zemindar.

Even if it be assumed that the word 'Putni Taluk' had acquired in 1818 the technical meaning which is ascribed to it in the Preamble to the Regulation all that it can be said is that it raises a strong presumption that the parties intended to use the words according to their correct technical meaning, but this is not conclusive evidence that such was the real meaning. In this case the terms of the kabuliyat Ex. 'E' displaces the presumption for there is no reference whatever in the deed to the power of sale of the Zemindar in case rent has fallen into arrears and to the further power of the Zemindar to make the other properties of the defaulter liable for the balance of the arrears of rent if the sale does not liquidate the entire arrears due. The parties intended that in case of arrears accruing for one year the Zemindar would be at liberty to take khas possession and not to sell. The technical meaning in this particular case seems to be an erroneous guide to the real one leading to a meaning contrary to what the party intended to convey by it and the technical meaning in such circumstances ceases to answer its purpose. As was observed by Sir Thomas Plumer, Master of the Rolls, in the case of *Cholmondeley* v. *Clinton* (2), at pp. 91, 92 and 93:

> "There is no case or dictum to be found which requires the Court to adopt the technical sense in opposition to the actual meaning of the party: on the contrary, the authorities uniformly demand the preference to be given to intent, over technical import and form."

There is no authority which compels us to hold that we should adhere to the technical meaning notwithstanding the manifestation of a contrary intent by the clear terms of the kabuliyat. Two cases however have been cited before us, as they were before the trial Court, in support of the view that the use of the

2. (1820) 2 J & W 81.

words 'putni taluk' in Ex. E was sufficient to attract the provisions of Regulation 8 of 1819. (1) A decision of their Lordships of the Judicial Committee in *Brindaban* v. *Brindaban* (3). A case reported in Sevester's Reports, Vol. II, p. 173. In the former case neither the Putni lease nor any copy of it appeared in the record but the plaintiff in his plaint described the tenure as a putni taluk and his own tenure as a durputni and their Lordships of the Judicial Committee said with reference to this state of facts this:

"Their Lordships are of opinion that under the description 'putni taluk' and 'durputni taluk' it must be prima facie intended that the tenure called a putni tenure was a tenure transferable by sale, and upon the creation of which it was stipulated by the terms of the engagements interchanged that in case of an arrear occurring, the estate might be brought to sale. If so according to the terms of Regulation 8 of 1819 the tenure might not only be brought to sale, but it might be sold free from encumbrances."

In this case it is to be observed that the putni was created subsequent to the enactment of the putni Regulations and as no document was produced the presumption that the words putni taluk bore the meaning ascribed to it by the Regulation was not displaced or rebutted. These two circumstances distinguish the present case from the case before the Judicial Committee. In the case in Sevester's report it appears that the parties mutually agreed on the one hand to create and on the other to accept a tenure which they called a putni taluk without actual words limiting or defining it as something of a separate kind, and in such circumstances it was held that the parties intended to make the taluk a putni taluk within the meaning of Regulation 8 which had come into force about seven years before the creation of the putni. This case therefore is also distinguishable from the present.

In the case of *Nirod Chandra* v. *Hari Har Chakravarty* (4), Sir Ashutosh Mookerjee, Acting Chief Justice, Fletcher, J., concurring observed that the use of the expression 'putni taluk' in the contract of tenancy does not necessarily create a putni taluk, in other words a taluk subject to the summary procedure for realization of rent provided by the putni Regulation. In that case the question was as to whether the tenure was merely hereditary or was held on a rent fixed in perpetuity and the learned Chief Justice pointed out that while there were expressions which show that the tenure was mourashi there was nothing to show that the tenure was intended to be mokarari. The position therefore is this that while the use of the expression "putni taluk" prima facie imports a putni within the meaning of the putni regulation, that prima facie position is displaced by anything in the document creating the putni which would lead to the conclusion that no power of sale by summary process was reserved to the zamindar. The terms of the document before us are clear and no power to transfer by way of sale is given to the Putnidar.

It has next been argued that in any event the use of the expression "putni taluk" in the document renders the document ambiguous and that therefore it is necessary to examine the conduct of the parties to see how the words were understood by the parties. And documentary evidence has been placed before us to show that the predecessor of the plaintiffs one Mathura Mohan Pal Choudhury as durputnidar made a deposit under S. 13 of the Putni Regulation to avoid the Putni sale and reference is made to Ex. 30 dated 8th June 1874, where a recital to that effect is to be found: See p. 15, part. 11 of the paper book lines 1 to 10. Reference has also been made to the practice in the Sherista of the Maharaja of treating this tenure as a putni tenure within the meaning of the Regulation. There can be no question that one of the most settled rules of law for the construction of ambiguities in ancient instrument is that you may resort to contemporaneous usage to ascertain the meaning of the deed. As was observed by Lord Sugden with reference to such ambiguity in ancient instruments "Tell me what you have done under such a deed and I will tell you what that deed means." See *Attorney General* v. *Drummond* (5), see also *Watcham* v. *Attorney General of the East African Protectorate* (6), which was cited at the Bar. This rule however

3. (1874) 1 I A 178=21 W R 324=3 Sar 365 (P C).
4. AIR 1920 Cal 594=58 I C 867.
5. 1 Dr & War 353=3 I D 162=1 Con & L 210.
6. (1919) A C 533=87 L J PC 150=120 L T 258=34 T L R 481.

has no application to the present case for the terms of Ex. E are absolutely clear and in such a case the subsequent conduct of the parties is an irrelevant consideration. In this connection the following observation of their Lordships of the Judicial Committee of the Privy Council in the very recent case of the *Barboni Coal Concern, Ltd.* v. *Gopinath* (7), may be usefully cited. Lord Alness delivering the judgment of their Lordships expressed himself thus:

"The only answer made by counsel for respondent 1 to this argument was that the conduct of the parties after the lease was signed, in accordance with which each lessor for a time accepted several payments of royalties, controls the stipulations in the lease, and vouches an agreement between parties to vary its terms. Their Lordships have no hesitation in rejecting this contention. The facts do not support it. Nay, more; it sins against the familiar principle affirmed in the case of *N. E. Ry. Co.* v. *Hastings* (8), that where the words in a deed are clear as they are in this case the subsequent conduct of parties is an irrelevant consideration."

Having regard to these considerations we are of opinion that on a true construction of the kabuliyat of 1818 it must be held that notwithstanding the use of the expression putni taluk the other clear terms of the kabuliyat show that it was a permanent hereditary taluk of a very different kind to which the putni regulation does not apply. We are in entire agreement with the Subordinate Judge on his finding on this issue and we think that the putni sale cannot be sustained on this ground alone. In this view it would not have been necessary to decide the other issues in the case but for the recent pronouncement of their Lordships of the Judicial Committee that it is the duty of the High Court Judges to pronounce their opinions on all important issues in cases before them. In the case of *Muhammad Suleman* v. *Birendra Chandra Singh* (9), at p. 252 (*of* 50 *Cal.*) their Lordships referred to their own remarks in the case of *Tara Kanta* v. *Padmamani* (10) at 488 to the following effect:

"The Courts below, in appealable cases, by forbearing from deciding on all the issues joined, not infrequently oblige this committee to recommend that a cause be remanded which might otherwise be finally decided on appeal. This is certainly a serious evil to the parties litigant, as it may involve the expense of a second appeal as well as that of another hearing below. It is much to be desired therefore that in appealable cases the Courts below, should, as far as may be practicable, pronounce their opinions on all the important points."

We now proceed to deal with the findings of the Subordinate Judge on Issue No. 8 as they have been attacked by the appellant. The case of the plaintiffs is that M. Pal Choudhury, one of the biggest darpatnidars within the disputed patni, tendered the arrears dues before the lot was called up for sale on 17th November 1927 and he was thus entitled to stay the final sale under the provisions of S. 13, Cl. 2 of the Regulation. The Subordinate Judge after considering the evidence of Mr. Durno, the learned Collector who held the sale, and his order on the petition dated 17th November 1927 and the evidence of the Maharaja's manager, has come to the conclusion that the provisions of S. 13, Cl. 2 had been complied with and that the Collector was bound to stay the sale. It was argued for the appellant that it should have been held on the evidence of the Collector that the money was not produced. On 17th November, the order which Mr. Durno made is to the following effect: "Put up for sale. Agent refuses to take the money": see p. 124, part. 11 (Ex. 48); but while deposing in Court more than two years after on 1st December 1929 Mr. Durno states that he refused firstly because the money was not produced and secondly that the payment at the time was contrary to the law. The Subordinate Judge rightly points out that it is hardly possible to reconcile these two reasons and as such the first reason recorded on the petition must be taken to have been working in the mind of the Collector when he passed the order. Besides the Manager, Kanti Bhusan, states that "when Chandra Babu presented the petition the Collector asked me whether I would accept the money." It appears further on the evidence of the Superintendent Hari Pada, P. W. 20, that under orders of M. Pal Choudhury a cheque of Rs. 15,000 was cashed in the Imperial Bank on 15th November

7. AIR 1934 P C 58=147 I C 884=61 I A 35=61 Cal 313 (PC).
8. (1900) A C 260=69 L J Ch 516=16 T L R 325=82 L T 429.
9. AIR 1922 P C 405=74 I C 906=50 I A 247=50 Cal 243 (P C).
10. (1863-66) 10 M I A 476=5 W R 63=1 Suther 631=2 Sar 184 (P C).

1927. It is not a matter of suprise that the recollection of the Collector who is a busy officer could not be very precise at the end of two years of the event he was deposing to and it is therefore right to trust to his written note of the event on the day when it occurred. We agree with the Subordinate Judge that the money was tendered to the Collector for payment to the zemindar, and that the money was really tendered before the lot was called up for sale. Another point was raised in connection with this tender and it was said that the tender must be made to the Civil Court. The word "Court" should not be strictly construed, for, as has been pointed out by Field, J. in *Tarini Debi* v. *Shyama Charan* (11), if a strictly literal construction were put upon the words "into Court" under S. 13, Cl. 2 no payment effectual to stay the sale could be made, for the Court has nothing to do with patni sales which are managed by the Collector.

We are therefore of opinion that issue 8 has been rightly decided by the Subordinate Judge in favour of the plaintiffs. The result of this finding is that the sale held is contrary to the provisions of the Regulation assuming the Regulation was applicable to the present case. We proceed now to the consideration of Issue 9, and this refers to the provisions of the Regulations regarding the service of the notices for sale. The necessity of accurately conforming to the provisions of the Regulations has been laid down authoritatively by the Judicial Committee in the case of the *Maharaja of Burdwan* v. *Tara Sundari Devi* (12).

The first irregularity complained of by the plaintiffs is that the Maharaja filed a separate petition for sale for each separate putni in arrears and caused the same to be stuck up at the Collector's Court and his own Sudder Cutchery, a separate sale notice for each putni, and this was said to be in contravention of S. 8 read with S. 10 of the Regulation, S. 8, Cl. 2 of the Putni Regulation read with S. 10 makes it plain that S. 10 contemplates a self contained notice which comprises not only a specification of the arrears and notification that the sale will be held on the 1st of Agrahayan if the amount claimed be not paid before that date but also a statement of the lots proposed to be sold in the order in which the sale wlll be held. The effect of these two sections is that the notice that will be stuck up in the cutchery of the Collector, like the petition, must contain specification of the balances that may be due to the zemindar concerned from all the Putnidars under him and that a copy or extract of such part of the notice as may apply to an individual defaulter shall be sent by the zemindar to be similarly published at the the cutchery or at the principal town or village upon the land of the defaulter. That this is the true legal position has been determined in the case of *Bhupendra Narain Singh* v. *Madar Bux* (13), a decision which has been affirmed by the Judicial Committee of the Privy Council in appeal : see *Bhupendra Narain Singh* v. *Madar Bux* (14). The notice which has been produced in this case does not fulfil the requirements of the Regulation. It does not contain a specification of the balances due from all the Putnidars under the Maharaja who are named in Ex. N. P. 136, Vol. 2. It mentions only the Putni now in suit though it is clear on the evidence that there were several "astam" cases in which the Maharaja was interested. (The notice is to be found at pp. 121 and 122 of the paper book, part 2). This case is sought to be distinguished on behalf of the appellant on the ground that the rule laid down in this case applies where the putnis are held under one touzi number. It is said that the Putni in question was the only putni which was held under one touzi No. 334. There is no foundation for this distinction. S. 8, Cl. 2 does not say that a petition to the Collector should contain a specification of any balances due to the zemindar on account of the expired year from all or any Putni Talukdars under one Touzi, but it says that it must contain a specification of balances due from all or any putni talukdars, and in the case *Bhupendra Narain Singh* v. *Madar Bux* (13) Sir Ashutosh

11. (1882) 8 Cal 954.
12. (1883) 9 Cal 619=10 I A 19=4 Sar 414 (PC).
13. A I R 1921 Cal 296=66 I C 793=34 C L J 399.
14. A I R 1925 P C 297=92 I C 681=52 I A 439 =53 Cal 1 (P C).

Mookerjee, J., at p. 401 (of 34 *C. L. J.*) in delivering the judgment of the Court states clearly that the notice to be stuck up must contain specification of the balances that may be due to the zamindar concerned from all the Putnidars under him. We agree with the Subordinate Judge that this was a irregularity which vitiated the sale.

The next irregularity complained of is that there was no service of notice on the cutchery of the defaulting putnidar within the tenure. The Putnidars allege that they have a cutchery at Chapra, another village within the Putni mahal: the defendant denied this and said that is the cutchery of the plaintiffs in respect of their durputni. The Record of Right shows that the cutchery which is dag No. 1353 of the Khas Khatian of the Putnidars in village Chapra has been recorded as their Cutcherybari with two huts and one well. The presumption arising from the entry in the Record of Rights is not rebutted by the evidence on the side of the plaintiffs to the effect that rents payable by the durputnidar to the Putnidars are realized at Kantalpota which is outside the putni tenure. It is beyond question that the non-publication of the notice in the Putnidar's Cutchery within the defaulting tenure is a non-ccmpliance within the provisions of the Regulation which renders the sale void : see *Maharani of Burdwan* v. *Mrityunjoy Singh* (15).

The next irregularity which is complained of is that there has been no service in the Mufassil and considerable criticism has been directed against the conclusion of the Subordinate Judge on this part of the case. The fact of the service or publication at the Mufassil depends solely on the testimony of the peon Abdul Jabbar. (After considering the evidence,His Lordship held that the important formalities prescribed by the Regulations were not complied with, and that the sale is bad even if the Putni Regulation applies to the case. The judgment then proceeded). We now proceed to deal with Issue 14 which raises the question as to whether the rule prescribed in S. 10 was duly observed in conducting the sale. The plaintiffs maintained that the lots were not called up successively as is required by the section. Mr. Durno, the Collector, says in his evidence that each case was taken up in the order as it was entered in the Register as far as he remembered. We do not see any reason to think that Mr. Durno's recollection is at fault so far as this particular matter is concerned. Reference has been made by the Subordinate Judge to the sale petition Register, Ex. 54, to show that it corroborates the plaintiff's case on the point. We do not find in the Register anything which conflicts with his testimony. We do not agree with the Subordinate Judge and we hold that the lots were called up successivly.

The next objection is that the Revenue Peshkar does not say that he looked into the Kabuliyat in order to see that the balance remaining unpaid exceeded a four annas' proportion of the demand up to the date of the sale. Kanti Babu however says that the Kabuliyat was looked into and it seems from the evidence of the Revenue Peshkar, p. 143, lines 29 and 30, that the Revenve Peshkar was not asked any question about this at all in cross-examination. He says that the statement was looked into and the balance of arrears was seen and in such circumstances we cannot agree with the Subordinate Judge that there was any irregularity in this respect. The next irregularity complained of is that the Collector did not give sufficient time to the other bidder to bid, but Mr. Durno says that it took 3 or 4 minutes when the first bid was made and the sale was closed. We must accept the evidence of the Collector and we are of opinion that the Subordinate Judge was wrong in holding that sufficient opportunity was not given to the bidders.

The result is that, while we disagree with the Subordinate Judge in his conclusions with regard to Issue 14, we affirm his findings on Issues 6, 8 and 9. It follows that the appeals fail and that the sale must be set aside having regard to our findings on Issues 6, 8 and 9 in affirmance of the findings of the Court below. All these seven appeals are dismissed with costs. The costs in the six appeals other than 8 of 1933 are to be paid to the plaintiffs respondents and in appeal. No. 8 of 1933 the costs are to be paid to the respondent Radhika Ranjan Lahiri. We assess the hearing fee in Appeal No. 8 of 1933, which is

15. (1887) 14 Cal 365=14 I A 30 (P C).

valued at less than Rs. 5,000 at five gold mohurs. The application in connexion with appeal No. 205 is not pressed and is rejected.

Patterson, J.—I agree.

K.S. *Order accordingly.*

** A. I. R. 1934 Calcutta 580

(Full Bench)

MUKERJI, COSTELLO, MALLIK, JACK AND S. K. GHOSE, JJ.

Amin Shariff—Accused — Appellant.

v.

Emperor—Opposite Party.

Full Bench Ref. No. 1 of 1933, Decided on 21st February 1934 in Criminal Appeals Nos. 262 and 376 of 1933.

** **Evidence Act (1872), S. 25 — Excise Officer is Police Officer within S. 25** (Per *Full Bench, Costello, J.*, dissenting).

An Excise Officer, who, in the conduct of investigation of an offence against the Excise, exercises the powers conferred by the Code of Criminal Procedure upon an officer in charge of a Police Station for the investigation of a cognizable offence, is a Police Officer within the meaning of S. 25, Evidence Act. The legislature in using the term "Police Officer" in S. 25 did not intend to exclude from its meaning Excise Officers exercising powers of detection and investigation of crimes committed against Excise Laws : *Case law discussed.* [P 587 C 1]

A. K. Fazlul Haq, Jogesh Chandra Sinha and *Bireshwar Chatterjee* — for Appellant.

N. N. Sircar and *Satindranath Mukherjee*—for the Crown.

Mukerji, J. — On receipt of some information an Excise Inspector with a raiding party went to a certain place and on making a search there seized a bundle which was found to contain seven seers of opium valued at Rs. 1,050. He arrested three persons one of whom was one Amin Shariff (appellant in appeal No. 262), and another, one Jahabir Singh (Appellant in appeal No. 379), both of whom have been convicted by the Chief Presidency Magistrate of Calcutta under S. 9, Opium Act (1 of 1878). These two men are said to have made confessions to the Excise Inspector. At the hearing of the appeals which the accused persons have preferred to this Court, a question having arisen as to whether the said confessions are admissible in law, in view of the provisions of S. 25, Evidence Act, the Division Bench which was dealing with the appeals, has made this reference. The question referred runs in these words:

"Is an Excise Officer, who, in the conduct of investigation of an offence against the Excise, exercises the powers conferred by the Code of Criminal Procedure upon an officer in charge of a Police Station for the investigation of a cognizable offence, a Police Officer within the meaning of S. 25, Evidence Act."

So far as this Court is concerned, the following is the state of authority bearing upon the question. In *Rokun Ali* v. *Emperor* (1), which was a case under S. 9, Opium Act (1 of 1878), a confession made by the accused to a Superintendent of Excise was admitted against him in evidence, it being held that there was no inducement, threat or promise to shut it out under S. 24, Evidence Act; but the question whether S. 25 of the said Act applied to the case or not was neither raised nor decided. In *Ah Foong Chinaman* v. *Emperor* (2), which also was a case under S. 9, Opium Act (1 of 1878), a confession made by the accused to an Inspector of Excise was sought to be ruled out on the ground that Excise Officers were in reality Police Officers, though not called as such; but the contention was overruled, it being only observed that it was not possible to say that Excise Officers were Police Officers. This last-mentioned decision was followed in *Harbhanjan Sao* v. *Emperor* (3), which was a case under S. 46, Bengal Excise Act (5 of 1909). In *Tura Sardar* v. *Emperor* (4), which was a case under Ss. 46 and 61, Bengal Excise Act (5 of 1909), a confession made to an Excise Inspector and an Excise Sub-Inspector was held admissible in spite of S. 25, Evidence Act. In that case the argument that an Excise Officer is a Police Officer within the meaning of S. 25, Evidence Act, was overruled on the ground that the question was no longer res integra, having regard to the decisions in the cases of *Rokun Ali* v. *Emperor* (1), *Ah Foong Chinaman* v. *Emperor* (2) and *Harbhanjan* v. *Emperor* (3).

A further point raised in that case, namely that in view of the provisions of S. 74, Bengal Excise Act (5 of 1909),

1. A I R 1918 Cal 138=45 I C 284 = 19 Cr L J 524.
2. A I R 1919 Cal 696=48 I C 504 = 20 Cr L J 24=46 Cal 411=22 C W N 834.
3. A I R 1927 Cal 527=102 I C 547=28 Cr L J 579=54 Cal 601.
4. A I R 1930 Cal 710 = 1930 Cr C 1110 = 129 I C 101=32 Cr L J 231.

a statement made by an accused to an Excise Officer was equally incapable of proof as against him as a statement made under S. 162, Criminal P. C., to a Police Officer, was not decided as the question did not really arise. It appears further that in that case reliance was placed on behalf of the accused upon the decision of a Full Bench of the Bombay High Court in the case of *Nanoo* v. *Emperor* (5), in which it had been held that an Abkari Officer, who in the conduct of an investigation of an offence punishable under the Bombay Abkari Act (Bom. Act 5 of 1878 as amended by Bom. Act 12 of 1912), exercises all the powers conferred by the Code of Criminal Procedure upon an officer in charge of a Police Station for the investigation of a cognizable offence, is a Police Officer within the meaning of S. 25, Evidence Act, and by confession made to such an officer in the course of this investigation under the Akbari Act or the Criminal Procedure Code is inadmissible in evidence. But this decision was not considered applicable, as the Abkari law in Calcutta was different from that in Bombay. In a later decision of this Court in the case of *Ibrahim Ahmed* v. *Emperor* (6), which was a case under S. 9, Opium Act (1 of 1878), as also under S. 46, Bengal Excise Act (5 of 1909), the view taken in the Bombay Full Bench decision was adopted and it was held that the Bengal Excise Act (5 of 1909) confers police powers on "Excise Officers and they are Police Officers within the meaning of S. 25, Evidence Act." Later on however in the case of *Matilal Kalwar* v. *Emperor* (7), the view taken in the earlier Calcutta decisions has again been taken and it has been again held that an Excise Officer is not a Police Officer within the meaning of S. 25, Evidence Act.

It is apparent therefore that there is a conflict of judicial authority on the question whether an Excise Officer is a Police Officer within the meaning of S. 25, Evidence Act. The question formulated and referred as above stated however does not cover the entire ground of the conflict and, following as it closely does the wording of the question which was referred in the Bombay case above-mentioned, is somewhat inapposite, because it is clear from a comparison of the relevant provisions of the Opium Act (1 of 1878), which is the Act to be considered in this connexion, and of the Bengal Excise Act (5 of 1909), the powers of an Excise Officer while investigating into offences under the said two Acts respectively are not quite the same; the Opium (Bengal) Amedment Act (5 B. C. of 1933) which has been recently enacted to amend the Opium Act (1 of 1878) in its application to Bengal would not apply to this case. In the course of the arguments addressed to us on this reference a much broader question has been submitted for our decision as arising upon the Order of Reference taken along with the facts of these cases. That question is, whether an Excise Officer is a Police Officer within the meaning of S. 25, Evidence Act. To answer this question one has necessarily to consider, what is the meaning of the term "Police Officer" as used in S. 25, Evidence Act.

The most satisfactory mode of construction, of course, is to examine the statute and if possible to ascertain the meaning from the statute alone. If the meaning of an expression used in a statute is plain, the intention of the legislature cannot be speculated upon and a Judge is not allowed to modify statutes to suit his own views of justice or expediency. In the present case it is not possible to ascertain the meaning of the term "Police Officer from the Evidence Act itself, because that Act has not given a definition of the term nor has it given any indication as to what its meaning or import is or in what sense it is to be understood. In such circumstances therefore, one has to resort to such extrinsic aids to construction as permissible. That in such cases it is allowable to travel beyond the four corners of the statute for the purpose of ascertaining the meaning of the word or the sense in which the legislature when they passed the statute intended the word to be understood, is a proposition which cannot be disputed. Nor can it be doubted that for this limited purpose an investigation into the history of the enactment may be embarked upon. The

5. A I R 1927 Bom 4 = 99 I C 330 = 28 Cr L J 122=51 Bom 78.
6. A I R 1931 Cal 350=1931 Cr C 414=131 I C 113=32 Cr L J 640=58 Cal 1260.
7. AIR 1932 Cal 122=1932 Cr C 107=140 I C 257=34 Cr L J 21.

word has to be understood in the import it bore at the time the statute came into being; and for this purpose other statutes, in pari materia, if any, may be taken into account. There is also a canon of construction, though it is not really necessary to resort to it in the present case, namely that while:

"the mere fact that it may have been better to extend a statute to other cases, or that it can apparently be gathered that such an intention was probable, is not enough to justify the putting of an interpretation upon the statute which would necessitate reading into it words extending the statute to other cases," yet "If there are circumstances which show that words in a statute must have been used by the legislature in a larger sense than their ordinary meaning the Court is bound to read them in that sense: (Beale on Cardinal Rules of Legal Interpretation, Edn. 2, p. 333).

The Evidence Act is now more than half a century old, and though it may not rank with "ancient statutes" in the sense in which that expression is used in forensic language, the principle will hold good that great regard ought to be paid, in construing a statute, to the construction which was put upon it by those who lived about the time or soon after it was made, because the meaning which a particular word or expression bore in those days may have got mixed up or blurred during the interval that has elapsed. From this point of view, I regard the decision of this Court in the case of *Queen* v. *Hurrybole Chunder Ghose* (8), as a decision of very great importance. It is true that the facts of that case were very different from those of the cases which have given rise to the present question. And this fact has been very forcibly pointed out in the decision of the Patna High Court in the case of *Radha Kishun Marwari* v. *Emperor* (9). But it seems to me that the most important aspect of the weighty pronouncement of Garth, C. J., in that case has not—and I say this with very great respect—been sufficiently appreciated in the case just cited. Dealing with one of the arguments addressed to the Court which was to the effect that the term "Police Officer" in S. 25, Evidence Act, comprised only that class of persons who are called in the Bengal Police Act (4 of 1866), "members of the Police Force," Garth, C. J., said:

"On looking to the Police Act of 1861, it will be found that the term "Police Officer" as used in that Act has generally the same meaning as a member of the Police Force in the Act of 1886; but in construing the 25th Section of the Evidence Act of 1872, I consider that the term "Police Officer" should be read not in any strict technical sense but according to the more comprehensive and popular meaning."

Now, what is that more comprehensive and popular meaning which the term "Police Officer" bore in those days? In the case of *Radha Kishun Marwari* v. *Emperor* (9), Courtney-Terrel, C. J., has observed:

"The fact is that the term "Police Officer" is sufficiently well understood to allow of its use without any precise definition."

The question is not how it is understood at present, but how it was understood in or about 1872. In the same case Fazl Ali, J., has drawn a distinction between a person who is nothing but a Police Officer and one who is primarily not a Police Officer but merely invested with the powers of a Police Officer. Such a distinction no doubt has come into existence by the creation of distinct Departments by the Government of the country. But the question is whether when the Evidence Act was enacted such a distinction really existed and was intended. Agarwala, J., in the said case appears to have held that no person is a police officer unless he be enrolled in or appointed a member of the Police Force or is declared by statute to be a member of that force, a dictum which is directly opposed to that of Garth, C. J., quoted above. It may be pointed out that the aforesaid dictum of Garth, C. J., has been followed by this Court ever since: see, e. g., *Queen-Empress* v. *Salemuddin* (10) and by other Courts as well: see *Queen-Empress* v. *Nagla Kala* (11) and has never been dissented from anywhere else.

A history of the provision contained in S. 25, Evidence Act, is to be found in the Full Bench decision of the Allahabad High Court in the celebrated case of *Queen Empress* v. *Babu Lal* (12). In that case it has been shown how for the first time a new rule came into existence in the shape of S. 148, Criminal P. C. (Act 25 of 1861), which in the most imperative terms laid down that:

"no confession or admission made to a police officer, shall be used as evidence against an accused person."

8. (1876) 1 Cal 207=25 W R 86 Cr.
9. AIR 1932 Pat 293=144 I C 457=12 Pat 723.
10. (1899) 26 Cal 569=3 C W N 393.
11. (1898) 22 Bom 235.
12. (1884) 6 All 509=(1884) A W N 229 (F B).

And it is this rule which thus came into existence strictly speaking not as a rule of evidence, but rather as a rule governing the action of police officers and as a matter of criminal procedure, that was subsequently removed into the Evidence Act in 1872, in S. 25 as a rule of evidence. Act 25 of 1861 received the assent of the Governor-General in Council on 5th September 1861. In it the powers and duties of police officers of different grades acting under the Code were defined, but the term " police officer " itself was not defined. But a few months before, another Act, namely, the General Police Act (5 of 1861), had been passed in which there was a definition or rather interpretation of the word " police " in its S. 1 which said :

" The word " police " shall include all persons who shall be enrolled under this Act."

By this Act a Police Force consisting of the entire police establishment under a Local Government was created for the purposes of the Act and provision was made for formal enrolment of such establishment into that Force ; and in it there were various other provisions enacted as regards their subordination, duties and privileges ; the formation of a Police Superannuation Fund and a General Police Fund ; the framing of rules for the organization, classification and distribution of Police Force ; the appointment of additional or Special Police Officers ; and so on. Two of the sections of this Act are important, namely, S. 20 and S. 21. S. 20 says :

" Police officers, enrolled under this Act, shall not exercise any authority, except the authority, provided for a police officer under this Act and any Act which shall hereafter be passed for regulating Criminal Procedure."

Section 21 says :

" Nothing in this Act shall affect any Hereditary or other village police officer unless such officers shall be enrolled as a police officers under this Act. When so enrolled, such officers shall be bound by the provisions of the last preceding section. No Hereditary or other village Police Officer shall be enrolled without his consent and the consent of those who have the right of nomination. If any Police Officer appointed under Act 20 of 1856 (to make better provision for the appointment and maintenance of Police Chowkidars in Cities, Towns, Stations, Suburbs and Bazars in the Presidency of Fort William in Bengal) is employed out of the district for which he shall have been appointed under that Act he shall not be paid out of the rates levied under the said Act for that district."

It has been pointed out that in the interpretation clause, S. 1 of the Act, the word " include " has been used. Ss. 20 and 21, make it perfectly clear that the word has not been used in the sense of " means and includes," because those sections proceed on the supposition that there are Police Officers, called by whatever name they might be, who are not Police Officers enrolled under the Act. The word " include " has been used, as it is very generally used in interpretation clauses, in order to enlarge the meaning of words or phrases occurring in the body of the statute ; and when so used the words or phrases must be construed as comprehending not only such things as they signify according to their natural import but those things which the interpretation clause declares that they shall include : see Per Lord Watson in *Dilworth* v. *Commissioners of Stamps* (13) at pp. 105 to 106. The natural import of the word " police " as understood in 1861, therefore was something more than the Police Force enrolled under Act 5 of 1861. The preamble to the Act says :

" Whereas it is expedient to re-organize the Police and to make it a more efficient instrument for the prevention and detection of crime."

And S. 6 of the Act, which conferred Magisterial powers upon certain superior officers of the police says :

" They shall be so invested only so far as may be necessary for the preservation of the peace, the preventien of crime, and the detection, apprehension and detention of offenders in order to their being brought before a Magistrate."

The police therefore were instruments for the prevention and detection of crimes with the concomitant powers of apprehension and detention of offenders in order to their being brought to justice, such powers varying according to the position or status of the particular member of the body. In other words " Police Officers " were officers whose duty was to prevent and detect crimes. Apart from any technical meaning which the term " Police Officer " occurring under any particular Act might bear, the more comprehensive and popular meaning of the term was what has just been stated. In the Oxford Dictionary two of the senses in which the word " police " is used are said to be the following :

13. (1899) A C 99=79 L T 473=47 W R 337=15 T L R 61.

"The department of Government which is concerned with the maintenance of public order and safety, and the enforcement of the law, the extent of its functions varying greatly in different countries and at different periods." "The civil force to which is entrusted the duty of maintaining public order, enforcing regulations for the prevention and punishment of the breaches of the law and detecting crime; construed as plural, the members of a police force; the constabulary of a locality."

All these duties which Police Officers discharge are but different phases of and means for carrying out the two more comprehensive duties, namely, of prevention of crimes and detection of crimes. It is true that it has nowhere been defined what minimum aggregation of functions will constitute a person a Police Officer within the meaning of S. 25 of the Act; but the more comprehensive and popular signification of the term "Police Officer," such as it was in 1861, it is not difficult to appreciate from what was said by the Legislature in the General Police Act (5 of 1861). Powers and duties of Police Officers under Act, 5 of 1861 or under Act 25 of 1861 or under any other statute; or the different powers which different grades of Police Officers have under any particular enactment are mere matters of details worked out in order to enable the entire body, taken as a whole, to carry out the two essential duties entrusted to them namely the prevention and detection of crimes. These two features of the duties which the police have to discharge and especially that of detection of offenders, which involves the duty of holding investigations, have always been regarded as marking them out for special treatment in so far as confessions made to them are concerned. Of this only one instance need be given here. There is, as is well-known, a preponderance of judicial authority in favour of the view that a chowkidar is a "Police Officer" within the meaning of S. 25, Evidence Act, *Queen-Empress* v. *Salemuddin* (10), *Queen-Empress* v. *Indra Chandra Pal* (14), *Queen-Empress* v. *Keta Baisnavi* (15). Also *Nazir Jharudar* v. *King-Emperor* (16), in which the admissibility of a confession before a chowkidar was doubted. In one of these cases, namely, *Indra Chandra Pal's* case (14) it was pointed out that a chowkidar, although he is not a Police Officer under Act 5 of 1861 is a Police Officer under Regn. 20 of 1817 and Act 1 of 1892. The contrary view which was taken in the case of *Queen-Empress* v. *Bepin Bihari Dey* (17) and which is no longer tenable in view of the express enactments relied upon in *Indra Chandra Pal's* case (14), was based upon the distinction that a chowkidar had no power of holding an investigation for the purpose of detecting offenders. The learned Judges said in that case:

"The reason why the law in Ss. 25 and 26, Evidence Act, jealously excludes a confession made to a Police Officer, and a confession made by an accused whilst in the custody of a Police Officer unless it be made in the immediate presence of a Magistrate, is that there is room for apprehension that a Police Officer who is armed with large powers over accused persons may unwillingly exert terror in their minds and extort false and involuntary confessions; and his duty to investigate criminal cases and to detect offenders and to bring them to justice may make him feel tempted to obtain confessions from threat, inducement or promise or other improper influence; but the reason for the rule can have no application to a chowkidar, who is vested with no such power, on whom no such duty of detecting and bringing to justice an offender is imposed, and who is not therefore likely to exercise any such influence or to be under any such temptation. The view we take is to some extent supported by the case of *Queen-Empress* v. *Tatya Appaji* (18),"

It is mainly this duty of detection of offenders and the consequential duty of bringing an offender to justice which requires an investigation to be made, that differentiates a private individual from a police-man. And although it may be that different grades of policemen have different powers in the matter of apprehension or of detention, if the person concerned belongs to a body whose duty it is to prevent the commission of offences as well as to detect offenders, that person, whatever his own powers, individually speaking, may be, fulfils the requirements of the idea conveyed by the expression "Police Officer." At the time of forming the Decennial Settlement of the land revenue for the Provinces of Bengal, Bihar and Orissa in 1790, the land-holders and farmers of land were, in conformity with former usage, bound to maintain the public peace and were answerable for robberies. But this responsibility was found as of little effect owing to the general im-

14. (1898) 2 C W N 637.
15. (1897) 2 C W N CLXXX (180).
16. (1905) 9 C W N 474=2 Cr L J 255.
17. (1897) 2 C W N 71.
18. (1896) 20 Bom 795.

practicability of enforcing it; and accordingly in 1793, Regn. 22 of that year was enacted whereby the police were declared to be under the executive charge of officers of Government, and the land-holders and farmers of land were required to discharge their police establishments and not to entertain them in future. Various Regulations were subsequently enacted from time to time for their better organization and greater efficiency, the powers of respective grades of Police Officers being more and more accurately defined, outside agencies being from time to time absorbed into the regular establishment under different denominations, and the whole department working for a common end, namely the prevention and detection of crime; and crimes which were previously unprovided for being gradually brought in within their cognizance.

From the year 1773 the monopoly of opium was first assumed in behalf of the company and by 1797-98 the system of providing opium by agencies in the Provinces of Bengal, Bihar, Orissa and Benares was completely established. The intermediate Regulations by which opium monopoly was gradually systematized need not be referred to because all of them were superseded by Regn. 13 of 1816: See Harrington's Analysis, Part 6, S. 3.

It will be seen from this Regulation that while opium was made into a separate department for the purpose of revenue, Police and Abkari Darogas were to act simultaneously for the prevention and detection of offences committed in breach of the Regulation (e. g., see Ss. 32, 33, 35, 36 etc). In the Opium Act (13 of 1857) there are also similar provisions, e. g., see Ss. 22, 23 and 24). S. 22 enjoined land-holders and others to give information of illegal cultivation of poppy to the Police or Abkari Darogas or Opium Gomashthas. S. 23 provided that all Police and Abkari Darogas and Opium Gomastas and all native officers of Government of whatever description and all chowkidars and other village Paiks and Police Officers should give information of illegal cultivation of poppy to superior quarters. And S. 24 which is very important, because it gave powers of investigation of granting bail and of sending an accused up in custody, was in these words :

"Whenever a Police or Abkari Darogah or Opium Gomastha shall receive intelligence of any land within his jurisdiction having been illegally cultivated with poppy, he shall immediately proceed to the spot and if the information be correct, shall attach the crop so illegally cultivated and report the same without delay to the authority to which he may be Subordinate. He shall at the same time take security from the cultivator of the land for his appearance before the Magistrate; and in the event of such cultivator not giving the required security he shall send him in custody to the Magistrate."

After the Sayer collections were resumed from the land-holders in 1790 it was considered expedient to continue and extend the duties on spirituous or fermented liquors and intoxicating drugs for the reason that such duties would check their immoderate use and at the same time augment the public revenue. After several earlier Regulations, Reg. 6 of 1800 was passed

"for the purpose of more effectually accomplishing the original objects of the tax by enhancing the price to the consumer as well as to give the Magistrates a more immediate and efficient control over the conduct of the vendors and to render the tax, as much as possible conducive to the general purposes of the police,"

Distilleries were to be established and were to be conducted under the immediate control of the Collectors or other officers invested with the charge of the Abkari Mehal. These officers were not only empowered to cause the apprehension of offenders but were also vested with Magisterial powers to hold investigations and award punishment. Orders passed, search warrants issued and penalties imposed by these officers could be enforced, executed or realised by such Subordinate Officers in the fixed establishment of the Collector as the Nazir, the Abkari Daroga or some such officer; and Magistrates and police officers were enjoined to support these officers of the Collector in the discharge of their duties (vide S. 23 of the Regulation). There were no other enactments on this subject prior to 1872 which are worth mentioning in this connexion. From what has been stated above, I think it is clear that before 1872 when the Evidence Act was enacted, except as regards the illegal cultivation of poppy in respect of which an officer concerned had received intelligence, a matter which was dealt with by S. 24, Opium Act 13 of 1857, no police powers were exercisable by officers of the Opium or the Excise Department. And it is also clear that the aforesaid provision namely S. 24 of Act

13 of 1857, gave only a very limited power to hold a summary inquiry and to grant bail or to send the offender in custody. On the other hand in the matter of prevention and detection of such offences as related to these branches of revenue, Abkari and Excise Officers as well as policemen worked hand in hand. And this, I understand, is why even to-day men of the excise are not unoften in common parlance in Bengali called men of the Abkari Police.

It was in this state of the law that in 1872 the Evidence Act was enacted, and in that Act the legislature did not consider it necessary to indicate what special meaning, if any, was to be attached to the word "police officer," with regard to confessions made to whom a most imperative rule of evidence was enacted. The only reason why they omitted to do so, in my view, was that at that time it was intended to express by that term all officers other than Magistrates who were entrusted with the duty of preventing and detecting crimes and specially the latter. It is the nature of the duties, performance of which was likely to give occasion for improper influence being exercised or felt, and not any particular aversion for a particular department of public service that must have moved the legislature in enacting the provision. I am therefore of opinion that if matters which previously did not fall within the category of crimes subsequently came to be recognized as such, and on that officers have been appointed to discharge or have been vested with powers of discharging duties which a police officer had to discharge in 1872, when whatever may be the name of the Department to which such officers may have been attached, such officers must be regarded as coming within the term "police officer" with regard to whom S. 25, Evidence Act, was intended to be applied.

It should be noted that in that section the words used are, "as against a person accused of any offence." I can find no reason why in 1872 in respect of an offence under the then Opium Act (13 of 1857) the legislature could have thought of excluding a confession made to a member of the regular police force but not a confession made to an Abkari or Excise Offieer, if such officer was, in fact, holding an investigation into an offence and was exercising such powers as a police officer is competent to exercise. The fact is that in those days he had no such powers and so could not exercise them. When in course of time he came tc have those powers and was able to exercise them in respect of offences which were not known to law in those days and only subsequently came to be regarded as such, such an officer, when so acting, is an officer for whom the term "police officer" used in S. 25, Evidence Act, was meant.

As miliating against the view which I am inclined to take as stated above, two points have been raised. One is that in S. 125, Evidence Act, there is a distinction observed between "police officers" and "revenue officers." And the other is that in S. 25 of the Act in respect of an officer of the police there is a personal disability implied irrespective of the question whether he is holding an investigation or not, while no such disability can be said to have been intended in the case of an Excise Officer. So far as the first of these points is concerned I entirely agree in what was said by Marten, C. J., in the case of *Nanoo* v. *Emperor* (5) (at p. 95 *of* 51 *Bom*) to meet it. And as regards the second point I need only observe that whereas police officers by reason of S. 22 of Act 5 of 1861 are to be always considered on duty for the purposes of the Act, all revenue officers on the other hand, are not police officers and it is only such of them as may be exercising the powers of police officers and only when exercising such powers that may be regarded as police officers. In the conclusion that I have arrived at as stated above, I feel fortified by the intention, as I appreciate it, of the legislature as expressed in the enactments that have come into being since 1872. The powers and duties of Excise Officers investigating offences have been gradually brought more and more on a line with those of the officers of the Police Force, and they have been made Police Officers for the purposes of such investigations in all possible manner (vide Ch. 9, Bengal Excise Act (V. (B.C.) of 1909) as it now stands, and also the amendments introduced into Opium Act (1 of 1878) by the Opium Bengal (Amendment) Act (V (B.C.) of 1933) which I am informed has not yet come into force. I would

accordingly answer the question formulated in the order of reference in the affirmative, and also the broader question, which arises on it, by saying that the legislature in using the term 'Police Officer' in S. 25, Evidence Act, did not intend to exclude from its meaning Excise Officers exercising powers of detection and investigation of crimes committed against Excise Laws.

Costello, J.—I have had the advantage and the pleasure not only of perusing the judgment which has just been delivered by Mukerji, J., but of hearing the opinions of the other members of the Court and I much regret that I am unable to agree with the view taken by them. The question which was referred to us was in the following terms : Is an Excise Officer who, in the conduct of an investigation of an offence against the Excise, exercises the powers conferred by the Code of Criminal Procedure upon an officer in charge of the police, a police officer within the meaning of S. 25, Evidence Act. It is to be borne in mind however that the case out of which this reference arises was a prosecution under S. 9, Opium Act of 1878 and the confession to which objection was taken was made to an officer acting in the exercise of the powers given by that Act. It follows therefore that the terms of the reference to a Full Bench were wider than was actually necessary for the purpose of the proceedings before the Bench which made the reference. By general consent however it was agreed that we should give an answer to the comprehensive question submitted by Lort Williams, J., and M.C. Ghose, J. As regards a case falling solely within the ambit of the Opium Act, it seemed quite clear that until recently at any rate an officer acting under the powers contained in that Act was in no sense whatever a Police Officer and so it was laid down in the case of *Ah Foong* v. *Emperor* (2). The position however has now been altered to some extent by reason of the provisions of the Opium (Bengal Amendment) Act, 1933—Bengal Act 5 of 1933, and I think we may take it that by virtue of those provisions an officer acting under the Opium Act is now very much in the same position as an ordinary Excise Officer. The question which we have to decide may be simply stated in this form. Is an Excise Officer a Police Officer for the purpose of S. 25, Evidence Act ? At first glance one would be disposed without any hesitation to reply that of course, an Excise Officer is not a police officer. I concede however that the matter cannot be disposed of quite so summarily or so succinctly as that because the problem is complicated by the provisions S. 74, Excise Act. No doubt in order to come to a decision on the point it is desirable if not indeed necessary to delve into the history of the relevant legislation, but it is of even greater importance in my opinion to remember at the outset that the Evidence Act contains those provisions which are set forth in S. 24, Evidence Act, as well as the provisions in Ss. 25, 26 and 27.

The learned Advocate who appeared before us on behalf of the appellant to argue against the admissibility of the confession upon which no doubt the conviction in the present case is largely based, contended before us that the Court ought to have regard to the spirit and the intention underlying the prohibition contained in S. 25, Evidence Act, and in particular, to the intention of the legislature at the time when the provision, now embodied in S. 25, first came into existence. The learned Advocate General on the other hand argued that there is no difficulty in interpreting S. 25 if the elementary principles for the construction of statutes are strictly adhered to and he contended and in my opinion rightly, that the expression with which we are now concerned must be given its ordinary and plain meaning according to the letter of the words used, any reference to spirit or intention being entirely by the mark. The provisions now contained in S. 25, Evidence Act, originally came into existence as S. 148, Criminal P. C., 1861, but were subsequently transferred to the Evidence Act as S. 25 when that Act was passed in the year 1872. The Advocate General reminded us that enactments must be construed by reference to the meaning of the words used at the time when the statute was passed and that therefore one of the points we have to consider is what was the meaning of the expression 'police officer' in the year 1861. In that year was passed the Police Act (Act 5 of 1861) and in S. 1 of that Act the

word 'police' was stated to include all persons who would be enrolled under that Act. No doubt that definition was not exhaustive but it does seem to me that the Criminal Procedure Code of 1861 and the Police Act, 1861, were intended to be taken together to form as it were one complete scheme for the prevention and detection and punishment of offences against the State. The Advocate General while deprecating any speculation as to the intention of the legislature at the time when the provisions now embodied in S. 25, Evidence Act, first came into existence contended nevertheless that if as Mr. Fazlul Huq had stated the legislature did not in the year 1861 contemplate the existence of Excise Officer then it obviously follows that the legislature could never have intended to include them within the meaning of the expression 'police officer'. The Advocate General referred us to the well-known dictum of Lord Macnaughten in the case of *Vacher & Sons, Ltd.* v. *London Society of Compositors* (19) as an authority for the proposition that for the purpose of construing words used in a statutory enactment the grammatical and ordinary sense of the words is to be adhered to. Lord Macnaughten quoted the warning given by Tindal, C. J., in the *Sussex Peerage* case (20) (at p. 143), which is to this effect :

"If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expand these words in their natural and ordinary sense. The words themselves alone do, in each case best declare the intention of the legislature."

In this connexion I would also refer to the case of *Satish Chandra Chakravarti* v. *Ram Doyal De* (21), where a Full Bench of this Court emphasised the proposition that the Court must administer the law as prescribed by the legislature and neither enlarge nor restrict its scope. It seems to me therefore that as a matter of first impression one ought quite definitely to conclude that when the legislature conferred upon the people of this country the important privilege now contained in the provisions of S. 25, Evidence Act, the legislature in using the words "police officer" must have intended that expression to bear such interpretation as would ordinarily be put upon it in the year 1861 by the people at large just that and nothing more and that no further implication should be imported into it. That in my opinion is a natural, reasonable and proper view, having regard to the fact that the words themselves are on the face of them "precise and unambiguous" to use the words of Tindal, C. J.

It is in actual fact the view which has been consistently and repeatedly taken by a large number of Judges of this Court and not only is there a long line of decisions of this Court to that effect but the other High Courts throughout India have given decisions in support of that view. It seems abundantly clear therefore that but for the provisions of S. 74, Excise Act, and the somewhat refined arguments which have been based upon those provisions, no possible doubt would ever have arisen as to whether or not it ought to be held that an Excise Officer is a police officer for the purpose of S. 25, Evidence Act. As already indicated it is, in my opinion, vital, that in dealing with the point we have to decide we should not be unmindful of the fact that the fundamental and indeed paramount provisions with regard to the admissibility of confessions are contained in S. 24, Evidence Act, which section embodies the agelong principles of English Common Law upon this point. The provisions of Ss. 25, 26 and 27, Evidence Act, differ widely from the law of England and they were originally inserted in the Code of Criminal Procedure 1861 for the reason it is generally conceded that the police in this country were suspect and were not trusted not to use improper means of obtaining confessions from persons in their custody. The provisions of S. 148 Criminal P. C. 1861, came into existence in order to prevent, so it has been said, the practice of police officer using improper and even violent methods for the purpose of extorting confessions from alleged wrong doers in the hope of securing their own professional advancement as a reward for convictions obtained. Be that as it may however it is obvious that the provisions of Ss. 25, 26, and 27 did in a sense confer on a limited class of persons, that is to say, presumed wrongdoers, a

19. (1913) A C 107=82 L J K B 232=29 T L R 73=57 S J 75=107 L T 722.
20. (1844) 11 Cl & F 85=8 Jur 793.
21. A I R 1921 Cal 1=59 I C 143 = 22 Cr L J 31=48 Cal 388 (SB).

very valuable privilege as against the community at large.

The provisions of S. 24 are themselves extremely wide and it is difficult to see why it should have been thought necessary wholly to exclude for example the incriminating statement of an individual who entirely of his own volition has walked into a police station or addressed a police officer and announced that he has done something which is a contravention of the criminal law. The provisions of S. 24 are of course sufficient to exclude any confessions which are not made entirely voluntarily. To my mind it is clear that in effect the provisions of S. 25 cast a very serious strigma upon the integrity of the police as such and one ought to hesitate a long time and be absolutely sure of the necessity for so doing before extending the scope of S. 25 in such a way as to cast an equal stigma upon officers enagaged in the excise service. Moreover one ought to be satisfied beyond all doubt whatever before coming to a conclusion which has the effect of further weighing the scales of justice in favour of wrong doers as against those charged with the prevention, detection, and punishment of contraventions of public law. It has been mentioned by my brother Mukerji that there are, as I have stated, a large number of cases in which the Courts have declined to put, upon the expression "police officer" for the purposes of S. 25 Evidence Act, the extended and to my mind wrongly extended meaning which was contended for in these proceedings. I have already referred to the case of *Ah Foong* v. *Emperor* (2), which was a case under S. 9, Opium, Act of 1878, in fact a case very similar to the one out of which this reference arises and there it was held by Sir Lancelot Sanderson, the then Chief Justice of this Court, that certain statements could not be rejected under S. 25 Evidence Act, for it could not be said that the Excise officers engaged in the matter were police officers.

With that view Beachcroft, J., agreed. A year or two before there had been a case in the chief Court of the Punjab *Emperor* v. *Wazir Singh* (22), in which it was assumed, apparently, that the Excise Inspector acting in the case was not a police officer. Shah Din, J., and Chevis, J., seemed to have had no doubt about the matter. A year later, in 1917, in a case in this Court, *Rukumali* v. *Emperor* (1) it was held by Chitty and Smither, JJ., that in the absence of any inducement, threat or promise a confession to the Superintendent of Excise was not shut out under Ss. 24 and 25, Evidence Act. In the year 1922 there was a case in the Court of the Judicial Commissioner of Sindh *Tillibai* v. *Emperor* (23) where the decision in *Ah Foong* v. *Emperor* (2) was followed. The learned Judges, Kennedy, A. J. C., and Rupchand Bilaram, A. J. C., in dealing with the matter which was one concerned with an offence under S. 43, Bombay Abkari Act, 1878 said :

"nothing has been pointed out which extends the operation of S. 25 to an Abkari Inspector and Abkari peons. On the contrary there is a case in *Ah Foong* v. *Emperor* (2) which is authority for the proposition that abkari peons and officers are not to be considered as police officers for the purpose of S. 25 Evidence Act."

The case of *Ah Foong* v. *Emperor* (2) was followed two years later in the case of *Budhu* v. *Emperor* (24). That also was a case arising out of the Bombay Abkari Act (5 of 1878). In that case Kincaid, J. C., and Barlee, A, J. C., held:

"It is now settled law that an excise officer is not a police officer within the meaning of the Evidence Act."

They in fact followed the case of *Ah Foong* v. *Emperor* (2). In the same year there was a decision on similar lines in the Bombay High Court in *Raphael Pereira* v. *Emperor* (25). In the following year again there was the decision of this Court in the case of *Harbhanjan Sao* v. *Emperor* (3), where again Suhrawardy, J., and Mitter, J., held that a confession made to an Excise Officer is admissible in evidence as an Excise Officer is not a Police Officer and S. 25, Evidence Act, does not apply to such a confession. Two years later there was a case in the Rangoon High Court, *Maung San Myin* v. *Emperor* (26), where it was held that although the Excise Officer concerned in the case

22. A I R 1918 Lah 372 = 44 I C 588 = 19 Cr L J 364.

23. A I R 1925 Sind 70=82 I C 151=25 Cr L J 1223=18 S L R 75.

24. A I R 1927 Sind 112 = 99 I C 594 = 28 Cr L J 162.

25. A I R 1926 Bom 517 = 97 I C 665 = 27 Cr L J 1145.

26. AIR 1930 Rang 49=121 I C 715=31 Cr L J 303=7 Rang 771.

had powers of arrest, search, granting bail and so on, under the Burma Excise Act, 1917, he was not a Police Officer. Therefore the admission made to such an Excise Officer was admissible in evidence. There is a passage in the judgment of Baguley, J., in this case where in dealing with the previous decision of *V. R. Venkataraman* v. *Emperor* (27) the learned Judge said:

"Had the trying Magistrate looked into the Acts a little more closely he would have seen that excise officers are now appointed under the Burma Excise Act 5 of 1917. The judgment in *Venkataraman's* case (27) was delivered in 1898 and then the present act was not in force. In those days all excise officers were sworn in as police officers because the old Act did not give them the necessary powers of arrest, search, granting bail and so on. The Act of 1917 gives all these powers direct to the Excise Officer as Excise Officer, and they are no longer Police Officers. Their position appears to have been assimilated to the position of Excise Officers of Bengal."

The above passage occurs at p. 773 of the report and in my judgment this expression of opinion suggests the key to the problem which was before us in the present reference. In my judgment the right view of the matter is that although Excise Officers have certain police powers they are not for all purposes Police Officers. In the year 1930 the point now under discussion arose in a case which came before Suhrawardy, J. and myself, *Tura Sardar* v. *Emperor* (4), and there we followed the decision in *Harbhanjan Sao* v. *Emperor* (3). The accused in that case was charged under Ss. 46 and 61, Excise Act. and had been convicted under S. 46. Suhrawardy, J. and myself held that an Excise Officer is not a Police Officer within the meaning of S. 25, Evidence Act, and consequently a confession to an Excise Sub-Inspector and an Excise Inspector was not excluded by reason of the provisions of S. 25, Evidence Act. It was argued before us in the case that as the powers of an investigating Police Officer under Ss. 160 to 170, Criminal P. C., have been conferred on an Excise Officer by S. 74, Excise Act, he must perforce be a Police Officer at any rate when he is in the course of conducting an investigation into an alleged offence and when he is exercising the powers conferred by the Criminal Procedure Code upon an officer in charge of a police station by virtue of the provisions of S. 74, Excise Act. Although this point was raised it was not necessary to decide it for the purpose of the case then before us. We said in the course of our judgment:

"Mr. Pal argues that an Excise Officer is a Police Officer within the meaning of S. 25, Evidence Act. The point may be arguable but so far as this Court is concerned it is not now res integra. It has been held in several cases that he is not, in *Harbhunjan Sao* v. *Emperor* (26), *Rokumali* v. *Emperor* (1) and *Ah Foong* v. *Emperor* (2). Reference has been made to a Full Bench decision of the Bombay High Court in *Nanoo Sheikh Ahmed* v. *Emperor* (5). The learned Chief Justice giving the judgment of the Full Bench at p. 93 of the report distinguished the Calcutta case on the ground that Abkari law in Calcutta was different from that in Bombay and that the latter was more stringent than the former. This point is settled by authorities of this Court and as the law now stands an Excise Officer is not a Police Officer within the meaning of S. 25, Evidence Act. As a branch of this ground Mr. Pal has also argued that under S. 74, Bengal Excise Act, 1909, an Excise Officer is a Police Officer within the meaning of S. 162, Criminal P. C. and any statement made to him cannot be proved against the accused. Under S. 74, Excise Act, whenever an Excise Officer suspects the commission of an offence he is empowered to investigate it and in carrying on such investigation the powers of a Police Officer under Ss. 160 to 170, Criminal P. C., have been conferred upon him."

We then proceeded to say:

"It may be reasonable to argue that when the power of investigation under this section has been conferred upon the Excise Officer it must be taken to have been conferred with all the limitations which the law imposes. But in the present case the question does not arise."

It was no doubt reasonable to argue that an Excise Officer must be taken, when clothed with certain powers of a Police Officer, to be subject to all the limitations which the law imposes but that is very far from saying that when an Excise Officer is clothed with certain powers for the purpose of one Act he is subject to the disabilities or the taints imposed by another. I must now refer to the decisions which favour the view that an Excise Officer is a Police Officer. The case which, with all respect to the Judges who decided it, has created in my opinion unnecessary doubt and has started a fallacious line of reasoning—if I may say so with all deference to the opinion of the majority of the members of this Bench is the case of *Nanoo Sheikh Ahmed* v. *Emperor* (5). The underlying fallacies of the judgment in that case were in my opinion exposed by Terrel, C. J., in the Patna High Court in a case to which I shall refer in detail later. In that

27. (1909) 3 U B R 1.

Bombay case it was held that an abkari officer, who, in the conduct of investigation of an offence punishable under the Bombay Abkari Act, exercises the powers conferred by the Criminal Procedure Code, 1898, upon an officer in charge of a police station for the investigation of a cognizable offence, is a police officer within the meaning of S. 25, Evidence Act, 1872, and any confession made to such an officer in the course of his investigation under the Abkari Act or the Criminal Procedure Code is inadmissible in evidence. That is a decision of a Full Bench of the Bombay High Court, and it seems to suggest that excise officers are sometimes police officers and that others are not.

If however the legislature had ever intended to make excise officers even when functioning under the powers conferred upon them by S. 74, Excise Act—police officers for all purposes—the legislature could have said so in plain and unmistakable terms. Mr. Huq in the course of his argument admitted to all intents and purposes that what he was contending for was that the Court should in effect arrogate to it the functions of the legislature and insert into S. 25, Evidence Act, after the words "police officer" some such expression "or such other persons as may from time to time and for certain purposes be acting as police officers under some statutory authority." I can only repeat that had the legislature in the year 1861 or in the year 1872 or at any subsequent time intended any such thing in, my opinion they would have said so in clear and unmistakable terms and it is not for this Court or any other Court to vary or add to the plain language of S. 25, particularly having regard to the fact which I have already emphasized—that any addition upon the lines indicated would have the effect of conferring the extraordinary privilege given by S. 25 on an additional class of wrongdoers and indeed confer on a limited class of the community an indulgence of a kind not enjoyed in all probability by any one in any country other than India.

The decision of the Full Bench of the Bombay High Court was followed by S. K. Ghose, J., with the concurrence of Lort-Williams, J., in the case of *Ibrahim Ahmed* v. *Emperor* (28). The headnote of that case reads as follows:

"In spite of the restricted provisions of the Opium Act, an excise officer in Bengal is, by virtue of the provisions of the Bengal Excise Act, a police officer within the meaning of S. 25, Evidence Act, and a confession made to such an officer during investigation is not admissible in evidence."

My brother Ghose in that case said:

"Section 74, Excise Act, prescribes the powers and the duties of excise officers investigating offences and the provision shows that such officers are virtually deemed to be police officers."

With all respect to my learned brother I can only say that in my opinion the conjunction of the word "virtually" and the word "deemed" cannot bring it about that excise officers are identical with police officers. On the contrary it seems to me that to say that one thing is "virtually deemed" to be another is less convincing even than to say simply that one thing is "deemed" to be another. It is in my opinion putting the supposed assimilation one stage further off. Even when it can accurately be said that one thing is to be deemed to be another that is by no means tantamount to saying that the one thing is the same as the other. I am bound to say that—with all respect to my learned brother—I disagree with the reasoning which appears at the bottom of p. 603 and the top of p. 604 of the report as contained in the sentence:

"On principle also the position of a police officer cannot be distinguished from that of an excise officer with regard to an offence under the Excise Act, because an excise officer is also interested in the conviction of the accused and in a position to dominate him."

I would point out that where there is any question of domination, the matter is amply provided for by the provisions of S. 24, Evidence Act, and where there is a possibility of domination or being in a position to dominate, that section provides the criterion to be applied. If domination were an important test for the determination of the question now before us, then with almost equal logic and with parity of reasoning it might equally well be said that parents, senior relations, and even spiritual advisers ought to be deemed in certain circumstances to be in the position of police officers for the purpose of S. 25, Evidence Act. It cannot in my opinion be too often emphasized that as S. 25 contains an abso-

28. AIR 1931 Cal 350=(1931) Cr C 414=131 I C 113=32 Cr L J 640=58 Cal 1260.

lute prohibition and an unqualified exclusion of statements which under English criminal jurisprudence would generally speaking be regarded not only as admissible but valuable evidence, the provisions must be strictly construed and not extended by inductive reasoning or by the presumed effect of other statutes not directly concerned with the laws of evidence. The transferring of the provisions now contained in S. 25, from Criminal P. C., to the Evidence Act indicates that the legislature intended that they should be treated solely under the law of evidence and nothing else. It is noteworthy that despite the decision of the Full Bench of the Bombay High Court and the judgment of S. K. Ghose, J., to which I have just referred, Sir C. C. Ghose while acting as Chief Justice of this Court—with the concurrence of Pearson J., preferred to follow the ealier decisions of this Court: see *Mati Lal Kalowar* v. *Emperor* (7), and so accordingly held that an Excise Sub-Inspector is not a police officer within the meaning of S. 25, Evidence Act.

Consequently a confession made to such an officer is not inadmissible in evidence. The decisions which favour the view that an excise officer in certain circumstances may be a police officer for the purpose of S. 25, Evidence Act, are all in essence based upon the fact that in S. 74, sub-S. 3, Bengal Excise Act, 1909, it is indicated that for the purpose of S. 156, Criminal P. C. 1898, the area to which an Excise Officer empowered under S. 73 (2) is appointed shall be deemed to be a police station and such officer shall be deeded to be the officer in charge of this station. It seems to me to follow therefore that any decision which makes an Excise Officer a Police Officer under S. 25, Evidence Act, is ultimately founded on the presumed effect of the word "deemed" as used in that section. As the learned Advocate-General reminded us, the very use of the word "deemed" of itself seems to involve the concession that the one thing is not wholly the same as the other. It may well be therefore that an Excise Officer is never for all purposes a Police Officer. To say that one thing is to be deemed to be another is not the same thing as saying that the one thing is identical with the other thing. I have no doubt that for the limited purpose of the Excise Act it may be that an Excise Officer is sometimes functioning as a Police Officer but that is very far from saying that he is not only to be considered as being but in fact is in precisely the same position as a Police Officer for all purposes whatever. In my opinion the Bengal Excise Act, 1909, confers by S. 74 certain police powers on Excise Officer for certain limited purposes and not for all purposes and certainly not to the extent of stigmatising Excise Officers as being of an untrustworthy character as regards the securing of evidence. In my opinion it would be quite wrong for this Court or any other Court to do something which if it is to be done at all ought only to be done by the considered opinion of the legislature.

After a very careful consideration of the matter I take the the view that an Excise Officer should not be put in the same category as a police officer for the purpose of S. 25 and I use that now to a large extent on those very observations of Sir Richard Garth, C. J., in the case of *Queen* v. *Hurribole Chunder Ghose* (8) which Mukerji, J., has cited in his judgment as supporting a contrary view. That case as Mukherji, J., observed was decided within a few years of the passing of the Evidence Act. The learned Chief Justice said

> "the term Police Officer should be read not in any strict technical sense, but according to its more comprehensive and popular meaning."

In my opinion although the observations to that effect are relied on in support of the view that Excise Officers are Police Officers, they may equally well and indeed with greater justification be taken to operate in the reverse sense, for one would imagine that no ordinary member of the public would have it in mind to identify an Excise Officer with a Police Officer for all purposes. I am supported in this view by the observations of Sir Courtney Terrel in the recent Patna Case to which I shall refer in detail presently. It is in my judgment of supreme significance that as recently as last year in the Opium (Bengal Amendment) Act 1933, Officers of Excise are definitely differentiated from Police Officers the categories referred to in that Act being Officers of the Excise. Police and Customs. We

find for example in S. 20-J (1) this provision

"Every Excise, Police or Customs Officer making an investigation under this Act shall, day by day, enter his proceedings in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him and a statement of the circumstances ascertained from day to day until the investigation is closed."

That section seems to indicate that investigation by an Excise Officer is by no means necessarily the same thing as investigation by a Police Officer. It may be useful in this connection to recall that in S. 45, Criminal P. C., a distinction is drawn between a Revenue Officer and a Police Officer.

This brings me to the observation of Fazl Ali J., in the most recent case of *Radha Kishun Marwari* v. *Emperor* (9) where the learned Judge says

"The section (i. e. S. 25) however is limited merely to a Police Officer and we cannot read into it words which it does not contain."

In my judgment the decision in this case which is one of a Full Bench of the Patna High Court is of all the reported cases the most logical and consonant with common sense. Fazl Ali, J., pointed out that there was nothing to prevent the framers of the Evidence Act from saying expressly that confessions made to a Police Officer as well as those persons who are for the time being and for certain limited purposes invested with the powers of a Police Officer are inadmissible in evidence, had they so intended and he then recalls that even

"in the Evidence Act itself the terms Police officer and Revenue Officer have been used to connote two different classes of officers as is evidenced on reading S. 125 of the Act."

The same learned Judge also pointed out that it is wrong to hold that the power of "investigation" ought to be taken as being the criterion as to whether or not the Excise Officer is a Police Officer for the purpose of S. 25 and in this connection he said that it is to be noticed that it is not only certain Revenue Officers, such as Officers of the Excise and salt departments, who are sometimes invested with the powers of a

"Police Officer in charge of a Police station but a private individual may also under certain circumstances be invested with such powers."

For instance:

"under S. 202, Criminal P. C., if an enquiry or investigation under that section is delegated to a private person, such person is to exercise all the powers conferred by the Code of Criminal Procedure on an officer in charge of the police station except that he is not to have the powers to arrest without warrant."

Are we then to suppose that such a private individual should also be regarded as a Police Officer within the meaning of S. 25, Evidence Act? Another of the learned Judges discussing the same point said:

"It may be observed however that there are officers who have no powers of investigation under Criminal Procedure Code, e. g., police constables, and yet such officers are nevertheless "Police Officers" within the meaning of S. 25, Evidence Act. Ths mere possession of certain of the powers of a Police Officer even though those powers include the power of investigation under the Code, does not suffice, in my opinion to convert into a Police Officer one who has no other claim to that status, e. g,, S. 202, Criminal P. C., empowers a Magistrate receiving a complaint to direct an enquiry or investigation to be made by any Magistrate subordinate to him, or by a Police Officer or by such other person as he thinks fit, but it is not arguable that if such an investigation is directed to be made by a person other than a Police Officer such person would be converted into a Police Officer even while engaged in making the investigation." See per Agarwalla, J., at p. 66.

I most respectfully agree with the reasoning to be found in the judgment of the learned Judges of the Patna High Court. It seems to me altogether an unwarranted conclusion to say that because Excise Officers are given certain powers similar to those of the police that therefore they should necessarily fall within the meaning of the expression Police Officer as used in S. 25. I referred earlier in this judgment to the fact that in the opinion of the Judges of the Patna High Court the decision in the Bombay case of *Nanoo Sheikh Ahmed* v. *Emperor* (5) was founded on certain fallacies. As regards this Sir Courtney-Terrell says:

"I find myself in complete disagreement with the arguments which found favour in that case and which have been presented before us and I think the fallacy is attributable to two causes. In the first place a judgment of Sir Richard Garth in the case of the *Queen* v. *Hurribole Chunder Ghose* (8) has been misunderstood and this misunderstanding has been the source of frequent error."

He goes on to say:

"In other words Sir Richard Garth held that the term 'Police Officer' in the Evidence Act included all Police Officers and not merely a member of the police force within the meaning of the Bengal Act."

He said:

"I consider that the term 'Police Officer' should be read not in any strict technical sense, but according to its more comprehensive and popular meaning. In common parlance and

amongst the generality of people, the Commissioner and Deputy Commissioner of Police are understood to be officers of police, or in other words 'Police Officers' quite as much as the more ordinary members of the force."

He again quotes Sir Richard Garth by saying:

"I think it better in construing a section such as the 25th, which was intended as a wholesome protection to the accused to construe it in its widest and most popular signification."

Then Sir Courtney Terrell says:

"This very sound decision that the term "Police Officer" in S. 25, Evidence Act, includes all kinds of Police Officers has been misunderstood as a decision that the term includes not only Police Officers but anyone on whom is conferred the powers of a Police Officer, although it has nowhere been decided what minimum aggregation of functions will constitute any person a Police Officer within the meaning of the section."

I would most emphatically agree with Sir Courtney Terrell where he says the fact is that the term 'Police Officer' is sufficiently well understood to allow of its use without any precise definition. It is well recognised that different countries and states confer upon their respective Police Officers different powers. Nevertheless it is not difficult to decide whether any particular individual is or is not a Police Officer in any particular country and it has been held that a

"confession made to a Police Officer of a foreign force in the country where he is in fact a Police Officer is not admissible in an Indian trial."

Sir Courtney Terrell then proceeds to deal with the second of the two fallacies underlying the decision in the Bombay case and all the decisions which would identify an Excise Officer with a Police Officer for the purposes of S. 25. The learned Chief Justice puts the matter thus:

"Another source is the adoption of an erroneous canon of construction of statutes that is, the consideration of what is supposed to be the object of this section of the Evidence Act and the adoption as an initial hypothesis of the theory that that object was to make inadmissible confessions made before persons possessing the power of investigation, search and arrest so that whereas a Sub-Inspector of Excise had been given these functions he came within the term 'Police Officer'."

Sir Courtney Terrell thus discards the theory that the "power of investigation" given by S. 74 must necessarily convert the Excise Officer into a Police Officer. He then proceeds to say:

"Courts of Justice are not concerned with the objects with which the legislature enacts any particular law unless in the particular enactment the object is stated as a guiding principle to be followed in interpretation. It may well be that the promoters of any particular bill in the legislature may have particular objects in view but any section as ultimately enacted may well be the result of compromise and it may be that the words ultimately agreed upon have been passed by the legislature in such a form that one or all of the objects of the promoters is defeated. In cases, therefore where the legislature has not thought fit to express its intention otherwise than by the use of the words of the section those words must be followed."

In my opinion endless difficulties inevitably arise when Judges endeavour to extend the plain provisions of any statutory enactment. Where the language of an enactment is unambiguous it should be interpreted strictly and in a case such as the present it is to my mind in the highest degree unsound, and indeed dangerous for the Court, by subtlety of argument or by resorting to other statutes to extend provisions such as that contained in S. 25. I am clearly and definitely of opinion that when the legislature used the expression 'Police Officer' they meant a Police Officer in the sense in which that expression is generally understood by the populace at large and in no other sense at all. I would therefore hold that not only was the confession in the present case rightly admitted but any confession made to an officer acting under the Opium Act or the Excise Act would be equally well admissible in evidence unless it could be ruled out, under the provisions of S. 24, Evidence Act. Having regard to the importance of this matter to the public and the State and in view of the confusion set up by conflicting decisions it would seem desirable that the legislature should deal with the matter again and give a clear definition of what it is intended the section should cover and possibly whether the time has not now come when the slur on the police implied in S. 25 should not be removed by the repeal of the section altogether seeing that the provisions of S. 24 afford ample safeguards against any real oppression or coercion.

Mallik, J.—I agree with my learned brother Mukerji, J.

Jack, J.—The question referred to us is whether an Excise Officer who, in the conduct of the investigation of an offence against the Excise, exercises the powers conferred by the Code of Criminal Procedure upon an officer in charge of a Police Station for the investigation of a cognizable offence, is a Police Officer

within the meaning of S. 25, Evidence Act. S. 25, Evidence Act states that:

"No confession made to a Police Officer shall be proved as against a person accused of any offence."

Therefore to answer the question referred to us in the affirmative we must find that while engaged in the investigation of an excise offence an Excise Officer is a Police Officer. According to S. 74 (3), Excise Act:

"For the purposes of S. 156, Criminal P. C., 1898, the area to which an Excise Officer empowered under S. 73 (2) is appointed shall be deemed to be a Police Station, and such officer shall be deemed to be the officer in charge of such station."

In other words an Excise Officer is to be deemed to be an officer in charge of a Police Station for the purposes of the investigation of an offence into which he is enquiring. He has not merely the powers of a Police Officer, but the status of a Police Officer for the time being :

"When a thing is to be 'deemed' something else, it is to be treated as that something else with the attendant consequences" (Cane, J., in *Reg* v. *Norfolk County Council* (29)).

It follows that, since for investigation purposes the Excise Officer is to be deemed a Police Officer, a confession made to him by the accused in the course of an investigation of an offence must be deemed to be a confession made to a Police Officer and as such inadmissible in evidence. I would however not go further than this and hold that in any circumstances a confession made to an Excise Officer is inadmissible in evidence. Genuine admissions made by accused persons are a very important aid in the administration of justice and under S. 21, Evidence Act, such admissions are relevant and may be proved as against the person who makes them.

Under S. 24 of the Act a general exception is made in the case of confessions caused by inducement, threat or promise proceeding from a person in authority. S. 25 makes further special exception in the case of confessions made to Police Officers. No doubt, through these exceptions, (however good the grounds may be for making them), the Courts in some cases are deprived of the advantage of a genuine confession, which would have greatly simplified the right decision of the case. In these circumstances the Courts should, I think, be very careful not to stretch the words used by the legislature to cover cases which do not come strictly within the terms of the section. Had the legislature intended to include confessions made to persons other than Police Officers surely it would have introduced words to that effect in the section, at least after Excise Officers were given police powers. I would suggest that there was no need to do so because S. 74, Excise Act, gives Excise Officers while engaged in the investigation of an excise case the status of a Police Officer for purposes of the investigation of the case, and the recording of a confession would be part of the investigation:

"Where the words of a statute are themselves precise and unambiguous those words are to be taken in their ordinary meaning."

There is, I think, no ambiguity in the term Police Officer, and therefore it was not considered necessary to give any definition of the term in the Evidence Act or in any other statute, we have simply to take the words in their ordinary meaning. Sir Richard Garth in the case of *Queen* v. *Hurribole Chunder Ghose* (8) says:

"I consider that the term Police Officer should be read not in any strict technical sense, but according to its more comprehensive and popular meaning. In common parlance and amongst the generality of people the Commissioner and Deputy Commissioner of Police are understood to be Officers of Police or in other words Police Officers quite as much as the more ordinary members of the force."

This however is by no means authority for holding that an Excise Officer is a Police Officer merely because he has for the investigation of excise cases certain powers of a Police Officer. No one in my experience regards an Excise Officer as a Police Officer, and in none of the decisions on this point has it been suggested that an Excise Officer is called a Police Officer by any class of the community. The Bombay Full Bench decision in *Nanoo Sheikh Ahmed* v. *Emperor* (5) is based on the fact that Excise Officers exercise police powers in excise cases and not on the ground that they are generally regarded as Police Officers. A village chowkidar on the other hand is a village police officer and is referred to as such in the Police Act 5 of 1861 and in other previous Acts, but in no statute so far as I am aware has an Excise Officer been referred to as a

29. (1891) 60 L J Q B 379 = 56 J P 7 = 65 L T 222.

Police Officer, in fact in the Excise and Opium Acts and in the Evidence Act a Police Officer is distinguished from a Revenue Officer. I therefore agree with the view taken in the cases of *Rukumali* v. *Emperor* (1), *Ah Foong* v. *Emperor* (2), *Haribhanjan Sao* v. *King-Emperor*(3), *Tura Sardar* v. *Emperr* (4), *Matilal Kalowar* v. *Emperor* (7) as well as *Radha Kishun Marwari* v. *King-Emperor* (9), that an Excise Officer is not a Police Officer. I would accordingly limit the application of S. 25, Evidence Act, in the case of an Excise Officer to a confession made to him in the course of an investigation of an offence by virtue of S. 74 , (3), Excise Act, which gives him the status of a Police Officer for the purposes of the investigation. My answer to the reference is in the affirmative.

S. K. Ghose, J.—The question referred to the Full Bench is this:

> "Is an Excise officer, who in the conduct of investigation of an offence against the excise exercised the powers conferred by the Code of Criminal Procedure upon an officer in charge of police station for the investigation of a cognizable offence, a police officer within the meaning of S. 25, Evidence Act."

The learned Advocate General has pointed out that the question as formulated in this form does not, strictly speaking, arise out of the appeal which is against a conviction under S. 9, Opium Act, and not one under the Bengal Excise Act 5 of 1909. He has however said that in view of the importance of the matter he would not press this technical objection and he has invited us to give our opinion on the question as stated above. The decision of this question turns upon a construction of S. 25, Evidence Act; in particular, upon a construction of the words "police officer" occurring therein. Ss. 25, 26 and 27 were embodied in the Evidence Act from the Criminal Procedure Code, Act 25 of 1861. This is how Stephen puts the matter:

> "I may observe upon the provisions relating to them that Ss. 25, 26 and 27 were transferred to the Evidence verbatim from the Code of Criminal Procedure, Act 25 of 1861. They differ widely from the law of England, and were inserted in the Act of 1861 in order to prevent the practice of torture by the police for the purpose of extracting confessions from persons in their custody. (Stephen's Introduction to the Evidence Act, p. 171)."

The provision in S. 25 is definite and explicit; for our purpose the expressions "police officer" and "any offence" are worthy of note. The latter expression is not confined to any thing which is an offence under a particular Act or which was an offence in 1872; it applies to all offences including those created by later Acts. Then what is a police officer? The learned Advocate General has contended that a police officer is simply a member of the police force whose duties are prescribed by S. 23, Police Act (Act 5 of 1861). He has strongly contended that it is unnecessary for us to look to the intent of the provisions regarding confessions when the words "police officer" are plain enough. It is however noteworthy that these words are not defined in the Evidence Act. The explanation, for instance, to S. 26 excludes certain persons from the category of "Magistrate;" but no such restriction or limitation is given with regard to the words "police officer." The Police Act of 1861 also did not define "police officer." The preamble shows that the Act was intended to reorganise the police and make it a more effective instrument for the prevention and detection of crime. The word "police" shall include all persons who shall be enrolled under this Act (S. 1). The entire police establishment shall be deemed to be one police force and shall consist of such number of officers and men etc., (S. 2). Police officers are to get certificates of appointment (S. 8) and the form of the certificate states that the officer is vested with the powers and functions and privileges of a police officer.

Police officers enrolled under this Act are not to exercise any authority except what is provided for by the Act and by any Act which shall hereafter be passed for regulating criminal procedure (S. 20). But it is recognized that there are already village police officers who are not affected by the Act (S. 21). The learned Advocate General has referred to S. 23 as showing the powers of police officers, but that section really prescribes the duties. Lastly, the Act shall not by its own operation take effect in any place (S. 46). The Criminal Procedure Code of 1861, Act 25, does not define police officer, but it contains provisions regarding the duties and powers of a police officer in the matter of prevention, detection, and investigation of crime.

The later Code merely defines "officer in charge of a police station." The Calcutta Police Act (Act 4 of 1866) does contain a definition of police officer, but it is merely that it shall mean "any member of the Calcutta Police Force."

It also prescribes the duties (S. 10-A) which arising out of the exigencies of city, are not identical with the duties prescribed by S. 23 of Act 5 of 1861. No doubt the legislature of 1872 was cognisant of the duties and powers of police officer of that period. But it is noteworthy that it used the words "police officer" in S. 25, Evidence Act, without any qualifying expression. By a later provision in S. 125 which was passed in 1887 a reference was made to "revenue officer" as distinct from "police officer." But in S. 25 the expressien "police officer" remained without any differentiation or amendment. On the other hand, the section applies to a person accused of any offence." Since 1872 not only have new offences been created by later Acts, but new bodies of officers have been created who are vested with powers of police with regard to these offences. Would that make any difference to the application of the section to those officers? I think not.

The scheme of the Act with regard to confessions is that a confession is testimonially untrustworthy unless it is perfectly voluntary, and, in the case of a confession made to a police officer, the law goes so far as to presume that it is testimonially untrustworthy for reasons which are well understood and justified by experience. But, says the learned Advocate General, we cannot look to the intent of the provision, because the term "police officer" is not ambiguous. But his contention that a police officer means simply one who is a member of the regular police force will not bear examination. Courts all over India have agreed in upholding the dictum of Sir Richard Garth, C. J., in the case of *The Queen* v. *Hurribole Chunder Ghose* (8) that the term "police officer" should be read not in any strict technical sense but according to its more comprehensive and popular meaning. It has been expressly held that S. 25 is not to be restricted to officers of the regular police force. *Queen-Empress* v. *Salemuddin Sheikh* (10).

For instance it was applied to the case of a police patel: *Queen-Empress* v. *Bhima* (30) and *Queen-Empress* v. *Kamalia* (31), to the case of a chowkidar in *Queen-Empress* v. *Salemuddin Sheikh* (10), besides to police officers of Native States, *Queen-Empress* v. *Nagla Kala* (11). Once it is found that the term cannot be confined to officers who are enrolled as members of the regular police force under one or other of the so-called Police Acts, the correct judicial interpretation would be to include persons who exercise the powers, or are charged with the duties, of the police. It is not necessary that one should find an exhaustive definition of the term "police officer." It is enough for our purpose if we can find what the term should include, namely, whether it should include a person who exercises the powers of a police officer in a particular case. There is no reason why such a person should not be deemed to be a police officer within the meaning of the section. This is quite in keeping with the plain words of the section. The Golden Rule of legal interpretation has been stated thus:

> "The grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or repugnance or inconsistency with the rest of the statute, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity, repugnance and inconsistency, but no further." (Beal's Cardinal Rules of Legal Interpretation, 3rd Edn., p. 343 et seq.)

Where the authorities are collected. It does not seem to me that the interpretation which I have sought to put upon S. 25 goes contrary to this maxim. With great respect the opposite contention results in a stilted, narrow, and superficial view of law, by the application as it were of a copy book maxim. The words "police officer" may be plain, but they are not defined in the Evidence Act. The contention that the term applies only to members of the police force is not borne out by authority. On the other hand it is quite consistent with the scheme of the Act that a person who exercises the powers of a police officer should be hit by the prohibitive provision in S. 25.

What is the position of an excise officer in an excise case? We find that in an excise case an excise officer is the

30. (1893) 17 Bom 485.
31. (1896) 10 Bom 595.

real police officer. He is so by statute. In practice he is often the only police officer in the case. The provisions of the Bengal Excise Act of 1909 make it quite clear that an excise officer exercises all the powers of the police for the prevention and detection of excise offences. S. 73 prescribes that certain excise officers may investigate offences under the Act. If read with R. 35, Bengal Excise Manual, 1918, p. 108, it shows that an Excise Inspector and an Excise Sub-Inspector are empowered to investigate any offence punishable under the Act. S. 74 prescribes the powers and duties of excise officer investigating an offence and it says expressly that he may exercise any of the powers conferred upon a police officer making an investigation or upon an officer in charge of a police station by Ss. 160 to 171, Criminal P. C., 1898. Sub-S. (3), S. 74 states that for the purposes of S. 156, Criminal P. C., the area to which an excise officer so empowered is appointed shall be deemed to be police station and such officer shall be deemed to be the officer in charge of such station. S. 81, sub-S. (3) also refers to such officers as being deemed to be police officers. The learned Advocate-General has contended that the expression "deemed" shows that the two are not identical. It may be that this is a statutary fiction, but it is sufficient to show that in so far as investigation into an excise offence is concerned an excise officer is virtually the same thing as a police officer.

In other cases for instance in a murder case an excise officer may be no more than a member of the public. But that is not the point. As I have said before, in an excise case excise officers are the police. There is no reason why they should not be police officers within the meaning of S. 25, Evidence Act. To hold otherwise would be to stultify the object of that provision. There is no question of hampering investigation by an excise officer, for it should be no more difficult for him than it is for a member of the regular police, to send a confessing accused to a Magistrate in order to have his confession properly recorded. It is desirable that that should be so. Experience shows that even a confession which is recorded by a Magistrate with all the formalities and safeguards that the law provides has sometimes to be thrown out as being not a voluntary confession and great is the risk in the case of an extra judicial confession before an officer exercising police powers, since such confession is more ofter than not recorded in a slipshod and negligent manner.

In the Calcutta High Court there is a number of cases in which the view has been taken that an excise officer is not a police officer for the purpose of S. 25, Evidence Act. These cases are, *Rukumali* v. *Emperor* (1); *Ah Foong Chinaman* v. *Emperor* (2): *Harbhanjan Sao* v. *King-Emperor* (3); *Tura Sardar* v. *Emperor* (4) and *Matilal Kalwar* v. *Emperor* (7). In none of these cases however the question of an excise officer exercising powers of a police officer was discussed and it does not seem that in any of these cases, except the last mentioned the attention of the learned Judges was directed to the material provisions of the Excise Act. In the case of *Tura Sardar* v. *Emperor* (4), it was held that the question did not arise having regard to the facts of the case. In the case of *Matilal Kalwar* v. *Emperor* (7), the case of *Ibrahim Ahmed* v. *Emperor* (28), was not followed, because in that case it was not thought necessary to refer the matter to a Full Bench for decision. In the case of *Ibrahim Ahmed* v. *Emperor* (28), the position of an excise officer with reference to his powers under the Excise Act was discussed and I adhere to the opinion I expressed therein. But on the facts of the case it was found necessary to make a reference to the Full Bench. A Full Bench of the Bombay High Court in the case of *Nanoo Sheikh Ahmed* v. *Emperor* (5) decided the matter upon the principle with which I respectfully agree. That was a decision under the Bombay Abkari Act (Bombay Act 5 of 1878) which provides that certain abkari officers are empowered to investigate offences punishable under the Act and these powers are similar to the powers which are conferred on excise officers by the Bengal Excise Act.

It was held that an abkari officer who in the conduct of an investigation of an offence punishable under the Bombay Abkari Act, exercises the powers con-

ferred by the Criminal Procedure Code, 1898, upon an officer in charge of a police station for the investigation of a cognizable offence is a police officer within the meaning of S. 25, Evidence Act. The views expressed in this case and also in the cases of *Ibrahim Ahmed* v. *King-Emperor* (6) and *Queen-Empress* v. *Salemuddin Sheikh* (10) were dissented from by a Full Bench of three Judges of the Patna High Court in the case of *Radha Kishun Marwari* v. *King-Emperor* (9). In that case the Judges agreed with the principle laid down in the case of *Queen* v. *Hurribole Chunder Ghose* (8) namely that the term 'police officer' should not be read in any technical sense and Fazil Ali, J., held that the definition of the term 'police officer' in S. 1, Police Act was not exhaustive and the term was not confined merely to persons enrolled under the Police Act. But Agarwala, J., held that no person was a police officer unless he was enrolled in, or appointed as a member of the police force, or was declared by statute to be a member of that force. There was a reference to police officer in its popular meaning, but as to this there may be some controversy.

The term 'popular' is elastic and large discretion is implied in its interpretation. Even in its popular meaning an excise officer may not be distinguishable from the police, for it is a common thing for people to refer to excise officer as 'excise police' or 'excise daroga' or 'abkari daroga' and so forth, and from the point of view of an accused person one certainly would not make a distinction as between an excise officer and a police officer. All this cannot be dismissed as a popular misconception, for it is no misconception at all. On the other hand it is in keeping with the Oxford Dictionary definition of the word 'police' which is quoted in the judgment just delivered by my learned brother Mukerji, J. It may be that the power to investigate is not a complete test, because a police constable has no power to investigate; one is landed in this sort of difficulty in trying to get at an exhaustive definition of the term 'police officer'. Nor should the case of a person who has been directed to inquire into a case under S. 202, Criminal P. C. create any difficulty on the ground that by sub-S. (2) such a person shall exercise the powers of an officer in charge of a police station, for such a person would not have the power to arrest without warrant; he is only to investigate for "the purpose of ascertaining the truth or falsehood of the complaint' and for that purpose to take evidence, as for instance, under S. 161 of the Code, and not to prevent or detect a crime or apprehend the criminal.

The Patna case was one under the Dangerous Drugs Act 2 of 1930, Ss. 29 and 30 of which provide for certain police powers. There is however no reference to this in the judgment. The case of *Maung San Myin* v. *King-Emperor* (26) was decided by a single Judge and he also did not discuss the effect of the powers conferred upon an excise officer. In so far as these cases lay down that an excise officer is not a police officer within the meaning of S. 25, Evidence Act, I respectfully disagree with the decision. It may be noted that in *Jas Bahadur Thafa* v. *Emperor*, *A.I.R.* 1930 *Rang* 227 which was decided later by a Bench of the Rangoon High Court the wider interpretation of the term police officer based on the dictum of Garth, C. J. was followed. A distinction has been sought to be made in the case of an officer acting under the Opium Act (Act 1 of 1878) on the ground that the powers conferred by that Act are not so extensive as those conferred by the Bengal Excise Act. This argument was made without reference to the Opium (Bengal Amendment) Act of 1933. But even under Act 1 of 1878 the officer is no less interested in getting a conviction; he has even a special interest in the fines imposed by the Court: vide S. 13. No doubt this Act does not contain a provision similar to S. 74, Bengal Excise Act, but S. 14, Opium Act provides that either from personal knowledge or from information an officer may enter into any place, in case of resistance, break into it, seize opium and all materials used in the manufacture thereof, detain and search and if he thinks proper arrest any suspicious person. S. 15, gives him the power to seize in open place and to detain search and arrest any suspicious person. By S. 20, the officer is to forward without delay to the officer in charge of the nearest police station the person arrested or the thing seized. But

the time is apparently left to some extent to his discretion according to the circumstances and by S. 21 he is required to make a report within 48 hours.

Practically therefore in so far as the investigation is concerned an officer under the Opium Act exercises the powers of a police officer. In this respect he is in no way inferior to village chowkidar or patel who have been held to be police officers under S. 25, Evidence Act. So far with regard to Act 1 of 1878. But the effect of the amendment by the Bengal Act 5 of 1933 is to bring the position in Bengal more completely into line with that under the Excise Act. By S. 12, Amendment Act the Local Government may authorize any class of officers of the Excise, Police or Customs Department to investigate offences and to grant bail to persons as arrested. They become the investigating police, with the necessary police powers. It is also enacted that the provisions of S. 162, Criminal P. C. shall apply to statements of witnesses as recorded, and also that the provisions of S. 172 of the Code shall apply to the diary of proceedings in investigation which is required to be kept. No doubt excise, police and customs officers are distinctly mentioned, but the distinction in nomenclature is purely departmental. In respect of their powers they are all the same. In practice too there is no difference from the point of view of an accused person between an officer acting under the Opium Act and an officer under the Excise Act. In the view that I have taken it seems to me that no exception should be made in the case of an officer under the Opium Act. He also is a police officer within the meaning of S. 25, Evidence Act. The non-application of this section in excise and opium cases has been, in my experience, very harmful and the practice should not be continued on the plea that it is in accordance with law which, in my opinion, it is not.

In my judgment the answer to the question referred to the Full Bench is that an excise officer who in the conduct of investigation of an offence against the excise exercises the powers conferred by the Criminal Procedure Code upon an officer in charge of a police station for the investigation of a cognizable offence is a police officer within the meaning of S. 25, Evidence Act. With reference to the larger question raised I would say that an officer investigating an offence under the Excise Act 5 of 1909 or under the Opium Act, 1878 is a police officer within the meaning of S. 25, Evidence Act.

R.K. *Reference answered.*

A. I. R. 1934 Calcutta 600

PANCKRIDGE, J.

Lotus Ltd.

v.

Mt. Nasiunnessaba Begum

Civil Suit No. 741 of 1933, Decided on 28th August 1933.

(a) Trade mark—Owner must prove that trade mark or name must be associated in mind of public with his goods.

A registered trade mark as such, is not protected, and the owner has to prove by evidence that he has acquired a right thereto in the sense that the trade mark or, the trade name is associated in the mind of the public with the goods manufactured by him: *Ewing* v. *Buttercup Margarine Co., Ltd.* (1917), 2 *Ch D* 1, *Ref*; *Turton* v. *Turton*; 42 *Ch D* 128, *Dist.*

[P 601 C 2]

(b) Trade mark—Infringement — Honesty of defendant does not affect question—If use of plaintiff's name by defendant is calculated to deceive, plaintiff is entitled to protection.

The question is not one which turns on the honesty of the defendant. If the use of the trade name by defendant is calculated to deceive, the plaintiffs are entitled to protection and it is no answer for the defendant to plead that special efforts are made to guard against deception in actual fact. [P 602 C 2]

Chippendale—for Plaintiff.

J. C. Hazra and *Amin Ahmed* — for Defendants 1 and 2.

Judgment.—The plaintiffs in this case are a company registered at Stafford in England carrying on business as boot and shoe manufacturers. They state that they are the sole proprietors of a registered trade mark known as 'Lotus' in respect of boots, shoes and slippers manufactured and sold by them. It appears that the plaintiffs are the successors-in-title of a corporation known as F. Bostock & Co. Ltd., and that the trade mark has been registered in England since 1903, and in India since 1911. The plaintiffs further say that the boots, shoes and slippers manufactured by them are well known to the public generally by the name of 'Lotus', which name distinguishes the plaintiffs' goods from the goods of other manufacturers.

They set out in the plaint particulars of the label which is affixed to the boxes in which their goods are sold, and also particulars of the representation of a lotus flower which is stamped upon the soles of the boots, shoes and slippers of their manufacture.

The suit was originally instituted against the male defendant who was alleged to be proprietor of a business calling itself "New Lotus Footwear" carried on at the shop in the New Market, Calcutta. The allegation was that the plaintiffs came to learn in 1932 that the male defendant was manufacturing and offering for sale and selling footwear under the name of 'Lotus' and passing his goods off as goods manufactured by the plaintiffs. The plaintiffs ask for an injunction, for damages and for delivery of all stock and labels for destruction. When the written statement was filed on behalf of the male defendant, the plaintiffs discovered that among the allegations therein was one that the business known as New Lotus Footwear did not belong to him, but to his daughter, a lady by the name of Mt. Nasiunnessaba Begum, wife of Ali Afzal. The plaintiffs therefore took the necessary steps to add this lady as a defendant and asked for consequential amendments of the plaint.

With regard to this aspect of the matter I am of opinion that the plaintiffs' case against the male defendant must fail. The evidence that he has anything to do with the management of the business is very scanty and certainly falls far short of proof. As to the ownership of the business, a stamped document has been put in, which has not been challenged, and which shows that in April 1932 the female defendant purchased the good-will and stock-in-trade of the business from its former proprietor for a consideration of Rs. 1,500. The male defendant and another member of his family have given what is prima facie a satisfactory explanation of the source of the purchase money, and the circumstances in which the lady who is now said to be about 16 years of age, came to have the necessary funds to buy the business. I do not think there is any evidence on which I can hold that the lady is a benamidar. It follows that as against the male defendant the suit must be dismissed with costs.

With regard to the female defendant who, as I find is the owner of the business, the position is that the suit must be considered on the merits. First of all, it is denied that the plaintiffs have acquired any right to the exclusive use of the word 'Lotus'. As has been pointed out in this country a registered trade mark as such, is not protected, and the owner has to prove by evidence that he has acquired a right thereto in the sense that the trade mark or, as in this case, the trade name is, associated in the mind of the public with the goods manufactured by him. In my opinion the plaintiffs have satisfactorily proved their title. Their local agent, a dealer in boots and shoes, by the name of Aziz Rahman, has been called, and he states that the shoes have been on the market to his knowledge since 1928, and that they enjoyed a good reputation among purchasers. He says that they are popularly known as 'Lotus' shoes, and that when purchasers ask for 'Lotus' shoes, they want, and what they mean, is, not a particular design of shoe, but a shoe manufactured by the plaintiff company. He has not been cross-examined to any extent on these points, and I am of opinion that the plaintiffs have shown, so far as the local market is concerned, that they have acquired the sole right to the use of the word 'Lotus' in connexion with boots and shoes, and I think it is clear in this state of things that the Court will restrain the female defendant from using a description containing a word which has come to be associated with the plaintiffs.

I need only refer to *Ewing* v. *Buttercup Margarine Co. Ltd.* (1). It is to be observed that 'Lotus' is a name which, as such, can have no possible meaning as applied to boots and shoes, and the only object of its use is to identify the boots and shoes with the manufacturer. It therefore appears to me that cases like *Linoleum Manufacturing Co.* v. *Nairn* (2) are of very little assistance, because they are not concerned with the existing words, but with a fancy word coined by the inventor to signify the article invented by him. Nor

1. (1917) 2 Ch 1=86 L J Ch 441=117 L T 67=33 T L R 321=61 S J 443.
2. (1878) 7 Ch D 834=47 L J Ch 430=20 W R 463=38 L T 44.

can I derive any assistance from cases like *Turton* v. *Turton* (3), where the names are the names of actual persons, and where it is suggested that, owing to a mistake in identity, customers are misled into dealing with the defendants instead of with the plaintiffs. The female defendant also argues that ,in the circumstances of the particular case there is no possibility of customers being deceived into purchasing her goods under the belief that they are the goods of the plaintiffs, and she points out that there is no similarity in get up, and also that whereas the plaintiffs deal in high grade shoes of English manufacture at Rs. 19 a pair, the shoes which she sells as 'New Lotus' shoes are made of Indian produced leather, and are of an inferior grade and cost only Rs. 6 a pair. I agree with her contention to this extent: that I cannot imagine a customer who was familiar with the plaintiffs' goods being deceived in buying the sort of article which the female defendant has been proved to be selling. Boots and shoes have this peculiarity: that the customer generally tries them on before he purchases them, and thus has a better opportunity of examining them than in the case of a purchase of goods which are sold in sealed wrappers or bottles.

I have however come to the conclusion that this point is really of no importance, because if the plaintiffs are entitled to the exclusive use of the word 'Lotus', they are entitled to it, in my opinion, in respect of all classes of boots and shoes, and not only of the particular high class grade of articles which they sell at the present time. In my opinion, if they are so minded, they are perfectly entitled to put on the market an inferior grade of Lotus shoe, with which the goods sold as 'New Lotus' Foot wear by the defendant might well be confused; and similarly, 'in my opinion, if the injunction asked for is refused, the female defendant will have the right to sell not only the shoes she is at present selling as 'New Lotus' footwear, but also more expensive and superior shoes, which it is quite possible that purchasers may buy in the belief that they are manufactured by the plaintiffs.

It is suggested that the female defendant in addition to goods of her own manufacture stocks genuine Lotus shoes, and I am asked to believe that the attention of customers is drawn to the difference in the articles. Apparently the stock of genuine Lotus shoes is now exhausted. It was not imported from England by the defendant, but as I understand it was bought from one of the Exchange Banks presumably because the actual importer had failed to take up the consignment. No documents have been produced to show either the size of the consignment or the date of delivery, and in my opinion that stock was purchased purely for purposes of this case. Be that as it may, the question is not one which turns on the honesty of the defendant. If the use of the name 'Lotus' is calculated to deceive, I consider the plaintiffs are entitled to protection, and it is no answer for the defendant to say that special efforts are made to guard against deception in actual fact. In the circumstances I propose with regard to the female defendant to grant an injunction restraining her, her servants and agents, from carrying on business as a manufacturer or vendor of any boots, shoes and slippers under any name or title of which the word 'Lotus' forms part, and from manufacturing, selling or offering for sale any boots, or slippers not being of the plaintiffs' manufacture, under any name of description of which the word 'Lotus' forms a part.

With regard to damages, I think the position is that the plaintiffs have not been able to prove any damage in fact. Some evidence has been given as regards a falling off in their sales, but I see no reason to connect the diminishing sales with the infringement of which the defendant has been accused. Moreover the claim for an inquiry as to damages is not pressed. The plaintiffs are however entitled to an order that the female defendant do deliver up to the plaintiffs on affidavit all labels and goods in her possession or which are in contravention of the injunction granted, or do delete therefrom any word or words which offend against the injunction. The plaintiffs are also entitled to their costs against the female defendant.

K.S. *Order accordingly.*

3. (1890) 42 Ch D 128=38 W R 22=61 L T 571.

A. I. R. 1934 Calcutta 603

PANCKRIDGE, J.

Madan Theatres Ltd.

v.

Babulal Chowkhani.

O. O. C. Ju. Decided on 30th January 1934.

Calcutta High Court Rules and Orders (Original Side) Ch. 6, R. 15—Objection to petition for winding up of company — Petition ordered to be taken off file if security to satisfaction of Registrar was furnished—Acceptance of security by Registrar—His order cannot be revised.

Where on an objection to a petition for compulsory winding up of a company, the Court orders that the petition will be taken off the file if the company produces security to the extent of a certain sum to the satisfaction of the Registrar in insolvency, and the Registrar accepts security offered as sufficient, his order cannot be revised : *Hoare & Co.* v. *Moreshead* (1903), 2 *K. B.* 359, *Foll,* [P 603 C 2]

S. M. Bose, and *S. B. Sinha*—for *Madan Theatres, Ltd. W. W. K. Page* and *N. C. Chatterjee,*—for *Babulal Chowkhani.*

Order.—I am of opinion that the preliminary objection taken by the company must prevail. The creditor presented a petition for compulsory winding up on 11th April 1933. The Court directed that the petition should be advertised as provided by the rules. The company moved the Court on 28th April 1933, to have the winding up petition taken off the file. Lort-Williams, J., directed that this should be done on the company furnishing security, to the satisfaction of the Registrar to the extent of Rs. 50,000 within a fortnight and that in default the application should stand dismissed with costs.

On appeal by the company the Court reduced the security from Rs. 50,000 to Rs. 30,000. On 7th June 1933, the Registrar in insolvency accepted five persons as sureties, the security being their interests in certain immovable properties in Calcutta and its suburbs. The creditor now wishes to appeal against the Registrar in Insolvency's decision under R. 15, Ch. 6 of the Original Side Rules and Orders. I need not in the circumstances discuss the grounds of appeal in detail. It is pointed out that the properties belong to a firm known as J. F. Madan, in which the sureties along with certain other persons are partners. It is said that under the law a partner cannot pledge partnership property to secure the debt of a third party. Objection is also taken to the title of some of the properties, and to their valuation. Moreover it is submitted that the security is unsuitable, as the properties are already mortgaged to a bank, and this bank has instituted a mortgage suit, which is now pending and in which a receiver has been appointed. The company has supported the Registrar in Insolvency's decision on the merits, but has also maintained that I have no power to interfere with it. The appeal Court, so runs the argument, saw fit to impose the specific condition, on the fulfilment of which the winding up petition was to be taken off the file. That condition was fulfilled as soon as the Registar in Insolvency, being satisfied with the security, accepted it, and I have no right to review his order, because to do so would be to substitute another condition, namely security to my own satisfaction, for that imposed by the Court. I think the correctness of this view is supported by the authority of *Hoare & Co.* v. *Morshead* (1).

There leave to defend under order O. 14, R. 6 of the Rules and Orders of the Supreme Court was given, upon the defendant's furnishing security to the satisfaction of the Master. The Master refused to accept the security offered, and directed that the plaintiffs should be at liberty to sign final judgment. The defendant appealed to the Judge in chambers under order O. 46, R. 21 which corresponds in all material particulars with our Ch. 6, R. 15. The Court of appeal affirmed the decision of the Judge that no appeal lay to him. Mathew L. J., observed that in the circumstances of the case the Master acted as a person designated by virtue of the power given to the Judge of imposing any terms on giving leave to defend. Cozens.-Hardy, L. J., also indicated his opinion that the Master was acting, not in exercise of his jurisdiction as Master, but as a person a designata. I appreciate that in the case before me the Court was not exercising a statutory power to impose conditions, but the power of the Court to order the removal of the petition on terms is not and cannot be challenged before me. Had the Court intended that the Registar's decision should be

1. (1903) 2 K B 359 = 72 L J K B 724 = 19 T L R 632=52 W R 87.

subject to appeal, it would have been quite simple to make this clear in the order.

I thought at one stage that difficulty might arise from the fact that it was the Registar in Insolvency who accepted the security, although the order specified, or "designated", the Registrar, by which must be meant the Registrar Original Side. The reason for this is an order made by Sir Lancelot Sanderson on 11th February 1924, whereby he directed that all references with regard to security should be transferred from the Registrar to the Registar in insolvency. Though it is not so stated, I take it that the order was made under Ch. 4, R. 18. In my judgment the Court must be assumed to have had Sir Lancelot Sanderson's authorisation in mind, when the order for security was made, or in other words that the Registrar in Insolvency is as much a person designated, as if the order specially provided that the security was to be to his satisfaction.

Both parties appeared before him and no objection was raised to his dealing with the matter. Indeed the creditor has not taken this point before me. I am conscious that the Judge in chambers has hitherto entertained appeals as to the sufficiency of the security tendered, in cases where conditional leave to defend has been given under O. 37 or Ch. 13-A. I do not think however that my natural reluctance to interfere with the established practice of the Court ought to deter me from construing the order for security in the manner, in which I consider authority shows that it should be construed. The application is dismissed with costs. Certified for counsel.

K.S. *Application dismissed.*

A. I. R. 1934 Calcutta 604

COSTELLO, J.

A. D. M. Cotton—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 902 of 1933, Decided on 13th March 1934.

(a) Factories Act (1911) — Prosecution under — Duty of prosecution — Proper evidence must be given and case properly conducted.

If the Factories Act is to be effectively administered it is desirable, whenever it is necessary that prosecutions under the Act should be properly launched and properly conducted and that proper evidence should be given in support of the complaint lodged by the Inspector of Factories. It is highly desirable that those who are responsible for the administration of the Act should see to it that the cases of prosecution are properly and satisfactorily conducted. [P 605 C 1]

(b) Criminal Trial — Complaint is not evidence in case — Conviction is improper in absence of properly proved evidence—Complaint cannot be treated as deposition—Criminal charges must be properly proved.

To lodge a complaint is not to give evidence upon which a Court can act. The complaint is in the nature of an indictment. Therefore averments in a complaint must be established and properly proved by evidence and the matter must not be dealt with as if the complaint is something in the nature of a deposition. Before anyone can be convicted on charges formulated in a complaint all those charges must be fully and properly proved in accordance with the procedure and the law of evidence applicable to criminal charges. [P 603 C 1, 2]

Probodh Chander Chatterji, *Bireswar Chatterji* and *Mohendra Nath Banerji*—for Appellant.

Kondkar and *Anil Chander Roy Chowdhury*—for the Crown.

Judgment. — This is an appeal on behalf of one who is described as A. D. M. Cotton. He was convicted by the Chief Presidency Magistrate of three several offences under the Factories Act 12 of 1911. The first charge was under S. 41 (a) read with S. 26 and the offence alleged was that of allowing persons to be employed in the factory after the prescribed hours. On that charge he was convicted and sentenced to pay a fine of Rs. 100 or, in default, to undergo six weeks' simple imprisonment. The second charge was under S. 41 (g) read with S. 18 and R. 14 and that related to a failure to comply with an order given by the Factory Inspector to remedy certain defects as regards the fencing or guarding certain machines and plant used in the factory. The last charge was brought under S. 36 (1) which requires that there shall be affixed in some conspicuous place near the main entrance of a factory the prescribed abstracts of the Act and of the rules made under that Act. On the second charge a fine of Rs. 200 was imposed, but no separate sentence was passed as regards the third charge.

The convictions were based on what I can only describe as very inadequate, loose and unsatisfactory evidence. The

only witness for the prosecution was the Inspector of Factories who had visited the premises known as Bridge and Sons Printing Press at No. 1, British Indian Street on 9th August 1933, and all that he said in his examination-in-chief was:

"They have a great deal of power machinery electrically worked. The statement prepared by the accused shows 24 employees."

That was the sum total of his evidence-in-chief. It is quite obvious that if the matter had rested there he would have proved nothing at all which came within any measurable distance of the charges brought against the defendant. Unfortunately for the defendant however the lawyer who represented him seems to have rushed in with great indiscretion and thought it necessary to cross-examine Mr. Joardar with the result that he succeeded in extracting certain amount of evidence which told entirely in favour of the prosecution and was highly damaging to the defendant. A written statement had been put in by the defendant in which he pleaded that under the definition in the Factories Act the "concern," as he described it—Bridge and Sons — was not a factory. He also said that no notice had been served upon him requiring him to fence or to improve the fencing of the machinery concerned, and, as regards the other charges, he made statements which in a sense might have been taken as admissions of responsibility if not of guilt.

It is clear to my mind that the prosecution was conducted—if indeed it can be said to have been conducted at all—in a most slovenly, slipshod and an altogether unsatisfactory manner. I am informed that it is not unusual in cases of this character that that kind of thing occurs. Where the blame lies is perhaps a matter which ought to be enquired into by those who are responsible for the proper administration of the Factories Act. It is obvious that if that Act is to be effectively administered it is desirable, whenever it is necessary that prosecutions of this kind should be instituted, that they should be properly launched and properly conducted and that proper evidence should be given in support of the complaint lodged by the Inspector of Factories. The present case is particularly unsatisfactory because when one examines Ex. 1, which is a document relied upon by the only witness for the prosecution, one finds that there is no indication whatever in the document itself that the defendant had anything whatever to do with the compilation of it. The document was signed by "M. Bridge" and it would appear from the handwriting on it to have been filled in by the person who signed it. Judging from the name at the top that would appear to be a lady of the name of Mrs. M. Bridge.

There is moreover a very unsatisfactory feature about the document in that it is obvious that one of the figures, in the space provided for setting out the number of operatives employed on any one day, has been altered. It seems to be quite obvious that originally the number was given as 14 and the figure 1 sometime or other was altered into 2. There was no evidence whatever before the learned Magistrate to show whether 14 was correct or 24 was correct. The conviction was apparently founded upon the supposition that "24" was the correct number of operatives employed at these particular premises and the relevancy of that, of course, is that unless not less than 20 persons were simultaneously employed at those premises at any one day in the year, then even though mechanical or electrical power was used in those premises they would not constitute a factory for the purposes of the Act. The definition of factory is given in S. 2, sub-S. 3 of the Act. Having regard to the alteration in the important document I have mentioned it is by no means certain that on any day in the year with which these proceedings are concerned there were 20 persons employed at any one time. As I have said the defendant himself in his written statement raised the point that the premises where the business of Messrs. Bridge and Sons was carried on did not constitute a factory, and the same point has been argued before me by Mr. Chatterji who appears for the appellant.

I am bound to say that upon the evidence as it appeared before the learned Magistrate it never was satisfactorily shown even that the defendant held a responsible position in Messrs.

Bridge and Sons and certainly it was never established that their premises were factory within the meaning of the Act. As I have said it seems to me highly desirable that those who are responsible for the administration of this Act should see to it that these cases of prosecution are properly and satisfactorily conducted.

Having regard to what the defendant himself says in his written statement and to the evidence given by Mr. Joardar in answer to the questions put in the cross-examination with regard to the actual facts of the case I think it is necessary and desirable in the interests of justice that the Crown should have another opportunity of putting the matters complained of before the Court in a satisfactory and proper manner. It is obvious to my mind that the present convictions cannot stand. I accordingly quash the conviction and direct a retrial. At the same time I may say however that it obviously must be the case that if the defendant can satisfy the Crown either that the premises do not constitute a factory or that he has not contravened any of the sections of the Act there would of course be no obligation on the prosecution to pursue the matter any further.

If the prosecution ultimately think fit to have the proceedings reopened before the learned Magistrate they must of course give sufficient evidence in a proper way fully to establish some of the charges made in the form of complaint. In the present instance the complaint was made by an officer described as an Inspector of Factories and the only attempt to substantiate the charges in the complaint was the very scrappy and altogether inadequate evidence given by Mr. Joardar. It must be clearly understood that to lodge a complaint is not to give evidence upon which a Court can act. The complaint is in the nature of an indictment. Therefore averments in a complaint must be established and properly proved by evidence and the matter must not be dealt with as if the complaint is something in the nature of a deposition. It rather appears that in the present case, as no doubt it happens in other cases, the complaint was treated as if it had the sanctity of affidavit-evidence, assuming it was ever possible to prove what is tantamount to a criminal change by any such means. I desire to emphasise very strongly that a complaint is a complaint and nothing else. It is, as I have said, something in the nature of an indictment. Before anyone can be convicted on charges formulated in a complaint all those charges must be fully and properly proved in accordance with the procedure and the law of evidence applicable to criminal charges. The fines, if paid, will be refunded.

R.K. *Retrial ordered.*

A. I. R. 1934 Calcutta 606

PANCKRIDGE, J.

Atindra Narayan Roy—Applicant.

v.

Hemanta Kumari Devi and *others*—Opposite Parties.

Suit No. 1486 of 1933, Decided on 13th December 1933.

Contempt—Contempt of Court—Publication in newspaper of copies or resumes of pleadings in pending suits—Editors and proprietors run the risk of being guilty of contempt — Held on the facts there was no contempt.

If the editors and proprietors of newspapers take upon themselves to publish copies or resumes of pleadings and similar documents in pending suits, they do so at considerable risk.

Where the matter published was merely a resume of the allegations made in the plaint against the defendant and there was no attack on the personal character of the defendant.

Held : that it was not likely to prejudice the defendant in the eyes of the Court or the public, and that it was not a case where it can be said that there has been an attempt to prejudge the issue or to substitute what is sometimes called "trial by newspaper" for trial by a Court of justice. There was nothing in the article from which a reasonable person could draw the conclusion that the defendant was not prepared to meet the plaintiff's case, nor any likelihood of the defendant being embarrassed in his conduct of the proceedings by the publication, or of witnesses being deterred by the fact that the article complained of has appeared. *In re Cheltenham and Swansea Railway Carriage and Wagon Co*,. (1869), 8 *Equity* 580, *Cheshire* v. *Strauss*, (1896) 12 *T L R* 291, *In re the Williams Thomas Shipping Co. Ltd.*, (1930), 2 *Ch.* 368, *Disting.* [P 608 C 2]

S. N. Banerjee and *A. Roy*—for Applicant.

S. K. Basu for Mazumdar, N. C. Chatterjee and *S. R. Das Gupta* — for Opposite Parties.

Order. — This is a rule obtained by the defendant Moharani Hemanta Kumari Devi calling upon Hirendra Nath

Sanyal and Satyendra Nath Mazumdar to show cause why they should not be committed for contempt of Court

"for causing to be printed for circulation the allegations made in the plaint in the suit, and, for publishing an abstract or a copy of the said plaint."

The respondent Sanyal is a relation of the plaintiff. The respondent Mazumdar is the editor of a Bengalee Newspaper called the "Ananda Bazar Patrika". This suit was filed on 7th July 1933, and the summons was served on 21st July. It appears that in the issue of the respondent Mazumdar's newspaper of 8th August 1933, the article, of which a complaint is now made, appeared. The respondent Mazumdar states that about 4th August 1933, the respondent Sanyal approached him and furnished him with a copy of the plaint and with what he describes as a summary for publication. He adds that the respondent Sanyal also asked for his assistance in arranging for the appearance of an article similar, to the one complained of, in other newspapers. In compliance with the respondent Sanyal's request, the respondent Mazumdar communicated with the editors of four other newspapers and the article in question or an article closely resembling it, in due course appeared in their columns. The respondent Sanyal has filed no affidavit denying the respondent Mazumdar's account of the manner in which he obtaincd the materials for the article and that account must therefore be accepted as correct.

In my opinion, the conduct of the respondent Sanyal is to be deprecated. It is suggested that his intention was merely to furnish the editor of the newspaper, with whom he was on terms of friendship with a valuable piece of news. I do not accept the suggestion for one moment, it is only a suggestion on the part of counsel and it is not supported by the oath of Sanyal. I have no doubt that Sanyal, being related to the plaintiff, thought it highly probable that the publication of the plaintiff's allegations in the press would be distasteful to the defendant, and that his motive in communicating with Mazumdar was to procure publication of matter offensive to the defendant. I have not called upon counsel for the respondent Mazumdar, because for reasons, which I shall shortly give, I do not think that there has been a contempt of Court in this case, but I desire to say that if the editors and proprietors of newspapers take upon themselves to publish copies or resumes of pleadings and similar documents in pending suits, they do so at considerable risk. If editors regard my judgment in the light of a license to them to publish matters of this nature they are likely to find themselves gavely mistaken. I now turn to the article concerning which complaint is is made. It is admitted that the article is a resume of the plaint.

As it first appeared, it was headed "complaint of the adopted son against Rani Hemanta Kumari." In consequence of a protest on behalf of the defendant, the respondent Mazumdar thereafter inserted a paragraph in his newspaper correcting the phrase 'the adopted son' to 'the alleged adopted son' and making it clear that the head line was not intended in any way to commit the newspaper to the statement that the plaintiff was, in truth, the adopted son of the defendant. I think his action in inserting the correction was proper, but I do not attach much importance to the omission of the word 'alleged' in the original head line. The aricle is to the effect that a suit has recently been filed in which the adopted son of the defendant's deceased husband is claiming the Putiya Raj. It goes on to allege the adoption of the plaintiff by the defendant after her husband's death, and states that although the plaintiff and the defendant remained on good terms for a considerable time, the defendant thereafter, at the instigation of her son-in-law and her grandson, entered into an agreement with the natural father of the defendant, who was at that time a minor under the terms of which his rights were considerably diminished to the advantage of the defendant's daughters and their families. The article proceeds to state that on attaining majority the plaintiff came to learn that the defendant being improperly influenced by the machinations of her son-in-law and daughter's sons was trying to make her daughter's sons her future heirs. The article stated that the plaintiff claims possession of the estate, costs and mesne profits.

The defendant relies on various authorities for the proposition that to publish a pleading, while the suit is pending, amounts to an ex parte statement of the case and is, in effect, an improper attempt to influence the judgment of the Court and to interfere with the course of justice. The first case is *In re Cheltenham and Swansea Railway Carriage and Wagon Company* (1). In that case, a petition has been presented for winding up a company, containing grave and serious charges with reference to the conduct of the directors. Sir R. Malins, V. C., held that its publication constituted a contempt of Court. The next case is *Chesshire* v. *Strauss* (2). In that case a newspaper had published a copy or resume of the statement of a claim, which is described as containing allegations, many of which were immaterial, of a most damaging description. This was held to amount to a contempt of Court and Day, J., observed that it was interfering with the course of justice to make public the statement of claim in this way, which was the ex parte statement of one side. Finally, there is the recent case *In re William Thomas Shipping Co. Ltd.* (3). There, certain plaintiffs in a debenture holder's action obtained an order for the appointment of a receiver of the defendant company. The director of a company closely connected with the defendant company gave an interview to a newspaper correspondent and permitted him to publish statements adversely criticising the conduct of the plaintiffs in obtaining the appointment of a receiver. His observations were held by Maugham, J., to amount to an injurious misrepresentation concerning the parties to the proceedings and to constitute a contempt of Court.

Now, with regard to the first two cases, it appears from the reports that the statement of claim in one case and the winding up petition in the other contained charges of disgraceful conduct against the opposite parties. I find it quite impossible to say that there has been anything of the sort here. Indeed, the defendant in the article is represented as merely the victim of the wickedness of others. No one, I think, reading the article would form an unfavourable view of the conduct of the defendant. The case decided by Maugham, J., is of no great importance from this point of view, because what was complained of there was not the contents of any pleadings or any petition but an intemperate criticism of plaintiffs who has successfully obtained an order, the granting of which was at the discretion of the Court. It seems to me that all these cases are distinguishable and that the defendant is not justified in saying that the publication can be read as an attack upon her personal character and is therefore likely to prejudice her in the eyes of the Court or the public.

Again, I do not think that this is a case where it can be said that there has been an attempt to prejudge the issue or to substitute what is sometimes called 'trial by newspaper' for trial by a Court of Justice. A reader of the article cannot fail to realize that what is set out is merely a summary of the plaintiff's allegations. There is nothing in the article from which a reasonable person could draw the conclusion that the defendant is not prepared to meet the plaintiff's case. I do not think that it has been shown that there is any likelihood of the defendant being embarrassed in her conduct of the proceedings by the publication, nor of witnesses being deterred by the fact that the article complained of has appeared. As I observed at the outset, it is a matter of considerable risk to publish the summary of a pleading in a pending case in newspaper, and journalists are liable to get themselves into serious trouble if they publish articles of this class. At the same time, I am bound to say that I do not think that the conditions necessary for making an order for the committal of the defendants or for their punishment in any other manner have been satisfied. The rule therefore is discharged. The respondent Mazumdar is entitled to his costs. To mark my disapproval of the conduct of the respondent Sanyal I direct that he pay his own costs.

K.S. *Rule discharged.*

1. (1869) 8 Eq 580.
2. (1896) 12 T L R 291.
3. (1930) 2 Ch 368=99 L J Ch 560.

A. I. R. 1934 Calcutta 609

BUCKLAND AND COSTELLO, JJ.

Lala Goverdhonedas — Defendant — Appellant.

v.

Harish Chandra and *another*—Plaintiffs and Defendants—Respondents.

Appeal No. 76 of 1933, Decided on 14th December 1933, from original order.

Succession Act (1925), S. 325—Insolvent estate—Executor can pay legatee before discharging debts of deceased — But without first ascertaining that estate is sufficiently solvent, it is not proper to pay legacies before debts.

It is not the duty of the executor under S. 325 in every case, whether the estate is solvent or insolvent, to pay each creditor before he pays any legatees. S. 325 only lays down priority. It does not stand in the way in an admittedly solvent estate, of the executor paying a legatee before he has discharged the debts of the deceased. But as a matter of general principle, it is the duty, no doubt, of an executor first to ascertain what the position is and, unless it is sufficiently clear to him that the estate is solvent, not to pay the legacies before the debts have been discharged. If there has been an administration decree the same principle applies. The debts will of course be ascertained and until the position has been clarified by an account being taken or it having reached such a stage when it becomes apparent that these payments can be made without risk to the creditors, no payment should be made.

[P 609 C 2; P 610 C 1]

Advocate-General and *H. Sanyal*—for Appellant.

L. P. E. Pugh and *T. P. Mukerjee*—for Respondents.

Buckland, J. —By his will one Lala Raghumull Khandelwal, who died on 5th September 1926, bequeathed to Sm. Chameli Debi, his brother's widow an annuity of Rs. 500 a month and a house at Delhi of the value of Rs. 20,000 and directed that certain sradh expenses should be met out of the general assets and the following sum to be spent therefor among others for the widow of Jaggumull, that is to say, the legatee, Rs. 5,000. Probate of the will was granted to the executor Lala Goberdhonedas on 10th January 1927. In the year 1929 a suit for the administration of the estate of the deceased was instituted in this Court and in that suit the Official Receiver was appointed on 16th June 1931. This was followed by an administration decree in the usual form on 2nd February 1932 and the usual accounts are now, we are informed, in the course of being taken. This is an application made in that suit by the executor of Sm. Chameli Debi deceased for an order that the Official Receiver be directed to pay to him the sum of Rs. 2,500 being the arrears of annuity due to Sm. Chameli Debi deceased and Rs. 1753-12-0 being the balance of the sum of Rupees 5,000 directed to be paid for the sradh expenses of Chameli Debi under the will. The application also prayed that the Receiver be directed to make over to the applicant a house at Delhi of the value of Rs. 20,000 or, in the alternative, a sum of Rs. 20,000 with interest and concluded with the usual prayer for payment of costs.

On this application my learned brother Ameer Ali, J., made an order for payment out to the executor of Chameli Debi of Rs. 25,00 provided the Official Receiver was satisfied that that was the correct amount of the arrears of the annuity but as regards the balance of Rs. 1,753-12-0 he gave liberty to the Official Receiver to pay a sum not exceeding that amount provided he was satisfied that the money in addition to the other sums already paid on the same account had been properly and legitimately paid for sradh expenses prior to the date of the application. With the exception of the directions as to costs, that was the order of the learned Judge on the application.

The learned Advocate-General has contended that the order is premature. He relies on the administration decree on the ground that the debts have not been ascertained. He has referred to the evidence for the purpose of establishing that in fact the estate is insolvent ; but actually it is not possible to say that the estate is either solvent or insolvent. One cannot go beyond asserting that so far the debts have not been ascertained. He also refers, as a bar, to S. 325, Succession Act of 1925, which says that debts of every description must be paid before any legacy. This cannot mean that it is the duty of the executor in every case, whether the estate is solvent or insolvent to pay each creditor before he pays any legatee a construction for which, if I understood him correctly, the learned Advocate-General contended. It only lays down, in my view, priority ; and though the matter does not arise in this appeal I should not be prepared to lend support to the view

that it would stand in the way, in an admittedly solvent estate, of the executor paying a legatee before he has discharged the debts of the deceased. S. 325, in my view, does not affect the matter either way which has to be considered rather from the standpoint of the solvency or insolvency of the estate. The learned Advocate-General has also relied upon the terms of the will in which the testator directed that all his debts be paid out of his estate in the first instance including the charities and subscriptions promised. That only expresses what is the ordinary rule and does not carry the matter any further.

Mr. Pugh on behalf of the respondent has laid great emphasis upon the circumstance that the executors who are also the residuary legatees took two lacs of rupees out of the estate and were subsequently directed to give security for the restoration of the money if it should be found on an account being taken that they were not entitled to that amount. The order or security was made by my learned brother Ameer Ali, J., as an alternative to bringing the money into Court and his order was taken to the appeal Court in *Gobardhandas* v. *Gopaldas Modi* (1). There is no need to refer to the matter further in this appeal. It has, I conceive, been rather introduced for the purpose of prejudice. The question of the executor's right in the matter does not arise ; but if they were wrong in what they did that would not justify payments to the legatees if the legatees are not otherwise entitled now to receive the legacies. I rather infer that learned counsel for the respondent appreciated the weakness of his position when he offered on behalf of his client, if the appeal were dismissed, to give security for the amount ordered by my learned brother to be paid to his client. It appears to me that the order cannot be supported. As a matter of general principle, it is the duty no doubt of an executor first to ascertain what the position is and, unless it is sufficiently clear to him that the estate is solvent, not to pay the legacies before the debts have been discharged. If there has been an administration decree the same principle applies. The debts will of course be ascertained and until the position has been clarified by an account being taken or it having reached such a stage when it becomes apparent that these payments can be made without risk to the creditors, no payment should be made. There is considerable force in what the learned Advocate-General has said that if this were allowed every legatee would expect to be paid on giving security, and if that were done and eventually it were found that legatees should restore the money, it is not difficult to imagine the confusion that might arise.

In my judgment therefore this appeal should be allowed so far as it provides for payment out to the executor of Rs. 2,500 and Rs. 1,753-12-0 or any other sum as balance of the sradh expenses. I am not prepared to disturb the order as to costs made by the learned Judge and I would add that the order made in this appeal will be without prejudice to any further application which may be made by the respondent after the accounts in the administration decree have been concluded, or I may even say, have arrived at such a stage that the application would not be open to the objections which I have stated. For these reasons I would make an order in these terms allowing the appeal and make no order as to costs of this appeal.

Costello, J.—I am of the same opinion.

K.S. *Order accordingly.*

1. A I R 1933 Cal 286=60 Cal 30.

A. I. R. 1934 Calcutta 610

PATTERSON AND GUHA, JJ.

Superintendent and Remembrancer of Legal Affairs, Bengal—Appellant.

v.

Bagirath Mahto and *others*—Accused —Respondents.

Govt. Appeal No. 4 of 1933, Decided on 11th May 1934.

(a) Criminal P. C. (1898), Ss. 449 and 417 —Appeal against acquittal under S. 449 is governed by Art. 157, Limitation Act — S. 449 only extends scope of appeal to questions of fact as well.

The right of appeal in a case tried by jury under the provisions of Chap. 33, Criminal P. C. is not created by S. 449. The right of appeal against an order of acquittal is created by Ss. 417 and 449; in its application to appeals against acquittals it merely has the effect of enlarging the scope of such appeals in certain classes of cases. The appeal against acquittal under S. 449 is also an appeal against an order of acquittal, and the effect of Art. 157, Limitation, Act is to fix the period of limitation in respect of such appeals at six months in all classes of cases, whatever may have been the form of trial and whatever

may be the scope of the appeal. The only effect is that by reason of the provisions of S. 449 its scope extends to questions of fact as well as to questions of law. [P 611 C 2]

(b) Growing crops — Right to, goes with land—Court sale—Right accrues from date of delivery of possession—Execution sale.

The right to the growing crop passes by the sale of the land in the absence of an express provision to the contrary, and in the case of a Court sale, the right to the possession of the crop accrues from the date of the delivery of possession of the land : 13 *Mad* 15 and *AIR* 1919 *Cal* 588, *Rel on.* [P 614 C 1]

(c) Criminal Trial—Jury — Erroneous misdirection—Verdict of jury and order of Judge loses much weight.

By an erroneous misdirection both the verdict of the majority of the jury and the order of the Judge accepting the majority verdict lose much of the weight that would otherwise attach to them. [P 614 C 2]

Advocate-General, S. N. Mukherjee, M. N. Das Gupta and *Jnanendra Nath Choudhury*—for Appellant.

S. K. Basu, Jitendra M. Banerjee and *Basanta Kumar Mukherjee* — for Accused.

Patterson, J.—This is an appeal by the Superintendent and Remembrancer of Legal Affairs, Bengal, against an order of the Additional Sessions Judge of Midnapur, dated 7th July 1933, by which he acquitted one Bhagirath Mahato and his three sons Uma Charan, Mahesh and Mahinti in respect of the charges under Ss. 147, 342/34 and 323, I. P. C., on which they had been tried. The complainant, a certain Mr. Crawley, being a European British subject, the trial was held under the provisions of S. 446, Criminal P. C., the jury being chosen in the manner laid down in S. 275 of that Code. At the conclusion of the trial the jury, by a majority of 3 to 2 found all the accused not guilty in respect of all the charges, and the learned Additional Sessions Judge, accepting the verdict of the majority of the jury, recorded an order of acquittal. It may here be observed that two of the respondents, namely, Bhagirath and Mahesh, died during the pendency of this appeal, so the appeal is now only in respect of the other two respondents, Uma Charan and Mahinti.

The appeal purports to have been preferred both under S. 449 and under S. 417, Criminal P. C., and a preliminary point has been taken on behalf of the respondents to the effect that the appeal is barred by limitation in so far as it purports to be an appeal under the former section, that is, in so far as it purports to be an appeal on the facts. The ordinary period of limitation for appeals to the High Court under the Criminal Procedure Code is 60 days, vide Art. 155, Sch. 1, Lim. Act, but an exception is made in respect of appeals from orders of acquittal, the period of limitation for which has been fixed at six months under Art. 157. It is however contended that Art. 157 only applies to appeals under S. 417, Criminal P. C., and not to appeals under S. 449, Criminal P. C., and that the period of limitation for appeals under the latter section is the period laid down by Art. 155, namely 60 days.

This contention can only prevail if it be held that the right of appeal in a case tried by jury under the provisions of Chap. 33, Criminal P. C., is created by S. 449 of that Code, and it is in my opinion impossible so to hold. The right of appeal against an order of acquittal is created by S. 417 of the Code, and S. 449, in its application to appeals against acquittals, merely has the effect of enlarging the scope of such appeals in certain classes of cases. The present appeal is an appeal against an order of acquittal, and the effect of Art. 157, Sch. 1, Lim. Act, is to fix the period of limitation in respect of such appeals at six months in all classes of cases, whatever may have been the form of trial and whatever may be the scope of the appeal. In this view of the matter, it must be held that the present appeal, having been filed within six months of the date of the order appealed against is not barred by limitation, and that, by reason of the provisions of S. 449, Criminal P. C., its scope extends to questions of fact as well as to questions of law.

Coming now to the facts of the case: these are, for the most part, not seriously disputed, and are briefly as follows: Bhagirath Mahato was a tenant under the Midnapur Zemindary Company in respect of a large jote comprising a number of plots of land, including three nij-jote plots in Mouza Baliasole, bearing Settlement Plots Nos. 183, 195 and 434. On 25th April 1932 the entire jote was purchased by the company at a sale held in execution of a decree for rent. The sale was confirmed in due course, and a sale certificate granted to

the company, and on 12th October 1932 possession was delivered to the company of the entire jote, including the three nij-jote plots referred to above. Meanwhile the judgment-debtors, Bhagirath and his sons had, despite the purchase of the jote by the decree-holder company, grown paddy on the three nij-jote plots, and these crops were still standing on the land at the time of the delivery of possession.

On or about 11th December 1932 Bhagirath and his sons cut and removed the paddy grown by them on Plot 183, and stored it in the Khamar adjoining their homestead, which was situated at a distance of about one mile from the land in question. On being informed of this, Mr. Crawley, one of the Assistant Managers of the Company, had the paddy on the other two plots, Nos. 195 and 434, reaped by his own men and removed to the Company's cutchery. This was on 12th and 13th December, and on the latter date, Mr. Crawley, after supervising the work of cutting and removing the crops from plots 195 and 434, proceeded to the house of the accused with a view to recovering possession of the paddy that had been cut and removed by them from plot 183 on 11th. While engaged in this attempt, he and his four cartmen were set upon by Bhagirath and his sons and others, some 15 or 16 in all; the cartmen were assaulted and ran away, abandoning their carts, while Mr. Crawley himself was thrown to the ground, tied hand and foot, and kept under guard for several hours until rescued by men from the cutchery who had received information of what had occurred. It should also be stated here that at or about the time of the attack on Mr. Crawley and his cartmen, it was noticed that a shed adjoining Bhagirath's house was on fire, and that Uma Charan then and there charged Mr. Crawley with having set fire to it, a charge that Mr. Crawley indignantly repudiated.

By the time Mr. Crawley was released it was about 8-30 p. m. and he spent that night (the night of the 13th) at the Company's Cutchery at Jaipur, which is about 5 miles distant from the place of occurrence.

On the following day he went first to Godapiasal, where he informed the Manager of the Company of what had occurred;—then to Midnapur where he had his injuries examined by the Civil Surgeon and finally to the Salbani P. S. where he wrote out and made over to the A. S. I. in charge a brief account of the events of the previous day. This was at about 7-30 p. m. on the 14th, but in the meantime, at about 2 p. m. on that day, accused Uma Charan had appeared at the Thana and had made a statement to the A. S. I., who referred him to Court. Neither Uma Charan nor any of the other accused, however, filed any petition in Court, and after the usual police investigation, in which Mr. Crawley's written report to the A. S. I. at Salbani P. S. was treated as the First Information, Bhagirath and his three sons were sent up with a charge sheet, and were in due course committed to the Court of Session for trial with the result already stated.

The main facts, as summarised above, are well established by the evidence adduced at the trial, and have not been seriously disputed. The defence of the accused was, and is, that whatever they did, they did in the exercise of the right of private defence of their property, namely the paddy that they had grown on Plot No. 183 and had cut and removed and stored in their Khamar. They also relied on S. 59, Criminal P. C., in justification of their action in tying Mr. Crawley up, their contention being that they did so with a view to his being taken to the Thana. As regards the fire that broke out in their homestead at the time of the occurrence, their case was that this was the work of Mr. Crawley, and they relied on this incident in further justification of their action, alleging that it was necessary that Mr. Crawley should be placed under restraint and so prevented from doing any further damage. These contentions were sought to be supported at the trial by suggestions to the effect that Mr. Crawley had appeared at the house of the accused without any warning, armed with a revolver and accompanied by a large number of coolies and cartmen, and had proceeded to loot the paddy and to set fire to the accused's house. There is however not a vestige of evidence in support of these allegations, and the appeal has been argued before us on behalf of the accused, on the footing that Mr. Crawley

was unarmed and was accompanied only by his four cartmen, and that he relied solely on his personal prestige and authority to compel the accused to surrender the paddy, and not on any force or show of force.

On the side of the prosecution, considerable importance appears to have been attached to that portion of Mr. Crawley's evidence in which he stated that he had met Bhagirath and Uma Charan on the 12th when he was supervising the cutting of the paddy on the other two plots, and that, on his promising to consider the question of letting them have a half share of the paddy of all three plots and of resettling the land with them, they had agreed to return the paddy they had cut and removed from Plot No. 183. According to Mr. Crawley this arrangement was confirmed by Uma Charan on the following day when he (Mr. Crawley) went to accused's house to get the paddy, and Uma Charan himself pointed out the stack of paddy in question among the other stacks in the accused's Khamar . It was not till the carts had been loaded up and the bullocks were about to be yoked that the accused suddenly turned round and refused to allow the paddy to be removed, and attacked Mr. Crawley and his cartmen in the manner already described. Mr. Crawley's evidence regarding the alleged consent of the accused to the removal of the paddy has been characterised by the defence as false, and as having been concocted with a view to meeting the plea of private defence raised by the accused, and attention has been drawn to the fact that there is no mention in the First Information of the discussion that is said to have taken place between Mr. Crawley and the accused on the 12th. This omission does not seem to me to be of any great importance, for Mr. Crawley's attitude being that the paddy belonged to the Company and that he had the right to take it it was not to be expected that he would think it necessary to mention, in the report he filed at the Thana, the fact that Bhagirath and Uma Charan had on the day before the occurrence given their consent to it's removal. It has also been contended on behalf of the accused that if the latter had really given their consent to the removal of the paddy, there was no reason why they should suddenly change their attitude and refuse to allow it to be removed. I am not prepared to accept this contention, for the apparent inconsistency in the conduct of the accused is far outweighed by the extreme improbability of Mr. Crawley sending only four carters to take possession of the disputed paddy, and going alone and unarmed to supervise its removal, if the accused had not previously given their consent. Attention has also been drawn to the fact that one of the prosecution witnesses, Jogendra Mahato, has contradicted himself as to whether Uma Charan first protested against the removal of the paddy when the carts were being loaded up inside the Khamar, or after the loaded carts had been taken out of the Khamar and the bullocks were about to be yoked, as stated by the other witnesses to the occurrence. This point does not seem to me to be of any real importance and the discrepancy in the evidence to which attention has been drawn is probably more apparent than real. On the other hand all the witnesses to the occurrence are agreed that Uma Charan himself pointed out the stack of paddy that was to be removed, to Mr. Crawley, and although there is no clear mention of this fact in the First Information, it is stated therein that Uma Charan gave his consent to the carts being loaded up, which comes to very much the same thing. The majority of the jury appear to have disbelieved Mr. Crawley's evidence regarding the alleged consent, and the learned Additional Sessions Judge, who evidently regarded this as the crucial point in the case, was not prepared to disagree with them, and accordingly accepted their verdict. I am however clearly of opinion, for the reasons given above, that Mr. Crawley's evidence ought to be accepted in its entirety, and that the accused had, as stated by him, actually given their previous consent to the removal of the paddy.

The question of previous consent has, however, in my opinion, been given quite unnecessary prominence, in view of the fact that the paddy belonged to the Company and had been wrongfully cut and removed by the accused. Moreover even the accused's bastu and the adjoining Khamar, in which the paddy

was stored, had been purchased by the Company in execution of their decree, along with the rest of the accused's jote, as appears from the evidence of the Company's Tahsildar, prosecution witness No. 13. In these circumstances it it impossible to hold that the accused had any right of private defence in respect of the paddy in question, whether they had or had not given their previous consent to its removal. The paddy did not belong to them but to the Company, and they had no right to prevent its removal by the Company's agent, Mr. Crawley, Moreover, the right of private defence of property only comes into operation when certain specified offences against property are committed, or attempted to be committed and once it is held that the paddy in question belonged not to the accused, but to the Company, it becomes clear that neither Mr. Crawley nor the carters had any dishonest intention, that they neither committed nor attempted to commit any of the offences against which the law gives a right of private defence, and that the accused are therefore not entitled to plead that in driving away the carters and in assaulting and tying up Mr. Crawlay, they acted in the exercise of the right of private defence. In this view of the matter, the contention that has been urged before us on behalf of the respondents to the effect that criminal law concerns itself mainly with actual physical possession, whether lawful or unlawful, and that the accused were, rightly or wrongly, in actual physical possession of the paddy in question and were therefore entitled to defend their possession, becomes irrelevant and need not be further referred to.

The proposition that the right to the growing crop passes by the sale of the land, in the absence of an express provision to the contrary, and the connected proposition that, in the case of a Court sale, the right to possession of the crop accrues from the date of delivery of possession of the land, hardly requires to be supported by authority, but if authority be needed it is sufficient to refer to *Ramlinga* v. *Samiappa* (1) and *Abinash Chandra Sarcar* v. *Atul Krishna* (2). The learned Additional Sessions Judge has entirely misconceived the legal position with regard to this point, for in his charge to the jury I find the following passage :

"The defence further argued that the paddy was grown by the accused and that the accused had a right at least to a share of it. This is admitted by the prosecution. The accused certainly had a right at least to a share of the paddy, but if they themselves consented to return it, it was no offence for Mr. Crawley to order his cartmen to take delivery of it. If however you find Mr. Crawley went without being asked to do so and took possession of the paddy, you will have to hold that the accused were acting in the exercise of the right of self-defence."

For the reasons already given, this direction must be held to be entirely erroneous, and it may well be that it was by reason of this erroneous direction on the part of the Judge that the majority of the jury were led to return a verdict of not guilty. The learned Additional Sessions Judge has clearly misdirected both himself and the jury on the above point, and having regard to the prominence that was given to this point at the trial I cannot but hold that, by reason of the said misdirection both the verdict of the majority of the jury and the order of the Judge accepting the majority verdict, lose much of the weight that would otherwise attach to them.

Another serious defect in the charge to the jury is that the learned Additional Sessions Judge omitted altogether to consider whether the right of private defence of the property, if it had ever existed at all, was still in existence at the time when Mr. Crawley was attacked and tied up. It appears that the cartmen had already abandoned their carts and run away, and that there was therefore no further possibility of the paddy being taken away by force. This being so, it must be held that the right of private defence of property, assuming such a right to have existed at the earlier stages of the occurrence, was no longer in existence at the time of the attack on Mr. Crawley, and the jury would probably, or at any rate possibly, have so held, if they had been properly directed on the point.

Apart from all this, it is clear that in tying up Mr. Crawley and in keeping him tied up for several hours, the accused used far more force than the circumstances of the case required, whatever view be taken of those circumstances

1. (1890) 13 Mad 15.
2. AIR 1919 Cal 588=48 IC 678=20 Cr L J 38.

S. 59, Criminal P. C., is of no avail to the respondents in this connexion, for that section only authorises a private person to make an arrest in certain circumstances which have no application to the present case. The attempt to remove the paddy was not an offence at all, and there is no evidence whatever in support of this contention that the outbreak of fire in the house of the accused was caused by Mr. Crawley. Indeed the circumstances are rather such as to preclude such a possibility, and to raise a strong suspicion that the fire was started by some one on the side of the accused. Moreover the evidence lends no support whatever to the theory that Mr. Crawley was seized and tied up with a view to his being handed over to the police, and the two Choukidars who were examined as witnesses in the case have emphatically denied that they were ever asked to take Mr. Crawley to the Thana. It further appears that no mention whatever of the incidents that had taken place at the accused's house on the 13th, was made by Uma Charan when he went to the Thana the following afternoon. The General Diary entry shows that the only complaint he made was with regard to the reaping of the paddy by the Company's men. It has been suggested that what he really stated at the Thana was that Mr. Crawley had looted his paddy and set fire to his house and had been arrested and kept in the custody of the Choukidars and that all this was suppressed by the A. S. I, in collusion with the Company's officers. There is no evidence whatever in support of this suggestion, and I have no hesitation in rejecting it as false.

I am clearly of opinion that there has been a serious miscarriage of justice in this case and that the order of acquittal cannot be allowed to stand. The plea that whatever the accused did they did in the exercise of the right of private defence, has completely failed, and on the proved and admitted facts it must be held that the accused are guilty of the offences with which they have been charged.

I would accordingly allow the appeal and set aside the order of acquittal in respect of the two surviving respondents, Uma Charan and Mahinti. Uma Charan was the prime mover in the affair and in his case a fairly severe sentence is called for : I would convict him under Ss. 147, 342/34 and 323, Penal Code, and sentence him to nine months' regorous imprisonment under each of the two former sections, the sentences to run concurrently, no separate sentence being passed under S. 323, Penal Code. Mahinti appears to have played a comparatively unimportant part, and no specific acts have been attributed to him individually. I would convict him under Ss. 147 and 342/34. Penal Code, and sentence him to three months' rigorous imprisonment under each section, the sentences to run concurrently. Respondents Uma Charan and Mahinti must now surrender to their bail and serve cut their sentences.

Guha, J.—I agree.

R.K. *Appeal allowed.*

A. I. R. 1934 Calcutta 615

MALLIK AND JACK, JJ.

J. C. Galstaun—Appellant.

v.

Janaki Nath Roy and *others*—Respondents.

Order No. 1239-A of 1933, in the matter of Civil Rule No. 781-S of 1933, Decided on 23rd November 1933.

Court fees Act (1870), S. 13—S. 13 is not exhaustive—Refund may be ordered in suitable cases under inherent power of Court—Civil P. C. (1908), S. 151.

Section 13 is not exhaustive and the High Court in suitable cases may exercise its inherent powers vested in it by S. 151, Civil P. C., and order refund of court-fees paid. The application for registration of the appeal was rejected on the ground that it was filed out of time but the delay in filing the memorandum of appeal was not due to any negligence on the part of the appellant himself but to some gross negligence on the part of his legal adviser :

Held : it cannot be said that there was any want of bonafides on the part of the appellant and that it was a fit case where the inherent power should be exercised. [P 616 C 1]

Bijon Behari Das Gupta—for Petitioner.

Rupendra Kumar Mitra — for Respondents.

Judgment.—This is an application for return of a Memorandum of appeal (which was not registered on the ground that it was filed out of time) with a certificate authorising the petitioner to receive back from the collector the amount of the court-fee paid on the Memorandum. The application was opposed on behalf of the Government. The first ground on which the applica-

tion was opposed was that the application did not come within the purview of S. 13, Court-fees Act, which is the rule on the subject of refund of court-fees paid on a memorandum of appeal. The application strictly speaking is true and does not come within the purview of S. 13. But it has been held in more than one decision that S. 13 is not exhaustive and that the High Court in suitable cases may exercise its inherent powers vested in it by S. 151, C. P. C., and order refund of Court-fees paid.

The learned Government pleader next contended that this is not a fit case where this inherent power should be exercised. I am unable to agree with him in this view of the matter. From the order by which the application for registration of the appeal was rejected it would appear that if there was any delay in filing the memorandum of appeal it was not due to any negligence on the part of the petitioner himself but to some gross negligence on the part of his legal adviser. That being so, it cannot be said that there was any want of bonafide on the part of the petitioner in the present case. It is to be observed moreover that for rejecting the application for registration it was not only not necessary to make any use of the contents of the memorandum of appeal but even to read the document. In the circumstances, we are of opinion that this is a fit case where the inherent powers of this Court should be exercised in favour of the petitioner under S. 151, Civil P. C. We would therefore allow the petition and direct return of the memorandum of appeal with the certificate prayed for. We make no order for costs.

K.S. *Petition allowed.*

A. I. R. 1934 Calcutta 616

PATTERSON AND GUHA, JJ.

Keratali—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 938 of 1933, Decided on 11th May 1934.

(a) Evidence Act (1872), Ss. 25 and 155—Confession of accomplice to excise officer is inadmissible under S. 25 even against accused—Maker examined as witness—Confession is admissible under S. 155.

A confession by an accomplice to an Excise Officer is inadmissible as a piece of substantive evidence as against the other accused, even if the latter had been tried along with the maker and a fortiori that it is inadmissible as a piece of substantive evidence in a separate proceeding against the other accused. But where the maker is examined as a witness on behalf of the other accused it is admissible for the purpose of impeaching his credit in respect of the later statement made by him in his evidence in Court, under the provisions of S. 155. [P 617 C 1,2]

(b) Criminal P. C. (1898), S. 162—Excise Officer is not Police Officer.

An Excise Officer is not to be regarded as a Police Officer for the purposes of S. 162. [P 617 C 2]

A. K. Fazlul Huq and *Hamidul Huq Chowdhury*—for Petitioner.

Khondkar and *D. N. Bhattacharji*—for the Crown.

Patterson, J.—The petitioner, Kerat Ali, was arrested at Sitakund Raliway Station on 31st December 1932, along with three other persons, named Abdul Jalil, Azahar and Badu Mia. Two seers of opium were found on the person of each of the petitioner's three companions, and another two seers of opium, wrapped up in a quilt, were found on the rack in the compartment in which they all four had been travelling. All four were sent up for trial under the Opium Act. Abdul Jalil, Azahar and Badu Mia pleaded guilty and were convicted and sentenced. The petitioner pleaded not guilty, and was tried separately on the allegation that the two seers of opium wrapped up in a quilt that were found on the rack had been in his possession. He was convicted by a Deputy magistrate of Chittagong under S. 9 (c), Opium Act and was sentenced to six months' rigorous imprisonment and to pay a fine of Rs. 300 and in dafault to undergo a further period of four months' rigorous imprisonment. On appeal, the Magistrate's findings of fact were affirmed, but the conviction was altered to one under S. 9 (a), Opium Act, while the sentence was modified to this extent that the term of imprisonment in default of payment of fine was reduced to one month's rigorous imprisonment.

The present rule is directed against the conviction and sentence, the main contention that has been urged on behalf of the petitioner being that a certain statement that is said to have been made to the investigating Excise Officer by the petitioner's companion, Badu Mia, after his arrest, has been wrongly admitted in evidence. Badu Mia was,

after he had been convicted and sentenced, examined as a defence witness on behalf of the present petitioner. In his examination-in-chief he stated that the quilt and the opium that was found in it belonged to him, and that he had made a statement to this effect to the investigating Excise Officer. The Excise Officer was then recalled and examined further, and Badu Mia's statement, as recorded by him, was tendered and received in evidence. In this statement Badu Mia implicates not only himself but also his three companions, and specially the present petitioner, Kerat Ali as participators in an attempt to smuggle the opium found concealed on their persons and wrapped up in the quilt, into Burmah, and it is undoubtedly in the nature of a confession. That being so, it would clearly have been inadmissible as a piece of substantive evidence as against its maker, a Full Bench of this Court having recently held that an Excise Officer is a Police Officer within the meaning of S. 25, Evidence Act : vide *Amin Shariff* v. *Emperor* (1). From this it follows that the statement in question would have been inadmissible as a piece of substantive evidence as against the present petitioner, even if the latter had been tried along with Badu Mia and a fortiori, that it was inadmissible as a piece of substantive evidence in the present proceedings. The Magistrate appears to have regarded Badu Mia's statement to the investigating Excise Officer as being admissible in evidence in its entirety, and to have relied on some of the allegations contained therein in support of his finding regarding the possession by the petitioner of the opium in question. The learned Sessions Judge, on the otherhand, has dealt with Badu Mia's statement to the investigating Excise Officer on the footing that it was admissble for the purpose of impeaching his credit in respect of the later statement made by him in his evidence in Court. It really comes down to this, that Badu Mia's statement to the investigating Excise Officer has been used merely for the purpose of supporting the evidence given by the latter to the effect that Badu Mia did not tell him after his arrest that the opium in question belonged to him alone, as stated by him in his evidence and of contradicting Badu Mia himself. I am clearly of opinion that this was permissible under the provisions of S. 155, Evidence Act.

It has however been suggested that even if S. 25, Evidence Act, be no bar to Badu Mia's statement being used for the purpose indicated above, S. 162, I. P. C. operates as a bar to its being so used. This involves the assumption that an Excise Officer is to be regarded as a Police Officer for the purposes of S. 162, Civil P. C., an assumption which is not supported by the recent Full Bench decision, or by any other authority of which I am aware. It is true that Ss. 160 to 171, Civil P. C., are made applicable by S. 74, Excise Act, to the proceedings of Excise Officers when investigating offences punishable under that Act, but there is no corresponding provision in the Opium Act, so the argument based on the provisions of S. 74, Excise Act has no application to the present case. Apart from the above considerations, it seems to me that even if Badu Mia's statement to the investigating Excise Officer be left out of account altogether, the evidence given by him in Court to the effect that the opium in question belonged to him alone, is quite unworthy of credit. His own evidence, when viewed in the light of the surrounding circumstances, makes it abundantly clear that he and his three companions including the present petitioner, were acting in concert throughout, and there is direct evidence which has been believed by both the Courts below to show that at any rate at one stage of the journey, the petitioner was in actual physical possession of the opium in question. I would accordingly order that the rule be discharged and that the petitioner should surrender to his bail and serve out the remainder of his sentence.

Guha, J.—I agree.

R.K. *Rule discharged.*

1. AIR 1334 Cal 580 (FB).

A. I. R. 1934 Calcutta 617

PATTERSON, J.

Nanda Lal Saha—Appellant.

v.

Sailesh Nath Bishi—Respondent.

Appeals Nos. 2540 and 2541 of 1930, Decided on 7th February 1934, from appellate decree of Second Court Sub-Judge, Pabna, D/- 23rd May 1930.

(a) Hindu Law—Reversioner — Mere presence of reversioner at time of execution of sale—His consent should not be inferred.

The consent of a reversioner ought not to be inferred merely from the fact that he was present when the sale-deed was executed still less that his consent, even if so inferred, was of such a kind as to bind him and the other reversioners. [P 618 C 2]

(b) Practice—Pleadings—Plaintiff alleging possession after death of female and dispossession—Finding of Court that plaintiff was never in possession after death of female—Plaintiff cannot subsequently take his stand on such finding.

Where plaintiff had alleged possession after the death of the female and dispossession by the landlords but it is found by the Court that he was never in possession after the death of the female, it is not open to him to turn round and take his stand on such finding : *A I R* 1929 *Cal* 157, *Dist.* [P 619 C 1]

Nagendra Chandra Chaudhury and *Biraj Mohan Ray*—for Appellant.

Jatindra Mohan Chaudhury—for Respondent.

Judgment.—These two appeals are by the plaintiffs and arise out of two suits for declaration of the plaintiffs' title in and recovery of possession of certain lands. The lands in suit were claimed by the plaintiffs as reversionary heirs of one Krishna Nath Saha, on the allegation that their title had accrued on the death of Krishna Nath Saha's widow Mukta Sundari. The defences raised were different in respect of different portions of the lands in suit, but it is not necessary at the present stage to set forth the various allegations in the written statements in detail. In respect of the cultivated lands, the only question which has been submitted to this Court for decision is whether the Courts below were right in holding that the plaintiffs' suit is barred by the special rule of limitation contained in Art. 3, Sch. 3, Ben. Ten. Act, while in respect of the homestead portions of the lands in suit, the only question for decision is whether the Courts below were right in holding that the sale of this portion of the land by Mukta Sundari to defendants 4 and 5 of Suit No. 1144 was for legal necessity. The plaintiffs' title as Krishna's reversioners has been found by both Courts; but both Courts have nevertheless dismissed the plaintiffs' suits for the reasons indicated above namely that the plaintiffs' suit in respect of the cultivated lands was barred by the special rule of limitation, and that as regards the homestead lands, defendants 4 and 5 had acquired a valid title by their purchase from Mukta Sundari.

As regards the homestead lands there is little to be said; the findings of the Courts below are conclusive on the point. It is true that as has been pointed out on behalf of the appellants the consent of a reversioner ought not to be inferred merely from the fact that he was present when the sale-deed was executed still less that his consent, even if so inferred, was of such a kind as to bind him and the other reversioners. It is however clear that the presence of one of the reversioners at the time when the sale-deed was executed, was merely one of the circumstances that was taken into consideration by the Courts below in arriving at their findings that the sale had been made for legal necessity and was therefore binding on the reversioners. It has also been pointed out that no issue was framed with regard to this question of legal necessity, but it appears that legal necessity was alleged in the written statements, and that the question of the existence or non-existence of legal necessity was fully considered by the Courts below : in these circumstances the absence of an issue on the point is immaterial. The result is that so far as this portion of the case is concerned, the appeal must fail.

As regards the cultivated lands, it was alleged in the plaint and sought to be established by evidence, that the plaintiffs had entered into possession after Mukta Sundari's death, but had subsequently been dispossessed by the present defendants : both the Courts below have however negatived this contention, and have held that the plaintiffs were never in possession after Mukta Sundari's death. The defence, on the other hand, contended that Mukta Sundari had acquired an absolute right in the lands in suit by virtue of a gift said to have been made to her by her husband : this contention has however been negatived by both the Courts below, and both Courts have held that Mukhta Sundari's surrender of the lands to the landlords was not binding upon the plaintiffs, that the latter being Krishna's reversionary heirs. Both the Courts below have found that some time after her husband's death, Mukta Sundari surren-

dered the cultivated portion of her husband's lands to the landlords, and that the landlords, after maintaining direct possession for some time through Bargadars, settled the lands with the defendants. These concurrent findings cannot be and have not been challenged before this Court, but it has been contended on behalf of the appellants that the facts referred to above do not amount to dispossession of the plaintiffs by the landlords, more especially in view of the fact that the defendants in their written statements alleged that the plaintiffs were never in possession of the lands in suit after Mukta Sundari's death, and that both the Courts below have upheld this contention and have recorded a clear finding to that effect. The real meaning of this finding appears however to be that the plaintiffs never actually cultivated the lands in suit after Mukta Sundari's death and never realised any share of the crops from the Bargadars in possession.

In view of the fact that the plaintiffs' right to possess the lands accrued from the date of Mukta Sundari's death, the finding in question does not, in my opinion, affect the question of the applicability of the special rule of limitation. For the purposes of that rule the plaintiffs ought, in my opinion, to be regarded as having been in constructive possession of the lands in suit from the date of Mukta Sundari's death, and in this view of the matter it is clear that the action of the landlords in settling the lands in suit with other tenants, amounted to dispossession within the meaning of Art. 3, Sch. 3, Ben. Ten. Act. I have the less hesitation in coming to this conclusion in view of the fact that the case set up by the plaintiffs was one of possession and dispossession after Mukta Sundari's death, and I agree with the learned Advocate for the respondents in respect of his contention that it is not open to the plaintiffs now to turn round and take their stand on the finding of the Courts below to the effect that the plaintiffs were never in possession after Mukta Sundari's death. My attention has been drawn to a decision of this Court in the case of *Srish Chandra Bhaduri* v. *Brojobashi Pramanik* (1) in which a contrary view appears to have been taken in circumstances somewhat similar to those of the present case. That case may however be distinguished on the ground that, so far as it appears from the judgment, the plea of special limitation was raised for the first time in this Court, and that, in that case, the defendants were the appellants—the suit in connexion with which the appeal was preferred having been decreed by both the Courts below. Moreover there is nothing in the judgment in that case to suggest that the plaintiffs' suit was based on an allegation of possession and dispossession after the plaintiffs' right to possession had accrued as in the present case. In these circumstances I do not regard this decision as binding on me so far as the present case is concerned. In my opinion the Courts below were right in holding that the special rule of limitation applies to the present case and it is conceded that if that rule applies, the plaintiffs' suit in respect of the cultivated lands must be held to be time barred. The result is that both these appeals are dismissed with costs and the judgment and decrees of the lower appellate Court are affirmed. Leave to appeal under S. 15, Letters Patent has been asked for and refused.

K.S. *Appeals dismissed.*

1. AIR 1929 Cal 157=115 I C 355.

A. I. R. 1934 Calcutta 619

HENDERSON, J.

Ramgopal Das Naskar and *others* — Defendants—Appellants.

v.

Purnachandra Roy and *others*—Plaintiffs—Respondents.

Appeal No. 113 of 1931, Decided on 14th May 1934, from appellate decree of Addl. Sub-Judge, First Court, 24-Parganas, D/- 10th June 1930.

(a) Mutation—Order for—Only Revenue officer is responsible for it and not proprietors.

An order for mutation is an order made by a Revenue Officer in the exercise of functions conferred upon him by the Land Registration Act. He alone is responsible for it. Notices in connexion with a sale are also published by the Collector and upon his own responsibility. The proprietors are in no way responsible for it and have nothing to do with it. [P 620 C 2]

(b) Revenue Records—Mere clerical error in Collector's register does not affect person's title—Suit by such person is necessary only when correction of error is refused.

A mere clerical error in the Collector's register does not throw any cloud on a person's title. It is only when he attempts to have the error cor-

rected and the Deputy Collector refuses to do so that it becomes necessary for him to institute a suit. [P 620 C 2]

(c) Co-sharers — Arrangement of shares in parganas among proprietors—Collector is not bound by it.

Proprietors frequently for their convenience come to an arrangement by which one set of proprietors have a large share in one Pargana and a lesser one in another; such an arrangement would not bind the Collector or affect an auction-purchaser at a revenue sale unless it was made with the consent of the Collector, [P 620 C 2]

Prasanta Bhushan Gupta — for Appellants.

Urukramdas Chakravarti — for Respondents.

Ramendramohan Mazumdar — for Deputy Registrar.

Judgment.—The question raised in the suit out of which this appeal has arisen is whether the disputed land belongs to the residuary share or to separate account No. 3 of Touzi No. 1 of the 24-Parganas Collectorate. The defendants-appellants are transferees of one Atul Chatterjee, who purchased the residuary share at a sale held for realisation of arrears of revenue. The learned Munsiff gave the plaintiffs a decree which was affirmed by the learned Subordinate Judge on appeal. Both the Courts found that the property formed part of the separate account and the trouble was due to clerical mistakes made by clerks in the Collectorate. The first point taken on behalf of the appellants is that the lower Courts were not justified in coming to this finding of fact because certain documents were misconstrued. On the other hand it has been naturally contended for the plaintiffs that this is a finding of fact which cannot be questioned in second appeal. There can be no question that by mistake the clerks in the Collectorate forgot to enter the number of the separate account against this particular share. The respondents attempted to have the matter set right by the Deputy Collector. This officer found that there was a mistake but came to the conclusion that he had no jurisdiction to correct it. There are no documents which require construing in order to arrive at this finding. The only thing upon which the appellants rely is the absence of any reference to this particular share in this particular pargana in certain application for mutation. That is not really a matter of construction of documents, and if it were, the lower Courts are transparently right.

The next point taken is that the plaintiffs are estopped from showing their title. This argument is based on the omission of any reference to this share in this pargana to which I have already referred in dealing with the first point. An order for mutation is an order made by a Revenue Officer in the exercise of functions conferred upon him by the land Registration Act. He alone is responsible for it. Notices in connection with a sale are also published by the Collectorate and upon his own responsibility. The proprietors are in no way responsible for it and have nothing to do with it. There are in fact no materials on which any plea of estoppel can be founded. The mistake in the sale-proclamation was due to mistakes committed by the clerks in the Collectorate. Thirdly it is contended that the suit is barred by S. 33 of Act 11 of 1859. On this point it is enough to say that the suit is not one to annul the sale. The plaintiffs do not even contend that the sale is not a good one. Fourthly it is contended that the suit is barred by limitation on the ground that time began to run against the plaintiffs from the date when the clerks first made the clerical error. For this proposition reliance is placed on the case reported in *Francis Legge* v. *Rambaran Singh* (1). In my judgment that authority really supports the case of the plaintiffs. A mere clerical error in the Collector's register does not throw any cloud on the plaintiff's title. It is only when they attempted to have the error corrected and the Deputy Collector refused to do so that it became necessary for them to institute the suit. It is therefore within time. Lastly it is contended that the plaintiffs cannot have share in individual parganas different from their share in the total estate. Proprietors frequently for their convenience come to an arrangement of this kind by which one set of proprietors have a larger share in one pergana and a lesser one in another. Of course such an arrangement would not bind the Collector or affect an auction-purchaser at a revenue sale unless it was made with the consent of the Col-

1. (1897) 20 All 35=(1897) A W N 193 (F B).

lector. In this case this was done and the particular share in this particular pargana was included in the plaintiffs' separate account. All the points taken in support of the appeal fail and the appeal is dismissed with costs. Leave to file an appeal under Cl. 15, Letters Patent has been asked for in this case and the leave has been refused.

K.S. *Appeal dismissed.*

A. I. R. 1934 Calcutta 621

ROY, J.

Shamsuddin Ahmed—Petitioner.

v.

Charu Chandra Biswas and *others*—Opposite Parties.

Civil Suit No. 726 of 1934, Decided on 3rd May 1934.

Injunction—Suit for declaration that plaintiffs are the only elected members and that defendants are not—Interim injunction restraining defendants from attending meetings held should not be given.

Where plaintiff's filed a suit for a declaration that they were the only elected members and that the defendant were not the members, and applied for an interim injunction restraining them from attending the meetings:

Held : that the likelihood of injury and inconvenience was much greater if the defendants were not allowed to function as members and that the injunction should not be granted.

[P 622 C 1]

Judgment.—The plaintiff is an elected Councillor of the Calcutta Corporation and on 20th April last filed this suit on behalf of himself and other elected Councillors of the Calcutta Corporation for a declaration that the plaintiff and the other persons on whose behalf the suit has been instituted are the only Councillors entitled to attend the meeting of 21st April 1934 and subsequent meetings of the Calcutta Corporation, for a declaration that the plaintiff and the said other persons on whose behalf the suit has been brought along with the Alderman alone constitute the whole Corporation under the Calcutta Municipal Act, for a declaration that the appointment of the defendants is illegal, and that they are not entitled to take part in the proceedings of the Corporation, and for an injunction restraining the defendants from attending any meeting of the Calcutta Corporation or from acting any way as Councillors of the Corporation.

On the day the plaint was filed an application was made before me by the plaintiff for a rule on the defendants to show cause why they should not be prohibited and restrained from acting as Councillors of the Corporation of Calcutta. The plaintiff also asked for an interim injunction. I issued a rule which was made returnable on 30th April last, but did not grant any interim injunction. The rule came on for hearing before me yesterday and seven of the defendants have appeared through counsel to show cause. The defendants K. C. Roy Choudhury, Moulvi Abdul Kasim and C. V. Hingston did not appear. The plaintiff's case is that the appointment of the defendants as Councillors of the Corporation was "ultra vires" of the Government and illegal and did not confer any right of Councillorship on the defendants. The appointment of the defendants as Councillors was made on 12th April last. It has been said that the Local Government was bound to make the appointment of Councillors for the year 1934 under S. 37, Calcutta Municipal Act, on some date prior to 29th April 1933, which was the date of the first meeting of the Corporation after the general election of 1933 and not having done so the Government had no further power to appoint Councillors for 1934; and it has been suggested in the petition that if the defendants are allowed to take part in the meetings of the Corporation and to administer Municipal funds the petitioner will suffer irreparable injuries. On behalf of the defendants affidavits have been filed by the defendants, Charu Chandra Biswas Sudhanshu Kumar Mitter and the Rev. Bimal Ananda Nag. The defendants have taken various points in their affidavits.

It has been submitted that the suit is not maintainable in its present form and the plaintiff has no cause of action. It has been stated that the plaintiff is not entitled to institute this suit on behalf of himself and the other elected Councillors of the Corporation as it is believed that many of the elected Councillors are opposed to the plaintiff and disapprove his action in bringing this suit. It has also been stated that the suit and the petition are malafide and have been filed in consequence of a representation which the defendant Charu Chandra Biswas along

with several other Councillors and Alderman submitted to the Local Government inviting them under S. 19, Calcutta Municipal Act, to annul the proceedings of the Corporation at a meeting held on 10th April last as not being in conformity with law on the ground amongst others that the appointed Councillors including defendant Charu Chandra Biswas had been wrongly excluded from taking part in the said meeting by an arbitrary and illegal ruling given by the plaintiff who happened to be the temporary Chairman of the said meeting. It has also been said that the plaintiff has not shown that either he or anybody else will suffer any injury or prejudice, irreparable or otherwise, at all.

The defendants have denied that their appointment is ultra vires and it has been submitted on their behalf that the Corporation cannot be legally constituted without the appointed Councillors. The defendants have asserted that the exclusion of the appointed Councillors from the meetings of the Corporation would cause irreparable loss and prejudice to the ratepayers and to the Corporatian. I do not think it would be desirable on the hearing of an interlocutory application to express any opinion on the question as to whether the appointment of the defendants is ultra vires or not or as to whether the suit is maintainable or not. Nor do I think, in the circumstances of this case, is it necessary for me to come to a finding at the present moment on the question as to whether the suit or the present application is mala fide or not, as I am clearly of opinion that this is not a case in which I should grant an injunction pending the hearing of the suit. I am not satisfied that the plaintiff will suffer any serious injury if no injunction is granted and I certainly think the likelihood of injury and inconveniencing is much greater if the defendants are not allowed to function as Councillors until the validity or otherwise of their appointment is decided by this Court. It has been admitted before me that the Local Government has been making appointments in the same way in which the present defendants have been appointed for about 10 years and that it has never been suggested prior to the institution of this suit or the making of this application that such appointments were ultra vires. On behalf of the defendants reliance has been placed on S. 15, Bengal General Clauses Act, as furnishing a complete and sufficient answer to the plaintiff's contention with regard to the appointment of the defendants being ultra vires. I do not think I should now decide whether that is so or not. I am unable to say at this stage that the appointment of the defendants is prima facie bad and as no case of irreparable injury to the plaintiff has been made out on the materials before me I must refuse this application. The rule is discharged. Costs costs in the cause.

K.S. *Rule discharged.*

A. I. R. 1934 Calcutta 622

GUHA AND BARTLEY, JJ.

Muhammad Samiruddin—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 959 of 1933, Decided on 21st May 1934.

Criminal Trial—Prosecution putting forward definite case that certain document was created between certain fixed dates—Failure to prove same—Failure of Judge to point out this to jury—Charge is defective and verdict thereon cannot be supported.

Where the prosecution has put forward a certain case that a certain document has been created between certain fixed dates but fails to prove the same, the Judge should point out to the jury the effect of such a finding. His failure to do so makes the charge defective and the verdict based thereon cannot be supported.

[P 623 C 2]

P. C. Chatterjee and *Abdul Hussain*—for Appellant.

D. N. Bhattacharji—for the Crown.

Bartley, J.—Appellant was convicted, in accordance with the unanimous verdict of the jury, under S. 471, I. P. C. His co-accused, Sudangshu, was unanimously acquitted on a charge of forgery. The case against both men was in brief, that Sudangshu, a clerk of the Union Board, had forged an entry in the Union Rate Books of Tilli Mouza, which purported to support a case that this appellant was assessed to chaukidari tax, and therefore had a hut in Tillichur, before Phalgun 1337 B. S. The appellant filled and used this entry in a suit brought on the footing that he had dispossessed the plaintiffs in that suit from the chur lands in Phalgun 1337. The specific charge against

Sudangshu was that he forged the entry at some time between 21st July and 15th September 1931. The specific charge against this appellant was that he used this entry in a title suit before the Munsiff on 8th June 1932, knowing or having reason to believe it to be a forgery. The learned Judge, in his charge to the jury, dealt with the case thus: He put it to them that Sudangshu was charged with forgery between the two specified dates, 21st July and 15th September, and if they were not satisfied that the forgery was committed between those dates, or held that the entry was in existence before 21st July, they must acquit Sudangshu. He went on to point out that there was evidence, coming from the prosecution, to show that the entry existed in April previous. Dealing with the case of this appellant, he said that as against him, the time of the forgery was not fixed or specified, so that the jury had merely to decide if it was forged at any time in 1337 B. S., and if the appellant used it knowing or having reason to believe it was a forgery. He then analysed the evidence as to the age of the entry which was conflicting to some extent, and clearly fell short of proving the original case for the prosecution, viz., that it could be no older than 21st July, and referred to a suggestion that it might have been the result of collusion between the clerk and a former Vice-president of the Union Board. The jury returned the following verdict:

"Sudangshur is not guilty. The entry was not forged between 21st July and 15th September as charged."

As to this appellant:

"He is guilty under S. 471, I. P. C. The entry was forged at some time before 21st July but at some time towards the latter part of 1337 B. S."

It is to be noted that there is no specific finding by the jury. that the appellant knew or had reason to believe that the entry was a forgery, though the verdict read with the Judge's charge, must be held to imply this. Now it is clear that one most essential element in the case against the appellant was that he knew or had reason to believe that the entry was a forgery. It is also clear that his knowledge would depend to a very great extent, on the time when the forged document came into existence. The prosecution set up a substantive case as to that time, which they failed to establish. Now we cannot find, throughout the charge delivered by the learned Judge, any reference to this aspect of the case. All that he says is that in deciding whether appellant used the document fraudulently or dishonestly the jury will have to decide if his defence in the suit was true or not. That is undoubtedly correct so far as it goes, but it does not go sufficiently far. Even if the defence was false, it would not necessarily follow that the appellant knew or had reason to believe that an entry in a public register used by him in support of that defence was a forgery. As we have already pointed out, the learned Judge failed to point out to the jury the effect of a finding that, as actually was found, the document was not created when the prosecution alleged it to have been created. A definite case was put forward that as the entry came into existence between certain fixed dates and for other reasons, the appellant must have known it was a forgery. Nowhere in his charge does the learned Judge comment on the position, in reference to the question of knowledge on the part of the appellant, created, if or when it is found that the entry was in existence previously. In that respect we think that the charge was defective and that the verdict based on it cannot be supported. We may add that in this view of the case we are to some extent supported by the wording of the verdict itself. In the result we are of opinion that this appeal must be allowed and the finding and sentence on the appellant set aside. We do not think that a retrial is either necessary or desirable in the circumstances of the case. The appellant will be discharged from bail bond and be acquitted.

Guha, J.—I agree.

K.S. *Appeal allowed.*

A. I. R. 1934 Calcutta 623

MALLICK AND JACK, JJ.

S. M. Bose and *others*—Petitioners.

v.

Hafiz Md. Fateh Nasib and *another*—Opposite Parties.

Civil Rule No. 1154 of 1933, Decided on 22nd January 1934.

Civil P. C. (1908), S. 151—Alternative remedy open to party aggrieved — Court cannot make use of special provision of S. 151.

A Court cannot make use of the special provisions of S. 151 when an aggrieved party has his remedy prescribed elsewhere in the Code and has neglected to avail himself of such a remedy. Thus where order of rejection of a plaint is made such an order is a decree and the party aggrieved has his remedy either by an application under O. 47, R. 1 or by filing an appeal against it and if he does not choose to take either of these two courses open to him, he cannot seek any relief under S. 151. [P 624 C 2]

Rupendra Kumar Mitter and *Promatha Nath Mitra*—for Petitioners.

Abdul Hussain and *Rashidul Hasan*—for Opposite Parties.

Mallik, J. — This rule is directed against an order dated 8th August 1933 made by the learned Subordinate Judge, First Court Alipur, setting aside an order rejecting a plaint on 17th January 1933. What happened in the case was this. One Hafiz Mahommed Fateh Nasim instituted a suit (being Title Suit No. 144 of 1931) in the Court of the First Subordinate Judge, Alipur, against the petitioners for declaration of his title to and for recovery of possession of some lands valuing the property at Rs. 2,000 only and paying court-fees on that valuation. A written statement was filed in which the correctness of the valuation of the suit was questioned the property being alleged to be worth more than one lac of rupees. On 27th July 1932 the plaintiffs admitted the value of the property to be one lac of rupees and prayed for being allowed to continue the suit in forma pauperis. On 11th November 1932 the plaintiffs' petition to continue the suit in forma pauperis was dismissed for default. Fourteen days later, on 25th November 1932 the plaintiffs filed a fresh suit in forma pauperis regarding the same subject-matter on the same cause of action (being Pauper Suit No. 7 of 1932). On 17th January 1933 the plaintiffs' plaint in suit No. 144 of 1931 was rejected on the ground that the pauper suit No. 7 of 1932 was in respect of the same cause of action. On 24th February 1933 the plaintiffs filed an application under O. 47, R. (1), Civil P. C., for the concellation of the order made on 17th January 1933 and for restoration of the suit.

The Court directed the plaintiffs, petitioners, to pay half of the ad valorem court-fees within seven days and apparently, as the plaintiffs were unable to pay the court-fees, they prayed that the petition made under O. 47, R. (1) might be treated as a petition under S. 151 of the Code. The defendant objected to the plaintiffs' application. This objection was however overruled and on 8th August 1933 the learned Subordinate Judge set aside the order of rejection of the plaint and restored the suit in the exercise of the powers vested in him by S. 151 of the Code. It is against this order that the present rule is directed. This rule, in our opinion, must be made absolute. The order of 17th January 1933 no matter whether it was a decision rightly or wrongly given was an order of rejection of a plaint and an order of rejection of a plaint is a decree as defined in S. 2 of the Code. If the plaintiff felt aggrieved by this order his remedy lay either by an application under O. 47, R. (1) or by filing an appeal against it. The plaintiff did not choose to take either of these two courses open to him under the Code. It is well settled that a Court cannot make use of the special provisions of S. 151 when the applicant has his remedy prescribed elsewhere in the Code and has neglected to avail himself of such a remedy. S. 151 is therefore inapplicable to the present case and the order of the Subordinate Judge must therefore be vacated on that ground alone. The result therefore is that the rule is made absolute with costs—hearing fee one gold mohur.

Jack, J.—I agree.

V.S. *Rule made absolute.*

A. I. R. 1934 Calcutta 624

BUCKLAND, J.

Brahmanbaria Loan Co., Ltd. In re Application Decided on 22nd January 1934.

Companies Act (1913), S. 76 — General meeting — Calling of — Balance-sheet—Preparation of, is immaterial—Court is not entitled to excuse persons responsible for failure to call meeting.

Section 76 is not intended to enable the Court to make an order, which will excuse persons, responsible for failure to call a general meeting, from the consequences of their omission. The terms of S. 76 are mandatory and they make no reference to the balance sheet. Its preparation has nothing to do with S. 76. [P 625 C 2]

S. K. Dutt—for Applicant.

Order.—This is an application, made under S. 76, Companies Act, 1913, for an order that the Court do direct the

calling of a general meeting of the company. The grounds for the application are a petition verified by the affidavit of Gobindalal Datta, who is described as a member of the board of directors of the company. In his petition, he states that the last balance-sheet of the company up to 31st March 1932, was adopted at its general meeting held on 30th September in the same year. That, it appears, is the date when the last general meeting of the company was held. The section provides that:

> A general meeting of every company shall be held once at the least in every year, and not more than 15 months after the holding of the last preceding general meeting.

In the event of default, the company and every officer of the company, who is knowingly a party to the default, is liable to a fine. It is clear that the section has not been complied with, as more than 15 months have elapsed since the last general meeting was held. The petition also states that, on 6th March 1933, criminal proceedings were instituted by the company against its former secretary, in which proceedings certain books of the company were exhibited and remained in Court, as the result of which the accounts of the company could not be audited and the balance-sheet for the year ending 31st March 1933, could not be prepared and that

> "in consequence thereof no annual general meeting for the adoption of any balance sheet for the said year could be held as yet."

It is then stated that the criminal proceedings terminated on 11th December 1933, with the conviction of the former secretary, who, however has filed an appeal against his conviction in the Court of the District Judge of Tippera, which appeal is not likely to be disposed of until the end of next month, and that, until the appeal has been disposed of, the books will not be returned to the company, and the auditor then will require about two months to audit the accounts of the company. In these circumstances, the Court is asked to make an order directing the calling of a general meeting of the company "within" 31st May 1934. In my opinion, this application is entirely misconceived. The object of the section is to enable a member of a company, where there has been default on the part of those whose duty it is to summon the meeting, to apply to the Court to direct the calling of a meeting. It is not, as is undisguisedly said by learned counsel, who appears on behalf of the applicant, is the object of this application, intended to enable the Court to make an order which will excuse the persons responsible from the consequences of their omission. What the petition says with regard to the balance-sheet, upon which learned counsel has laid considerable stress, has nothing to do with the matter. Possibly, the general meeting, which should have been called, is one before which the balance-sheet should have been placed. but S. 76 makes no reference to the balance-sheet and its terms are mandatory.

I have enquired as to the genesis of this application and have been informed that, in cases where persons have rendered themselves liable to a penalty, it is the Registrar of joint stock companies who initiates the proceedings, and that the Registrar was approached in relation to this matter and said that he would stay his hands for three weeks in order to enable an application to be made under this section. If this information is correct the Registrar has taken an erroneous view of the object of the section, as there is nothing in the section which would excuse the persons liable for the default even if an order were made as desired. Take a case for which the section is obviously intended to provide, namely where the directors, for reasons of their own, or it may be negligently or in furtherance of fraudulent dealing, fail to call a general meeting, and a share-holder considers it his business to take action under the section. In such case, could it be said that the persons responsible were to escape the consequences of their omission to call a general meeting? Certainly not. The fact that a director makes the application makes no difference. On the contrary, I conceive that it is possible that he could have taken steps to have the meeting convened. He can only apply *qua* member of the company, and, even were I to make the order, he might still be liable to a fine under the section. I need hardly say that I am not prejudging any proceedings that may hereafter be instituted under the section and, in this connection, I desire to add that it would be extremely unsatisfactory on an ex parte application, such as

this is, to excuse any officer of the company from the consequences of his omission.

The order is one which may be made ex parte, but it may be that there are other matters to be considered which do not find a place in a petition and exculpation would not be justified. If proceedings are instituted and if there are sufficient grounds for not having complied with the mandatory provisions of the section. I apprehend that they will furnish a defence and the person or persons charged will be acquitted, but this, in my judgment, is not the time or place at which either directly or indirectly to adjudicate on the point. The application will be dismissed.

R.K. *Application dismissed.*

A. I. R. 1934 Calcutta 626

LORT-WILLIAMS AND NASIM ALI, JJ.

Radhasyam Dutta

v.

Ananga Munjari Dassi and *others*.

Civil Ref. No. 8 of 1933, Decided on 26th February 1934.

Contribution — Rent decree against brothers and entire decree amount recovered from one of them—Suit by such brother for amount paid on ground that he was not liable to pay any amount, but that only other brothers were liable — Suit held not one for contribution.

"Contribution" signifies payment by each of the parties interested, of his share in any common liability. Mutuality is thus the test of contribution. [P 626 C 2]

A rent decree was passed against brothers and the entire amount was recovered from one by execution. Such brother sued the other brothers for the recovery of the amount so paid on the ground that he was not liable to pay any amount, but that only the others were liable to do so :

Held : the suit as framed cannot be deemed to be a suit for contribution : *AIR* 1915 *Cal* 278, *Rel on.* [P 626 C 2]

Dr. Basak—In support of Reference.

Lort-Williams, J.—This is a reference made under O. 46, R. 7, Civil P. C., by the learned District Judge of Birbhum. It refers to a suit filed before the Sadar Munsif of Suri.

It appears that certain patnidars had filed a rent suit and got a decree against the plaintiff and his brothers as well as others. The plaintiff's contention in the present suit is that he had no possession in any of the lands of the jote in question, because he and his brothers had separated a year before the period for which the rent was claimed and the joint properties had been divided, as a result of which the plaintiff ceased to have any interest in the jote and his brothers were liable for the entire rent. The patnidars however executed the rent decree against the plaintiff and as they were about to attach his movable properties, he had perforce to satisfy the decree. Accordingly he has brcught this suit for reimbursement of the amcunt with costs which he had to pay in respect of the patnidar's decree. The Munsif however decided that it was a suit for contribution and not re-imbursement and therefore in accordance with the provisions of Art. 41, Sch. 2, Provincial Small Cause Courts Act,, 1887, he was not competent to try it and and he directed the plaint to be returned in order that it might be filed in the proper Court. Hence this Reference.

The learned District Judge is of opinion that the Munsif was wrong in this view and that the present suit is a suit not for contribution, but for reimbusement and therefore the article referred to does not apply. He says, quite rightly, that the question must be decided upon the basis of the allegations made in the plaint. The contention of the plaintiff is not that the defendants must bear some part of the sum which he had to pay but that he was not liable for any part of that sum and that the defendants were liable for the whole of it. Such a case is not one for contribution. The point has been clearly stated and decided in the case of *Satya Bhusan* v. *Krishna Kali* (1), in which the learned Judges said that "contribution" signifies payment by each of the parties interested of his share in any common liability . . . Mutuality is thus the test of contribution. The suit as framed, cannot be deemed a suit for contribution; it was really a suit by the plaintiff for recovery of the money paid by him for the benefit of the defendants. The facts of that case are vary similar to those in the present case, and I am satisfied that the reasoning adopted by the learned Judges is applicable to the present case and that the decision of the District Judge is correct. The consequence is that the order of the learn-

1. A I R 1915 Cal 278=24 I C 259.

ed Munsif must be set aside and the suit restored to the Small Cause Court file.

Nasim Ali, J.—I agree.

K.S. *Order set aside.*

A. I. R. 1934 Calcutta 627

LORT-WILLIAMS AND M. C. GHOSE, JJ.

Surendrakumar Chaudhury and *others* Plaintiffs—Appellants.

v.

Gangachandra Chaudhury and *others* —Defendants—Respondents.

Appeal No. 482 of 1932, Decided on 22nd January 1934, from appellate decree of 1st Addl. Sub-Judge, Noakhali, D/- 19th September 1931.

Civil P. C. (1908), O. 41, Rr. 27 (2), and 29 —Court must require additional evidence on inherent lacuna becoming apparent — Discovery of fresh evidence by party is not sufficient—Court must further record reasons.

Under O. 41, R. 27 the legitimate occasion for reception of additional evidence in the appellate stage is when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent and not where a discovery is made outside the Court of fresh evidence and the application is made to import it. It must be the (appellate) Court that requires the additional evidence, when on examining the evidence as it stands on the record some inherent lacuna or defect becomes apparent. The defect may be pointed out by a party, or a party may move the Court to supply the defect but requirement must be the requirement of Court upon the appreciation of of the evidence as it stands. Wherever the Court adopts this procedure, it is bound by R. 27 (2) to record its reason for so doing and under R. 29 must specify the points to which the evidence is to be confined and record on its proceedings the points so specified: 31 *Bom* 381 and 10 *Pat* 654, *Foll.* [P 692 C 2]

Rupendrakumar Mitra and *Bhagirathchandra Das*—for Appellants.

Jitendrakumar Sen Gupta—for Respondents.

M. C. Ghose, J.— This is an appeal by the plaintiffs in a suit for declaration of title to and recovery of possession of a 9-annas share into shikmi taluks described in the schedule to the plaint. The plaintiffs' case was that, in 1906, Hridaytara, from whom the plaintiffs purchased the property in suit, was a young widow and Gangasundari was her deceased husband's aunt and had been appointed her guardian by the District Judge under the Guardians and Wards Act; that, in that year, 1906, Gangasundari purchased the property in suit in her own name but the plaintiffs' case is that the purchase was made in benami for Hridaytara with Haridaytara's money; that, further, in 1912, when Gangasundari was leaving the place and was going away to Benares, she transferred the property to her son-in-law, defendant 1; and that, since then, defendant 1 really held the property in trust for Hridaytara. But, in the year before the suit, which was instituted in 1928, defendant 1 denied the title of Hridaytara and refused to make over possession, whereupon she transferred the property to the plaintiffs, who instituted the present suit. There were two main issues in the case: (1) Whether Gangasundari was the benamdar for Hridaytara or was she herself the owner of the property in suit; and (2) Whether the suit was barred by limitation. On the first issue, the trial Court found that the title deeds of the property came from the custody of the plaintiffs and, on a consideration of the same, as well as other evidence, the Court came to the conclusion that Gangasundari was the benamdar of Hridaytara and had purchased the property on account of Hridaytara. On issue 2, the trial Court found that the possession of defendant 1 was adverse to Hridaytara from 1912 and the suit was, therefore, barred by limitation.

In appeal by the plaintiffs, the learned Subordinate Judge found both the issues against the plaintiffs and dismissed the appeal. Mr. Rupendrakumar Mitra, for the appellants, urges that the learned Subordinate Judge committed an error in law in using in evidence against the plaintiffs a compromise decree in Suit No. 10 of 1930 and that, in doing so, he violated the provisions of O. 41, R. 27, Civil P. C. It appears that, some time after the decree of the first Court, there was another suit pending in another Court between the parties and, in that suit, on a certain date after the decree of the present suit, the parties filed a compromise petition, wherein the present plaintiffs admitted the title of defendant 1 in the property in suit. A decree was passed in that suit according to the compromise. This compromise decree was produced by the defendants as a piece of evidence before the appellate Court. The plaintiffs objected, on

various grounds, to the reception of this evidence. The Court postponed the decision of the matter until the judgment. In the judgment, the learned Subordinate Judge came to the conclusion, on the evidence, that it was not established that defendant 1 held the property in the benami or in trust for Hridaytara and that his possession was, in fact, adverse to her. After that finding, he proceeded as follows:

"There has, moreover, been produced at the hearing of the appeal on behalf of respondent-defendant 1, a certified copy of a compromise decree supported by an affidavit to indicate that the plaintiff-appellant 1, and the other plaintiff, appellant 2's father, Uday noticed above, have lately admitted under that decree the title of defendant 1 in the disputed properties in suit No. 10 of 1930 of a local Munsif's Court relating to certain lands of the disputed shikmis.

Further down in the judgment, the learned Subordinate Judge proceeds:

"In view of all the above stubborn facts and other circumstances, it is idle to contend on behalf of the appellants that the respondent, defendant 1, had been only a trustee for the plaintiffs' vendor Hridaytara and the Court is not favourably influenced by the production from their custody of the alleged benami kabala of 1906 and the sale certificate relating to the disputed properties."

It is urged by Mr. Mitra that the additional evidence influenced the learned Subordinate Judge in deciding both the issues before him. On hearing the learned advocates on both sides and considering the whole matter, we are of opinion that this argument is correct. The additional evidence influenced the Subordinate Judge in coming to his conclusions on both the issues. The additional evidence could only have been admitted under O. 41, R. 27, which provides that the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate Court. But if . . . . . the appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment or for any other substantial cause, the appellate Court may allow such evidence or document to be produced, or witness to be examined. The section further provides that wherever additional evidence is allowed to be produced by an appellate Court, the Court shall record the reason for its admission. In this case, the learned Subordinate Judge has not recorded any reason for admitting this piece of additional evidence. The question of reception of additional evidence by the appellate Court came up for discussion before their Lordships of the Privy Council in three cases, which have been cited before us. In the case of *Kessowji Issur* v. *G. I. P. Ry. Co.* (1), their Lordships considered the previous section, which is in the same words as O. 41, R. 27, of the Code. Their Lordships state that the legitimate occasion for reception of additional evidence in the appellate stage is when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent and not where a discovery is made outside the Court of fresh evidence and the application is made to import it.

In this case, a passenger sued the railway company for damages for injuries sustained by him when alighting from a carriage, which overshot the platform of a station at night. The High Court on the original side decreed the plaintiffs' suit. In appeal, the railway company applied for an inspection by the appellate Judges of the railway-station at about the same time of the day to see for themselves whether the light, either natural or artificial, was sufficient to prevent a normal person from meeting with an accident. The appellate Judges held the inspection and incorporated their notes of the same in their judgment. It was held by the Judicial Committee that such reception of additional evidence was not warranted by the law. The next case is that of *Indrajit Pratap Sahai* v. *Amar Singh* (2). In this case the plaintiffs claimed a declaration of their title to two mouzas. The defendant pleaded that these two mouzas were included under the designation of a certain village, of which he had got mokarrari settlement from the plaintiffs' predecessors. The question for decision was whether the plaintiffs' predecessors, from whom the defendant obtained the mokarrari title, had granted him the lease of the one village named or of all the three villages under that one name. The suit was decided in favour of the plaintiffs in both Courts in India. In

1. (1907) 31 Bom 581=34 I A 115=9 Bom L R 671 (P C).
2. A I R 1923 P C 128=74 I C 747=50 I A 183 =2 Pat 676 (P C).

the appellate stage, the defendant pleaded for reception of certain evidence, which he had obtained after the decision of the first Court to show that, at about the time, when the lease was granted to him many years ago, the lessor in certain solemn documents admitted that he had granted the lease of all the three villages to the defendant. This evidence, if admitted, would decide the matter entirely in favour of the defendant. Their Lordships of the Judicial Committee held that they had unrestricted power to admit documents, where sufficient ground is shown for their not having been produced at the initial stage of the litigation and in the cirstances of that case, they admitted the additional evidence and allowed the defendants' appeal. In the judgment, it is stated as follows:

"Under O. 47, R. 1, which reproduces S. 623, Civil P. C., 1882, a party has a right to apply for a review of judgment to the Court that has decided the case before an appeal has been preferred. The grounds, on which such an application may be made, are specifically set forth in R. 1. In the present case, an appeal had been preferred and a review, therefore, was out of the question; and the defendants took the only and proper course, viz., to apply to the High Court, which was in possession of the case, to admit the additicnal evidence either under the general principles of law or under the specific provisions of R. 27 which lays down that the appellate Court may, for any other substantial cause, allow such evidence or documents to be produced or witnesses to be examined. Rules of procedure are not made for the purpose of hindering justice. As the application is now for the admission of the documents to which reference has already been made, we observe that there is no restriction on the powers of the Board to admit such evidence for the non-production of which at the initial stage sufficient ground has been made out."

Mr. Jitendrakumar Sen Gupta, the learned advocate for the respondents, has urged that, having regard to the observations made in the above case, we should hold that the reception of the additional evidence by the learned Subordinate Judge was not illegal. The last case quoted before us is the case of *Parsotim Thakur* v. *Lal Mohar Thakur* (3), where the matter has been fully discussed. Their Lordships observe as follows:

"Turning to the provisions of R. 27, sub-Cl. (1) (a) has no application in the present case. Under R. 27 (1) (b), it is only where the appellate Court 'requires' it that additional evidence can be admitted. It may be required to enable the Court to pronounce judgment, or for any other substantial cause, but in either case it must be the Court that requires it. This is the plain grammatical reading of the sub-clause. The legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but 'when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent' . . . . . It may well be that the defect may be pointed out by a party or that a party may move the Court to supply the defect, but the requirement must be the requirement of the Court upon its appreciation of the evidence as it stands. Wherever the Court adopts this procedure, it is bound by R. 27 (2) to record its reasons for so doing, and under R. 29 must specify the points to which the evidence is to be confined and record on its proceedings the points so specified . . . . . , ... Reference has been made in this connexion to certain observations contained in the judgment delivered by Ameer Ali, J., in *Indrajit Pratap Sahai* v. *Ameer Singh* (2) . . . . . If any incidental remarks appearing in that judgment have occasioned any doubt as to the meaning of the rules above referred to, or the conditions under which the discretion of the appellate Court is to be exercised, their Lordships desire to emphasise their view that the correct practice in the matter is as they have now defined it in accordance with the plain words of the Code."

In view of the clear explanation of R. 27, as given by their Lordships of the Privy Council, we are of opinion that, on the facts of this case, the learned Subordinate Judge committed an error in law in admitting, as he did, the compromise decree as additional evidence in the appellate stage. This admission coloured the whole of his judgment. The judgment and decree of the lower appellate Court are, accordingly, set aside and the case is remitted to that Court to deal with the appeal in accordance with law. The appellants are entitled to the costs of this Court. Future costs will abide the result.

Lort-Williams, J.—I agree.

R.K. *Case remanded.*

3. A I R 1931 P C 143=132 I C 721=58 I. A 254=10 Pat 654 (P C).

A. I. R. 1934 Calcutta 629

PANCKRIDGE, J.

Administrator-General of Bengal

v.

Lalbihari Dhar

Original Suit No. 1690 of 1933, Decided on 10th January 1934.

Hindu Law—Will— Construction — Independent gift held not created—Line of succession held was attempted which was not permissible under Hindu Law.

L, by his will, created a religious endowment and, provided for the devolution of the shebaitship as follows :

"I appoint my sons *K* and *R* to be the shebaits and I direct that, upon the death, retirement or refusal to act of any of them or any of the future shebaits the then next eldest male lineal descendant of *K* and *R* shall act as a shebait or shebait refusing to act as such, it being my intention that the eldest for the time being in the male line of *K* or *R* shall always remain as joint shebaits and, in the event of the death or resufal to act of any shebait, the then next male member of the branch, to which the shebait dying or refusing, belonged shall act as a shebait in his place and stead."

Held : that the words could not be construed to mean an independant gift to persons who answer the description of the eldest male lineal descendants of the original shebaits at the time of their deaths. The testator attempted to lay down a line of succession which was not permissible under the Hindu Law and was therefore invalid : *A I R* 1932 *Cal* 791 (*FB*) and *AIR* 1924 *Cal* 379, *Rel on* ; *A I R* 1928 *PC* 33, *Dist.* [P 631 C 2]

Pugh and *S. B. Sinha*—for Administrator General of Bengal.

S. N. Banerji (*Sr.*) and *S. N. Banerji* (*Jr.*)—for Lalbihari Dhar.

S. M. Bose and *N. C. Chatterjee*—for Banbihar Dhar, Rashbihari Dhar and Bankubihari Dhar.

Sarkar and *P. C. Basu*—for Ganeshchandra Dhar.

Judgment.— This originating summons is concerned with the legality of certain dispositions in the will, dated 18th November 1923, of Lakshminarayan Dhar, who died on 26th March 1927. The testator left three sons, Ramchandra, Kartik, and Ganesh. Ramchandra and Kartik were appointed executors by the will. Kartik died before probate was obtained, and probate was granted on 13th March 1928, to the surviving executor Ramchandra. Ramchandra died on 17th October 1928, and on 25th April 1929, letters of administration de bonis non were granted to the Administrator-General of Bengal. By Cls. 9 and 10 of the will, a religious endowment was created, and by Cl. 11 of the will the following provisions were made for the devolution of the shebaitship :

"I appoint my sons Kartikachandra Dhar and Ramchandra Dhar to be the shebaits of the said Thakurs and I direct that, upon the death, retirement or refusal to act of any of them or any of the future shebaits, the then next eldest male lineal descendant of Kartikchandra Dhar or Ramchandra Dhar shall act as a shebait in place of the deceased or retiring shebait or shebait refusing to act as such, it being my intention that the eldest for the time being in the male line of my said sons, Kartikchandra Dhar and Ramchandra Dhar, shall always remain as joint shebaits and, in the event of the death or refusal to act of any shebait, the then next male member of the branch, to which the shebait dying or refusing, belonged shall act as a shebait in his place and stead."

The Administrator-General now seeks to have it decided who are the persons who are not entitled to act as shebaits. The other parties to the summons are Lalbihari Dhar, Banbihari Dhar, Rashbihari Dhar and Bankubihari Dhar, who are the sons of Ramchandra, Nitaichand Dhar, who is the son of Kartik and Ganesh, the surviving son of the testator. Ganesh contends that the provisions of Cl. 11 of the will are an attempt to create a line of succession to the shebaitship according to rules which are repugnant to the principles of Hindu law, and he relies on the decision of the Full Bench in *Manohar Mukerji* v. *Bhupendranath Mukherji* (1). If this view is correct, it follows that, as both the shebaits appointed by the will are dead, the shebaitship devolves upon the heirs of the testator. The other parties to the summons maintain that the shebaits are Lalbihari, the eldest son of Ramchandra and Nitaichand, the only son of Kartik. It is argued that they succeed their respective fathers, not according to any line of succession laid down by the will, but directly under the will, as though they were named therein, and it is pointed out that, as they were both alive at the date of the death of the testator, their position is not affected by the rule of Hindu law, which forbids a bequest to a person not in existence when the bequest takes effect, that is, at the death of the testator : *Tagore* v. *Tagore* (2). Before deciding this question, I must notice two preliminary points raised on behalf of Lalbihari and Nitai.

It is suggested that, by reason of a certain undertaking given by Ganesh, he is precluded from opposing the claim of his nephews to succeed. It appears that Ganesh, opposed the grant of probate to Ramchandra and filed a caveat. The matter was set down as a contentious cause, but was eventually compromised, and, by consent, probate was granted and the caveat discharged : it was also agreed that the costs of both parties as between attorney and client should come out of the estate, and, in

1. AIR 1932 Cal 791=141 I C 544=60 Cal 452 (F B).
2. (1872) 9 B L R 377=I A Sup. Vol. 47=18 W R 359=2 Suth 692=3 Sar 82 (P C).

consideration of this, Ganesh undertook "not to bring any further suit regarding the will." Now, in my judgment, such an undertaking must be construed strictly, and I find it quite impossible to hold that for Ganesh to submit his views as to the validity and construction of Cl. 11 of the will, in proceedings initiated by the Administrator de bonis non, is a breach of an undertaking by him not to bring a suit regarding the will. The other point has not really been insisted upon, although the learned Advocate-General has made some observations with regard to it. In August 1928, Madanmohan Dhar, the son of Ganesh, instituted a suit claiming to be the assignee of the interest of Ganesh in the testator's estate, and asking, among other things, for the appointment of Ganesh as shebait. The suit was dismissed by Buckland, J., on 27th March 1930. An appeal was filed and dismissed by Rankin, C.J., and Pearson, J., on 22nd April 1931. The judgment of the Court in its appellate jurisdiction has been reported—*Madan Mohan Dhur* v. *Netai Gour Jew* (3). I have read both judgments, and it is abundantly clear that the point, now in issue, was never decided, and that the reason why the suit and appeal were dismissed, was that all the learned judges were of opinion that it was not competent for the plaintiff to enforce the rights, if any, of Ganesh to the shebaitship. It is true that the opinion was expressed that Lalbihari was, in any view, one of the shebaits, but nothing was said on the question whether his title was based upon the will or upon his being an heir of the testator. Mr. Banerji for Lalbihari relies on the decision of the Judicial Committee in *Madhavrao Ganpatrao* v. *Balabhai Raghunath* (4). In that case, a settlor gave, subject to his life interest, one-fourth of the settled property to

"my daughter Krishnabai during her life for her sole and separate use and after her death, in trust for the male heirs of the said Krishnabai share and share alike."

It was held that the decision of the Bombay High Court that the gift to the male heirs was bad, as creating an estate in tail male, was wrong, and that there was an independent gift to the persons who answered the description of male heirs at Krishnabai's death, subject to the exclusion of those who were not living when the deed of settlement was executed. In my opinion, that case must be distinguished from the present case. As is pointed out in the judgment delivered by Lord Buckmaster, the gift to the male heirs was absolute, whereas here there is no absolute gift to the heirs of Ramchandra and Kartik or to their next eldest lineal male descendant. On the contrary, a perpetual succession is sought to be established, whereby on the death, retirement, or refusal to act, of the eldest male lineal descendant for the time being of either of the two original shebaits, the next eldest male lineal descendant succeeds to the shebaitship. The facts of this case and the language of Cl. 11 of the will appear to me to resemble closely the facts in *Kandarpamohan Goswami* v. *Akshaychandra Basu* (5) and the language of the deed of settlement with which that case was concerned.

I hold, accordingly, that Cl. 11 cannot be construed as an independent gift to the persons who happen to answer the description of the eldest male lineal descendants of the original shebaits at the time of their deaths. In my opinion the clause attempts to lay down a line of succession which is not permissible under the Hindu law and is therefore invalid on the authority of *Manohar Mukherji* v. *Bhupendranath Mukherji* (1). It follows that the answer to question No. 2 in the originating summons must be that the persons at present entitled to act as shebaits to the deities mentioned in the will are the heirs of the testator Lakshminarayan Dhar. This disposes of the other questions. The Administrator-General is entitled to his costs as of a hearing out of the estate as between attorney and client. Ganesh is also entitled to his costs as of a hearing out of the estate. The other parties to the summons may have one set of costs out of the estate between them.

I certify for counsel.

R.K. *Order accordingly.*

3. AIR 1934 Cal 30=147 I C 1247.
4. AIR 1928 P C 33=107 I C 119=55 I A 74=52 Bom 176 (P C).
5. AIR 1934 Cal 379=150 I C 179=61 Cal 106.

* A. I. R. 1934 Calcutta 632

MALLIK AND PATTERSON, JJ.

Rivers Steam Navigation Co., Ltd.—Petitioner.

v.

Khanta Kumari Banik and *others*—Plaintiffs—Opposite Parties.

Civil Rules Nos. 1535 of 1933, Decided on 8th March 1934, from order of Second Sub-Judge, Dacca, D/- 29th June. 1933.

(a) Civil P. C. (1908), O. 6, R. 15—Verification stating that certain statements are true to information and belief—Mere omission to disclose source of information does not vitiate verification.

Where the verification states that certain statements are true according to information and belief, the mere omission to disclose the sources of such information may affect the weight that is to be attached to that verification; but so long as the verification is made in strict accordance with O. 6, R. 15, it cannot be aid to be faulty in form. [P 632 C 2]

*** (b) Civil P. C. (1908), O. 33, Rr. 2 and 5—Application to sue in forma pauperis for damages partly under Fatal Accidents Act and partly under other Act—Such application although defective so far as claim under Fatal Accidents Act is concerned but in form as to claim under other Acts, should be allowed—Fatal Accidents Act (13 of 1855), Ss. 1 and 3.**

If in a plaint, damages are claimed for certain amount of money under Fatal Accidents Act and for another amount under other Acts for loss of personal effects, the plaint must disclose all the beneficiaries so far as it relates to the claim under the former Act. If such a suit is brought with an application under O. 33, R. 1, it having failed to comply with R. 2, is liable to be rejected under R. 5 (a). But if the court-fee payable on the amount claimed under other Acts is in excess of the value of the applicant's belongings, and no exception can be taken to this part of the claim on the ground of faulty form, the application to sue in forma pauperis should be allowed as a whole. [P 633 C 1]

C. Bagram and *Fanindra Nath Sanyal*—for Petitioner.

Basak, R. B. Pal and *Bhupendra Nath Ray Chaudhury*—for Secy. of State.

Mallik, J. — This Rule is directed against an order of the Second Subordinate Judge of Dacca dated 24th June 1933, by which he allowed an application made by one Khanta Kumari Banik for permission to sue as a pauper. Khanta Kumari with three of her children was travelling in a motor-boat called the "Meghna" on 17th January 1933, when due to negligent navigation of the Serang of the Steamer S. S. "Mikir," owned by the Rivers Steam Navigation Company Limited, there was a collision between the steamer and the motor launch, with the result that the motor-boat sank two of Khanta's children, one a boy aged about 12 and the other a girl of 5, were drowned, and Khanta herself lost her personal properties. On these allegations Khanta filed a plaint claiming damages against the Rivers Steam Navigation Company Limited, to the extent of Rs. 5,157, Rs. 3,250 on account of the loss of her two children and the bodily and mental pain sustained by her, and Rs. 1,907, on account of the loss of her personal effects. Khanta filed an application for permission to sue as a pauper on the allegation that she had no sufficient means to pay the court-fees that would be payable. The learned Subordinate Judge allowed this application, and it is against this order allowing the application that the present Rule is directed.

The order that was made by the learned Subordinate Judge has been assailed before us mainly on two grounds. It was stated that the plaint filed by Khanta Kumari had not been properly verified and it was said also that the plaint did not contain all the particulars as required for plaints in suits, and it was contended that on these grounds the application for permission to sue in forma pauperis ought to have been rejected under O. 33, R. 5, Civil P. C. As regards the first ground, I may mention that there is no substance in it. At the foot of the plaint filed by Khanta Kumari, a verification is to be found—a verification made by Khanta herself, and in this verification it has been stated that some of the statements were true to her knowledge and the others true to her information and belief. This verification was clearly in the form as prescribed by O. 6, R. 15 of the Code. It was said that Khanta in that verification had not, in support of the statements which, she stated were true according to her information and belief, disclosed the sources of her information. That may be so and the omission to do so may affect the weight that is to be attached to that verification, but so long as the verification was made in strict accordance with O. 6, R. 15 of the Code, it cannot be said to be faulty in form.

The other ground, namely, that the plaint did not contain all the particulars with regard to plaints in suits, is not without any substance altogether. In the plaint damages were claimed for

a certain amount of money under the Fatal Accidents Act (13 of 1855) and for another amount under other Acts on account of loss of Khanta's personal effects. So far as the claim under the Fatal Accidents Act goes, the suit was, under the provisions of S. 1 of that Act, for the benefit of Khanta, her husband—the father of the two deceased children—and also for their grandmother who, it appears, was living at the time. Under S. 3, Fatal Accidents Act, it was obligatory to give in the plaint particulars of of all these beneficiaries, but the plaint filed by Khanta was wanting in these particulars. The plaint, so far as it related to the claim under the Fatal Accidents Act, did not comply with the requirements of O. 33, R. 2, Civil P. C., and might therefore be defective in form. But, for that defect in form, Khanta's application for permission to sue in forma pauperis could not, in my judgment, be rejected. The suit was for damages. No doubt a part of the damages was claimed under the Fatal Accidents Act, but there was another part of the claim, not under the Fatal Accidents Act but on account of loss of the petitioner's personal effects. No exception could be taken to that part of the claim in the plaint on the ground of faulty form. The amount claimed for the loss of her own properties was nearly Rs. 2,000 and the court-fee that would be necessary for that amount was far in excess of the value of Khanta's belongings.

I would therefore for the reasons stated above, discharge the rule. No order is passed as to costs in this Court. It is to be understood that the observations we have made regarding the applicability of the provisions of the Fatal Accidents Act will not affect the merits of the case at the time of hearing. They have been made for the purpose of considering the question of pauperism only.

Patterson, J.—I agree.

v.s. *Rule discharged.*

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BUCKLAND, J.

On difference between

LORT-WILLIAMS AND M. C. GHOSE, JJ.

Shobharani Datta—Appellant.

v.

Santoshkumar Bakshi—Respondent.

Appeal No. 1855 of 1933, Decided on 22nd December 1933.

(a) Practice—Second appeal — Rule—Difference between Judges—Case must be referred under Letters Patent (Cal.) Cl. 36.

Per *Buckland, J.*—On the question of admission of an appeal to the High Court, three courses are open to the Judge constituting a Division Bench of two Judges: (1) either to concur in rejecting it; (2) to concur in admitting it, or (3) differ. If they differ, it is possible for the one to give way to the other; but that is a matter purely between the Judges themselves and it is not a "practice" in the technical sense, so as to impose a rule upon the Bench. If one of the learned Judges will not give way to the other and they deliver dissentient judgments, the case must be referred under Cl. 36, Letters Patent, to a third Judge to decide whether the appeal ought to be admitted. [P 635 C 1]

(b) Civil P. C. (1908), S. 100—Findings of fact—No interference unless finding is based on misconception — Provisions must be strictly enforced.

Per *Curium.*—In a second appeal the High Court cannot interfere with findings of fact unless those findings have been based upon a misconception of the evidence or upon some mistake, which has arisen in the consideration of that evidence in the lower Court. The provisions of the Civil Procedure Code with regard to the admission of second appeals in the High Court ought to be strictly enforced. [P 634 C 2]

(c) Civil P. C. (1908), S. 100—Question of fact—Genuineness of signature is question of fact.

(Per *Buckland* and *Lort-Williams, JJ.*, and *M. C. Ghose, J.*, Contra.)—A second appeal ought not to be admitted merely on a question of the genuineness of a signature which is a question of pure fact. [P 635 C 2]

(d) Practice—Appellate Court — Evidence need not be scrutinized with same elaboration as by trial Court.

Per *Buckland, J.*—It is not the duty of an appellate Court by its judgment to scrutinize the evidence with the same elaboration of detail as is to be expected from a Court of first instance. [P 636 C 1]

Samarendrakumar Datta and *Tarakeshwarnath Mitra*—for Appellant.

Lort-Williams, J.—This is an appeal from a decision of the Officiating Additional Subordinate Judge, Burdwan, reversing a decision of the Munsif of Burdwan.

The suit was for a declaration that a mortgage bond, alleged to have been executed by Panchukrishna Bakshi, who was the plaintiff's fourth brother, was a spurious and fabricated document, that there was no consideration for it, and that it was void. The bond purported to have been given on 10th Poush 1337, in favour of the defendant, Sreemati Shobharani Datta for a sum of Rs. 150, which, it was alleged, had been lent by this woman to Panchukrishna

Panchukrishna died within two months of the alleged date of the bond and it was registered after his death.

The plaintiff's allegation was that the alleged signatures of Panchukrishna on the bond did not tally with his admitted signatures on other documents and that consequently the document was a fabrication, and the allegation that this woman lent Panchukrishna Rs. 150 upon it was untrue.

The Munsif came to the conclusion that the signatures were genuine and that consequently the document was genuine, and had been given in respect of the loan alleged to have been made by Sreemati Shobharani Datta.

The Officiating Additional Subordinate Judge disagreed with this finding and came to the conclusion that all the signatures upon the document, except one, were forgeries, and that no loan had been made by this woman to Panchukrishna. The reasons why he came to this conclusion were the following: Panchukrishna's alleged signature upon the first page of the bond, upon which the stamp appears, was genuine, as it tallied with Panchu's admitted signatures. The rest of the signatures were forgeries, because they differed altogether from his admitted signatures and from the first signature on the bond. The learned Judge deduced from these and other facts, to which I will refer in a moment, that Panchu signed the first page with the stamp upon it in blank and that, after his death, the other pages were added to the bond, and the signatures forged upon them, in furtherance of a conspiracy between the defendant's uncle, one Phakir Mitra, and the defendant and the witnesses called on her behalf. In confirmation of the truth of this deduction, there was the fact that the document was not registered until after Panchu's death: Secondly, that Panchu did, in fact, owe Rs. 150 to Phakir Mitra for medicines supplied to him, which sum coincided exactly with the sum alleged to have been lent by the defendant. Phakir contradicted another of defendant's witnesses, one Jateendramohan De, on the point whether Rs. 150 was owing by Panchu to Phakir. Phakir alleged that only Rs. 40 was due. The probable reason for this was that he appreciated how damaging was the coincidence between the amount of the debt owed by Panchu to him, as stated by Jateendra, and the amount of the loan which was alleged to have been made by the defendant. Further the Judge found that all the defendant's witnesses were more or less under the influence of Phakir. It seems to me clear therefore that the decision of the learned Subordinate Judge turned solely upon questions of fact.

The only suggestion of a point of law, which the learned advocate for the appellant has been able to make, is that the Judge wrongly put the onus of proof upon the defendant. He based that argument upon a statement made in the judgment on the effect that :

"the defendant did not also offer any explanation for not examining herself and her husband in this suit to clear their character. It is the positive case of the plaintiff that the defendant is a mere tool in the hands of her relative, Phakir Mitra, and that she did not lend any money to Panchukrishna. Under these circumstances, it was the bounden duty of the defendant to come into the witness box and to swear that the bond in suit was actually and really executed by Panchukrishna, that she lent him the money from her own pocket, and that she was not in collusion with her maternal uncle, Phakir Mitra."

In my opinion it is clear beyond doubt that the learned Subordinate Judge neither put, nor intended to put, any onus upon the defendant. What he meant, by this sentence in his judgment, was that, in face of the positive evidence given by the plaintiff that this deed was a fabrication and that the alleged signatures did not tally with the admitted signatures of Panchu, any Court would expect the defendant to give some evidence on the point, and go into the witness box to contradict what amounted to an allegation of fraud against her. It follows therefore that no point of law arises upon this appeal.

It is necessary for me to point out, once again, that, on second appeal, this Court may consider only points of law. We cannot interfere with findings of fact, unless those findings have been based upon a misconception of the evidence or upon some mistake, which has arisen in the consideration of that evidence in the lower Court.

I regret that my learned brother does not agree with me that this appeal ought to be dismissed under O. 41, R. 11, Civil P. C. I am aware that the usual prac-

tice has been that an appeal is admitted. where there is disagreement between the Judges, who form the Bench hearing second appeals. During the period in which I have sat upon this Bench, I have been struck particularly with the looseness which appears, at times, to have been practised with regard to the admission of these second appeals. In a considerable proportion of the second appeals, which have come before us for hearing no point of law has been discoverable, and the learned advocates for appellants have not even, with the greatest ingenuity, been able to direct our attention to any such points of law. In a large majority of the cases coming before us in the O. 41 list, there has not been the vestige of a point of law for us to consider. The result is that, owing to the practice, which seems to have to been followed, the lists which have to be dealt with by this Bench have been swelled unconscionably, and there are a considerable number of arrears. I am convinced that, unless the provisions of the Code are more strictly enforced with regard to the second appeals, it will not be possible for the Court to overtake these arrears.

For these reasons, I have thought it necessary to state why I consider that this appeal ought to be dismissed. As my learned brother does not agree, the matter will be referred to a third Judge, under Cl. 36, Letters Patent, to decide the point, whether the appeal ought to be dismissed, because no grounds for appeal exist within the meaning of S. 100, Civil P. C.

M. C. Ghose, J.—I regret to disagree with my learned brother. I agree with him that the provisions of the Code ought to be strictly enforced before admitting second appeals and no appeal ought to be admitted, unless it appears to us that the Court of appeal below has committed an error on a point of law or has made a manifest error in consideration of the evidence.

In this case the plaintiffs sued for a declaration that a certain registered mortgage bond was spurious, without consideration, null and void. The Munsif, who heard the witnesses and tried the case, came to the conclusion that the bond was genuine, that it had been signed by the executant, and that he had received consideration for the same. The Court of appeal below considered that of the four signatures on the bond, three were forgeries and that one had been obtained by fraud from the executant. On the question of the alleged forgery, the Munsif remarked that, in his opinion, the style and look of the signatures did not exhibit any marked difference and that, if the plaintiffs relied on the allegation of forgery, they should have obtained the help of an expert in the matter. No expert was examined on behalf of the plaintiffs. The Court of appeal below examined the signatures, and upon such examination, came to the conclusion that three of the signatures were forgeries.

I think in this case we ought to send for the record and satisfy ourselves whether the Court of appeal below was correct in his estimation of the alleged signatures.

It appears that the Court of appeal below has also made an error in consideration of the question whether there was consideration for the bond. On this point, he has not at all met the evidence which was carefully considered by the trial Court.

On these grounds I think that this appeal should be admitted and heard in the presence of both parties. (On difference between their Lordships the case came before)

Buckland, J.—My learned brothers, Lort-Williams and M. C. Ghose, JJ., have unfortunately differed on the question whether this appeal should be admitted and it has been placed before me under Cl. 36, Letters Patent. On the question of the admission of the appeal, there are three courses open to the Judges constituting a Division Bench of two Judges: either to concur in rejecting it, or to concur in admitting it or to differ. If they differ, it is possible for the one to give way to the other. But that I concieve, is a matter purely between the Judges themselves; and though my learned brother, Lort-Williams, J., has referred to that as a practice, it is not, in my opinion, a practice in the technical sense so as to impose a rule upon the Bench. If one of the learned Judges will not give way to the other and they deliver dissentient judgments, the present situation arises and the case must be referred under the Letters Patent to

a third Judge to decide whether the appeal should be admitted. It is no doubt usual, I do not say the "practice," for that is a technical term, the use of which might lead to misconception, where Judges differ as to the admission of an appeal for the Judge who would reject it to give way. But, for reasons which he has expressed, my learned brother, Lort-Williams, J., on this occasion, has declined so to do and it has been argued that, in accordance with such practice, the appeal should have been admitted. That argument ignores entirely the question whether the appeal is one in which a point of law arises and therefore is an appeal which should be admitted.

In my judgment there is no rule of practice such as that for which the learned advocate contends, binding upon the Judges who differ, and I therefore come back to the question whether or not there is a point of law upon which the appeal should be admitted and heard. Having now heard the learned advocate for the appellant and read the judgment of my learned brothers, not only do I agree with the view which my learned brother, Lort-Williams, J., has taken, but, if I may for it is not strictly within my province, I desire to express my agreement with the course he has adopted, for the reasons which he has stated. As to the facts of the case, reference may be made to the judgment of Lort-Williams, J. His colleague M. C. Ghose, J., would admit the appeal, in order that the Judges of this Court, by whom the appeal may be heard, for it is by no means certain, indeed it is improbable that it would be heard by the same Bench, may themselves inspect the mortgage bond in suit and satisfy themselves whether the Court of appeal below was correct in his estimation of the alleged signatures." If ever there is a question of pure fact, the question of the genuineness of a signature is such a question. The rule is that the findings of the lower appellate Court, on questions of fact, are to be accepted by this Court on second appeal and, unless that rule is to be ignored and such findings of fact reviewed by this Court, it would serve no useful purpose to send for the document, for the learned Subordinate Judge has found as a fact against the appellant on this question. My learned brother, M. C. Ghose, J., has also observed:

> "It appears that the Court of appeal below has also made an error in consideration of the question whether there was consideration for the bond. On this point, he has not at all met the evidence which was carefully considered by the trial Court."

In this connexion the learned Subordinate Judge, in his careful judgment, has considered the evidence very fully and has observed:

> "I am also fully satisfied that Panchukrishna did not receive any consideration in cash from the defendant in respect of the bond in suit."

Here is another finding of fact, by which this Court is bound. I must frankly admit that I do not appreciate what my learned brother, M. C. Ghose, J., means when he says that the lower appellate Court has not at all "met" the evidence which was carefully considered by the trial Court. The Subordinate Judge in his judgment says he has "very carefully considered the entire oral and documentary evidence adduced by the parties," upon which he bases his findings, and he has also discussed it at some length. I reject any suggestion, if such is intended to be made, by my learned brother, that it is the duty of an appellate Court by its judgment to scrutinize the evidence with the same elaboration of detail as is to be expected from a Court of first instance. Sufficient reasons for his findings have been given by the learned Subordinate Judge and, as there is no point of law to be argued, I agree with my learned brother, Lort-Williams, J., that this appeal should be dismissed.

R.K. *Appeal dismissed.*

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GUHA AND NASIM ALI, JJ.

Nayeb Shahana & others—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeals Nos. 536 and 592 of 1933, Decided on 15th January 1934, against orders of Sess. Judge, Burdwan, D/- 5th May 1933 and 16th May 1933.

(a) Criminal P. C. (1898), Ss. 356 and 537—Evidence—Deposition not taken down by Sessions Judge — Irregularity is cured by S. 537.

If a particular rule has been prescribed for achieving a particular object and that object has not been defeated by reason of the breach of that rule, it cannot be said that the accused had not a fair trial. Where therefore the Sessions Judge has omitted to take down the deposition

of witnesses in writing himself, or to make a memorandum of the substance of what the witness deposed as required by Cl. (3), S. 356 but the evidence has been taken down in the presence and hearing and under the personal direction and superintendence of the Judge, and the depositions of the witnesses have been read over and interpreted to them in the presence of the accused and their pleader and admitted to be correct, the irregularity does not vitiate the trial but the same is cured by S. 537: 25 *Mad* 61 (*P C*); *AIR* 1927 *P C* 44 and *AIR* 1931 *Cal* 401 (*F B*), *Rel on*. [P 637 C 2; P 638 C 1]

(b) Criminal P. C. (1898), S. 337 (2)—Accomplice forfeiting pardon—Prosecution is not bound to examine.

It is not obligatory upon the prosecution to examine an accomplice as a witness after he has forfeited his pardon. [P 639 C 1]

(c) Evidence Act (1872), S. 154—Before contradicting, previous statement must be shown to be voluntary.

No doubt a witness can be contradicted by his previous statements recorded in writing under S. 154, but before this is done it must be shown that the statements were voluntary. [P 639 C 1]

(d) Evidence Act (1872), S. 154—Witness making different statement before Sessions is not necessarily hostile.

From the mere fact that a witness before the Sessions Court makes statements relating to a part of the prosecution case different from what he made before the Magistrate does not necessarily make him hostile. [P 639 C 2]

(e) Criminal Trial—Confession — Before putting it before jury, Judge should decide whether it can be excluded from evidence.

Before a Judge places the confession of the accused before the jury for their consideration as evidence in the case he should carefully consider all the circumstances disclosed in the evidence and come to a decision whether these circumstances do justify a well-founded conjecture which may be sufficient for excluding from evidence. [P 640 C 2]

(f) Criminal Trial—Confession—Objection as to admissibility—Judge must decide whether it is voluntary.

When an objection is taken by the accused as to the relevancy or admissibility of his recorded confession on the ground that it was not voluntary, it is the duty of the Judge to decide whether the confession was voluntary or not. [P 640 C 1]

(g) Criminal Trial—Duty of Judge—Trial by jury—Judge must exclude inadmissible evidence from jury.

In a trial held with the aid of jury it is the duty of the Judge to exclude all inadmissible evidence from the consideration of the admissible evidence from the consideration of the jury. [P 640 C 1]

(h) Evidence Act (1872), S. 24—For rejecting confession lesser degree of probability is required.

In order to justify the rejection of a confession, a lesser degree of probability would be necessary, inasmuch as, instead of the word 'proved,' the legislature has used the word 'appear' in S. 24. [P 640 C 2]

Narendrakumar Basu, A. S. M. Akram, Md. Manawar and *Jagadishchandra Ghosh*—for Appellants.

Debendranarayan Bhattacharya—for the Crown.

Judgment.—The eight appellants before us were tried by the Sessions Judge of Burdwan with the aid of a jury on a charge under S. 302/120-B, I. P. C., i. e., conspiracy to murder, and were convicted on the majority verdict of the jury and sentenced to transportation for life. The case for the prosacution is that there was a conspiracy to murder one Dr. Akhtar Ali, in pursuance of which he was murdered by some men while he was returning home on the evening of 29th March 1932, and that the appellants were some of those conspirators. The appellants' defence was that they were not in the conspiracy and that they knew nothing of the conspiracy.

The first ground urged in support of the appeal is that the trial has been vitiated by the non-compliance with the imperative provisions of S. 356, Criminal P. C. It appears that in this case the evidence was not taken down in writing by the Judge himself. It appears further that the learned Judge did not make a memorandum of the substance of what the witnesses deposed, as required by Cl. (3), S. 356, Criminal P. C. It is clear however from the record that the evidence was taken down in the presence and hearing and under the personal direction and superintendence of the Judge and that the depositions of the witnesses were read over and interpreted to them in the presence of the accused and their pleader and admitted to be correct. There was no suggestion, either before the Sessions Judge or before us, that the record of the evidence, which was placed before the jury in this case, is not a correct record of what the witnesses deposed. There is no doubt that there is an omission or irregularity in this case, because the law requires that the Judge shall make a memorandum of the substance of the depositions of the witnesses. The question for determination therefore is whether this omission or irregularity vitiates the whole trial or whether it is cured by the provisions of S. 537, Criminal P. C. The two decisions of the judicial committee, viz., *Subramania Ayyar* v.

Emperor (1) and *Abdul Rahman* v. *Emperor* (2) clearly indicate that all violations of the rules of procedure in a criminal trial do not stand on the same footing.

The test to be applied is to ascertain whether the accused had a fair trial in spite of the transgression of the prescribed rule of procedure. If a particular rule has been prescribed for achieving a particular object and that object has not been defeated by reason of the breach of that rule, it cannot be said that the accused had not a fair trial. We are not satisfied in the present case that, by reason of sub-S. (3), S. 356, Criminal P. C., the appellants have, in any way, been prejudiced. The object of S. 356 is to have an accurate record of the evidence in the case. As already observed there was not the faintest suggestion in the present case that the evidence, which was placed before the jury, is something different from what the witnesses deposed or that the record is otherwise incorrect or incomplete.

We are therefore of opinion that there is no substance in the first ground. This view of the matter is in consonance with the recent decision of this Court in the case of *Praphullakumar* v. *Emperor* (3). The second ground urged in support of the appeal is that the appellants have been seriously prejudiced by the manner in which the confession of P. W. 20, Abdul Khan, was introduced as evidence by the prosecution in this case and was read to the accused in the presence of the jury. The relevant facts for the proper appreciation of this point are as follows: A Magistrate recorded the confession of Abdul Khan on 22nd April 1932, under S. 164, Criminal P. C. On 28th June 1932, pardon was tendered to him under S. 337 (1), Criminal P. C., by the committing Magistrate on his giving an undertaking to make a full and true disclosure of the whole of the circumstances within his knowledge relating to the offence, and he was examined as a witness for the prosecution. Abdul Khan however denied all knowledge of the occurrence and stated before the Magistrate that he did not recall anything about the confessional statement alleged to have been made by him. The learned Magistrate therefore stopped his examination and the pardon tendered to him was withdrawn under S. 339, Criminal P. C., on the Court Sub-Inspector certifying to the fact that he had not complied with the conditions on which the pardon was tendered. On 13th July 1932, the committing Magistrate ordered that the inquiry against Abdul Khan could not be made jointly with the other accused. On 12th May 1932, Abdul Khan was examined as a witness for the prosecution before the Sessions Court. He however denied all knowledge of the circumstances relating to the offence charged, whereupon he was declared hostile and was cross-examined by the public prosecutor. In the course of his cross-examination for the purpose of contradicting him, his confession was read to the accused in the presence of the jury. In his evidence before the Sessions Judge he made serious allegations against the police. It may be noted here that, in his evidence before the committing Magistrate, Abdul Khan admitted that the deceased and his brothers oppressed their tenants and debtors very much, but, in his evidence before the Judge, he said that he could not say if the deceased and his brothers used to oppress the villagers and that he never heard that they oppressed the villagers.

The learned advocate for the appellant contended that, in view of Abdul Khan's statement before the committing Magistrate and also in view of the fact that the pardon tendered to him was withdrawn, the only object of the prosecution in examining Abdul Khan as a witness in the Sessions Court was to declare him hostile and to place on the record his confession as evidence, not for the purpose of showing that he is not a truthful witness, but for the purpose of using it as substantial evidence to be placed before the jury and that this procedure had seriously affected the verdict of the jury. The learned advocate representing the Crown relied on S. 337 (2), Criminal P. C., for justifying this procedure. Sub-S. (2), S. 337, Criminal P. C. lays down that every person accepting a pardon shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial if any. In this

1. (1901) 25 Mad 61=28 I A 257=8 Sar 160 (P C).
2. AIR 1927 P C 44=100 I C 227=23 Cr L J 259=54 I A 96=5 Rang 53 (P C).
3. AIR 1931 Cal 401=1931 Cr C 497=131 I C 575=32 Cr L J 768=58 Cal 1404 (F B).

case the pardon was withdrawn long before he was examined in the Sessions Court.

In our opinion, it was not obligatory upon the prosecution to examine Abdul Khan as a witness after he forfeited his pardon. The learned advocate representing the Crown further contended that, as the witness admitted before the committing Magistrate certain facts which proved the motive for the crime, the public prosecutor was justified in examining him as a witness in the Sessions Court to prove those facts. Assuming that this position is a correct one in law and that the prosecution would be justified in contradicting him by his previous statement before the committing Magistrate, the prosecution was not, in our opinion, justified in reading the confession to the accused before the jury, which he retracted, and which, according to his statement before the committing Magistrate, was not a voluntary one. In his evidence before the Judge he made serious allegations against the police. It does not appear that the learned Judge at all applied his mind to the question whether the statements in the confession, which were sought to be used for contradicting him, were voluntary or not. Before a witness can be contradicted by his previous statement it must be shown that the previous statement was really his voluntary statement. No doubt a witness can be contradicted by his previous statements recorded in writing under S. 154, Evidence Act, but before this is done it must be shown that the statements were voluntary.

If the previous statements were not voluntary, it may be that his present statements are true. Further, before examining Abdul Khan as a witness for the prosecution in the Sessions Court, the prosecution knew very well that his evidence on the whole would be unfavourable to the prosecution case and, as already observed, it was not obligatory on the prosecution to examine him as a witness before the Sessions Judge. It does not appear, from the circumstances of this case, that the witness unexpectedly turned out hostile to the prosecution and consequently the discretion given to the Judge under S. 154, Evidence Act, for allowing the prosecution to cross-examine him evidently with the object of introducing his retracted confession in evidence was not properly exercised. From the mere fact that a witness before the Sessions Court makes statements relating to a part of the prosecution case different from what he made before the Magistrate does not necessarily make him hostile. The facts and circumstances of this case are such that it would have been better if this witness would not have been examined as a witness at all before the Sessions Court. In our judgment, though the retracted confession of this witness was read over to him in the presence of the jury, apparently with the object of contradicting him, in the events that have happened, the procedure adopted in this case, by which the retracted confession of this witness, which, according to the defence case, was not at all voluntary was placed on the record, has seriously prejudiced the appellants in their trial. We have looked into the evidence in this case and we are not in a position to say that this is a case where it can be said that there is no evidence to go before the jury and that the appellants should therefore be acquitted. The result therefore is that this appeal is allowed. We set aside the verdict of the jury and along with it the conviction and the sentence of the appellants and order their retrial.

Appeal No. 592 *of* 1933.—The appellant, Abdul Khan, has been convicted by the Sessions Judge of Burdwan under S. 302/120-B I. P. C., on the unanimous verdict of the jury and sentenced to transportation for life. The case for the prosecution was that there was a conspiracy to murder one Dr. Akhtar Ali, in pursuance of which the said doctor was murdered by some men while he was returning home on the evening of 29th March 1932, and that the appellant was one of the conspirators. The defence of the accused in substance was that he was not in the conspiracy and that he knew nothing about it. One of the principal items of evidence, on which the prosecution relied, for substantiating the charge of conspiracy against the appellant and which was placed before the jury for their consideration was his confession which was recorded by a Magistrate under S. 164, Criminal P. C. It appears that, after the confession was recorded, the appellant was ten-

dered pardon by the committing Magistrate, in the course of the enquiry before him against him and other persons and was examined as a witness for the prosecution. The appellant however retracted his confession and the pardon was withdrawn. Thereafter, the appellant was placed on his trial, which ended in his conviction. Before the committing Magistrate, as well as the Sessions Judge, the appellant stated that before his confession was recorded he was beaten mercilessly by the police. It appears that the Magistrate, who recorded the confession, was not available for examination, for reasons which cannot be gathered from the record. In his charge to the jury relating to this confession the learned Judge directed them as follows :

"It is the duty of the Judge not to admit a confession into evidence at all unless in his opinion there is no ground for thinking that it has been extorted under undue influence. It is your duty to decide whether the confession is true or not and, in order to do so, you will have to form an independent judgment as to whether the confession was obtained under undue influence or not."

It was contended by the learned advocate for the appellant that these directions were misdirections and that the appellant, on account of this misdirection, was seriously prejudiced in his trial. Under S. 298 (a), Criminal P. C., it is the duty of the Judge to decide all questions of law arising in the course of the trial and specially all questions as to relevancy of facts which it is proposed to prove, and on the admissibility of the evidence. S. 24, Evidence Act, rules out a confession made by the accused person as irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise proceeding from a person in authority. Therefore, when an objection is taken by the accused as to the relevancy or admissibility of his recorded confession on the ground that it was not voluntary, it is the duty of the Judge to decide whether the confession was voluntary or not. In a trial held with the aid of a jury it is the duty of the Judge to exclude all inadmissible evidence from the consideration of the jury. In view of the provisions of S. 80, Evidence Act, a confession duly recorded by the Magistrate with the prescribed certificate appended to it may be presumed to be voluntary and as such admissible, but this admissibility is subject to the restrictions contained in S. 24, Evidence Act. It is true that, in order to justify the rejection of a confession, a lesser degree of probability would be necessary, inasmuch as instead of the word "proved", the legislature has used the word "appear" in S. 24.

In view of these statutory provisions, we are of opinion that before a Judge places the confession of the accused before the jury for their consideration as evidence in the case he should carefully consider all the circumstances disclosed in the evidence and come to a decision whether these circumstances do justify a well-founded conjecture which may be sufficient for excluding it from evidence. If after considering the facts and circumstances of the case he comes to the decision that the confession was not voluntary he should exclude it from the evidence in the case and should not place the same before the jury. If however he decides that the confession was voluntary, he should place the same before the jury and ask them to decide whether it is true or false, regard being had to the other evidence in the case. He should not leave the question of the admissibility of the confession to the jury for their decision. We have examined the record of this case with some care, including the learned Judge's charge to the jury. We are however not satisfied that the learned Judge's attention was sufficiently directed to this part of his statutory duty when he asked the jury to consider the confession as evidence against the appellant in this case. In this view of the matter, the verdict of the jury and, along with it, the conviction and sentence of the appellant are set aside and we direct that the appellant be tried according to law.

R.K. *Retrial ordered.*

A. I. R. 1934 Calcutta 640

MALLIK AND PATTERSON, JJ.

Bagala Sundari Devi — Plaintiff—Petitioner.

v.

River Steam Navigation Co. Ltd. and *others* —Opposite Parties.

Civil Rule No. 1271 of 1933, Decided on 21st February 1934, from order of Second Sub-Judge, Dacca, D/- 30th June 1933.

(a) Civil P. C. (1908), O. 33, R. 2—Omission of one item from schedule is not non-compliance with R. 2.

An omission from an application for leave to sue as a pauper to include one solitary item of property is not a non-compliance with the provisions of O. 33, R. 2 : *AIR* 1915 *Mad* 652 and *AIR* 1928 *Pat* 28, *Rel on* [P 641 C 2]

(b) Civil P. C. (1908), O. 6, R. 17, and O. 33, R. 2—Information from application under O. 33, R. 2 omitted not deliberately but inadvertently — Amendment should be allowed.

An application for amendment to have the application to sue as a pauper amended by including the property which is disclosed at a later stage of the proceeding should be allowed where the case is not a case of deliberate suppression but only of inadvertent omission.

[P 642 C 1]

Bhupendra Nath Ray Chaudhury—for Petitioner.

Charles Bagram and *Fanindra Mohan Sanyal*—for Opposite Parties.

Mallik, J. — The petitioner Bagala Sundari Devi filed an application on 16th January 1933 for permission to sue as a pauper. In the application which she filed were given particulars that are required with regard to a plaint in a suit and the petition was duly signed and verified according to the prescribed rules and to the application was also attached a schedule wherein some moveable properties were mentioned with an estimated value thereof. This application of Bagala Sundari was opposed. When the matter was taken up for hearing on 26th June 1933 it was disclosed from the cross-examination of a witness examined on the side of Bagala that Bagala had inherited some property from a deceased son of hers. Thereupon within a couple of days, namely, on 28th June 1933 Bagala applied to have her application amended by including the property which had just been disclosed as having been inherited by her in the schedule which had been attached to her original application for permission to sue as a pauper. The learned Subordinate Judge refused to entertain this application for amendment being of the opinion that in view of the provisions of O. 33, R. 5, Cl. (a) he had no other alternative than to reject her application of 16th January 1933. It is against this order of refusal to entertain the application for amendment that the present rule is directed.

This rule, in my opinion, should be made absolute. From what I have stated above it would appear that Bagala's original application for permission to sue as a pauper had all the particulars that are required with regard to a plaint in a suit, it had been duly signed and verified and it had attached to it a schedule containing the name of some immovable properties with an estimated value thereof. That being so, there was in my opinion no defect in the form or frame of the application and the omission to include one solitary item of property was, in my judgment, not a non-compliance with the provisions of O. 33, R. 2, Civil P. C. This view of mine is in agreement with the decision of the Patna High Court in the case of *Biajr Ballab Lallji* v. *Benoy Krishna* (1) and also of the Madras High Court in *Kuppusamy Ayyar* v. *Muthuswamy Ayyar* (2). I am therefore of opinion that the order of the learned Subordinate Judge by which he refused to consider the application for amendment simply on the ground that he had no other alternative than to reject the application of 16th June 1933 cannot therefore be sustained.

Now the question is whether the application for amendment which the learned Subordinate Judge refused to consider was an application fit to be allowed. This will depend on the question whether the leaving out of the immovable property was an inadvertent omission of a deliberate suppression. Having regard to the facts of the case I am of opinion that it was not a case of a deliberate suppression. The property that was sought to be included was a one-third share in a small area of land, 5 kanis in area, which had been inherited by a deceased son of the petitioner who was himself a posthumous child and who died before attaining majority. The deceased son of the petitioner was not in existence at the time when the father died and the property left by him was taken possession of by the other sons of Bagala. In these circumstances, remembering specially the fact that the deceased son died before attaining majority it was by no means easy for the petitioner to realise that the deceased son also had inherited any share in the property left by his father. The property that was sought to be included was a petty one. One-third of 5 kanis of land. The value of the pro-

1. AIR 1928 Pat 28=104 I C 364.
2. AIR 1915 Mad 652=27 I C 891.

perty was as given in the petition for amendment was Rs. 100. This figure was by no means unreasonably low, regard being had to the fact that the area was less than two bighas. There was a verified statement that the value was Rs. 100 and this statement was nowhere controverted. In these circumstances, for our present purpose we can take the value of the property to be Rs. 100 and if the value of the property did not exceed Rs. 100 there was no point in wilfully suppressing it in the original application for permission to sue as a pauper. Taking all these facts together I am of opinion as stated at the outset that the case was not a case of deliberate suppression but only of inadvertent omission. When to this is added the fact that the application for amendment was made almost immediately after it had been disclosed that there was the immovable property to which the petitioner had a title the application for amendment was in my judgment, a fit one to be allowed.

I would therefore make the rule absolute, set aside the order made by the learned Subordinate Judge and allow the application for amendment. The learned Subordinate Judge will now proceed to consider and determine the question of the petitioner's pauperism in accordance with law. The petitioner will get her costs in this rule from the opposite party the hearing fee being assessed at one gold mohur.

Patterson, J.—I agree.

v.s. *Rule made absolute.*

A. I. R. 1934 Calcutta 642

MALLIK AND M. C. GHOSE, J.

Harey Harey Sinha Chowdhury—Appellant.

v.

Saradindu Narayan Ray and *others*—Respondents.

Appeal No. 196 of 1932, Decided on 14th March 1934, from appellate decree of Special Judge, Murshidabad, D/- 20th August 1931.

Bengal Tenancy Act (8 of 1885), S. 115—S. 115 does not exclude proof of fixity of rent.

Section 115 no doubt precludes the presumption that might arise under S. 50 but it does not preclude other proofs of fixity of rent such as dakhilas showing payments at a fixed rate.

[P 642 C 2]

Prafulla Chandra Chakraberty—for Appellant.

Gopendra Nath Das—for Respondents.

Mallik, J.—This appeal arises out of an application made by the landlord under S. 105, Ben. Ten. Act, for settlement of a fair and equitable rent. The plaintiff's claim was resisted by the tenant defendant on the allegation that the holding in question was a mokurari one and that the rent was not liable to any enhancement and in support of this allegation the defendant filed a number of dakhilas the earliest of which was of the year 1248 B. S. and the latest of 1335 B. S. On the strength of these dakhilas the tenant claimed the presumption under S. 50, Ben. Ten. Act. The Assistant Settlement Officer as also the special Judge refused to consider these dakhilas holding that S. 115, Ben. Ten. Act, operated as a bar and the Courts below in that view of the matter gave an increase of two annas and three pies in the rupee to the plaintiff-landlord. The defendant-tenant is the appellant before us. The order of refusal of the Courts below to consider the dakhilas filed by the tenant-defendant cannot, in my judgment, be sustained. It is true that in the year 1907 there was a petty settlement of an area of land within which the holding in question lies under the provisions of Ch. 10, Ben. Ten. Act, and it is true also that there was a finally published record-of-rights prepared in that petty settlement. Under those circumstances S. 115, Ben. Ten. Act, no doubt precluded the presumption that might arise in favour of the defendant under S. 50, Ben. Ten. Act. But S. 115 cannot be said to preclude also other proofs of fixity of rent and it was the case of the tenant-defendant that the rent of the holding was fixed. That being so, the lower appellate Court, in my opinion, was not justified in refusing to consider the dakhilas that were filed by the tenant-defendant.

There were two courses open to us. One was to remand the case to the Court below for the consideration of the dakhilas filed by the defendant and on a consideration thereof come to a decision on the point whether the rent of the holding was fixed or not and the other course was to consider the dakhilas ourselves and to come to our own decision on the

point. In view of the fact that the suit had been instituted so long ago as 1929 it was the second course which commended itself to us, and we have given full consideration to the dakhilas which were produced in the case. Now the question is whether from the dakhilas that had been produced in this case one can come to the conclusion that the rent of the holding in question is fixed. After giving our best consideration to these dakhilas we have been unable to come to the conclusion that the rent was fixed. According to the case of the defence there had been a number of jamas with fixed rents until the year 1316 B. S. when there was an amalgamation—amalgamation of the component jamas—and there was another amalgamation of 12 component jamas in the year 1335. Out of these component jamas there are only three of them, one of Rs. 2-12-0, another of Rs. 2-10-8, and the third of eight annas and six pies in respect of which there had been filed five to ten dakhilas showing the same amount of rent. No doubt the earliest dakhilas for two of these jamas are of the year 1248 and for the third of the year 1285.

But it would, in my opinion, be a very violent inference to draw merely from the fact that there were five, seven or ten dakhilas extending over a period of nearly 80 years, that for this long period of time the rents of these jamas had all along been the same. There is besides the fact that when in the year 1316 these small jamas were amalgamated with others, some of which were very much bigger than them, these three jamas practically lost their identity with the result that they altogether ceased to exist. In this view of the matter we are unable to hold that the dakhilas filed by the defendants were of any help to them in establishing that the holding in question was one of fixed rent and as the plaintiff-landlord had the entry in the record-of-rights in his favour the presumption in his favour cannot but he held not to have been rebutted in the case. For the reasons recorded above the appeal, in my judgment, must be dismissed and it is accordingly dismissed with costs, the hearing fee being assessed at one gold mohur.

M. C. Ghose, J.—I agree.

v.s. *Appeal dismissed.*

A. I. R. 1934 Calcutta 643

M. C. GHOSE AND BARTLEY, JJ.

Rohini Kanta Bhattacharjya—Plaintiff—Petitioner.

v.

Rajani Kanta Bhattacharjya and *others*—Defendants—Opposite Parties.

Civil Rule No. 1476 of 1933, Decided on 19th March 1934, from order of Dist. Judge, Sylhet, D/- 31st August 1933.

Civil P. C. (1908), O. 23, R. 3—Reference to arbitration and award given by arbitrator which award is not accepted by parties does not come within meaning of R. 3—Such award without intervention of Court during pendency of suit cannot be enforced—Arbitration.

Reference to arbitrators and an award given by the arbitrators which award is not accepted by the parties do not appear to come within the meaning of O. 23, R. 3. The rule appears to mean that the Court shall give effect to the agreement or compromise when the parties in an open Court agree to the same. If one party states that he compromised the matter out of Court, and the other party denies the same it is not the duty of the Court to stay the suit and to proceed to hear evidence on the fresh issue whether the parties out of Court had made a lawful agreement or not. Therefore an award made on a reference to arbitration without the intervention of the Court during the pendency of a suit cannot be enforced unless consented to by both parties: *AIR* 1921 *Cal* 238; *AIR* 1922 *Cal* 404; *AIR* 1927 *Cal* 887, *Foll*; *AIR* 1925 *All* 503 (*F B*); *AIR* 1927 *Bom* 565 (*F B*) and *AIR* 1928 *Mad* 1025 (*F B*), *Not foll.*

[P 644 C 1, 2]

Paresh Lal Shome and *Surendra Nath Das Gupta*—for Petitioner.

Hemendra Kumar Das—for Opposite Parties.

Judgment.— This is an application under S. 115, Civil P. C., by a plaintiff in a partition suit. His case is that he instituted a partition suit in 1932 in the Court of the Subordinate Judge, Sylhet, defendant 1 alone contested the suit. After certain adjournments the parties on 1st March 1933 obtained time by a joint petition filed on the ground that there was a talk of compromise. The Court thereupon adjourned the case to 26th March when there was no petition of compromise. On the prayer of the parties the case was fixed for 12th April for hearing. On that date the contesting defendant filed a petition stating that the parties had referred the matter to certain arbitrators and that the arbitrators had given an award which he prayed might be accepted by the Court. The plaintiff stated that he had not agreed to the arbitration as sta-

ted by the defendant. The trial Court held that as the parties did not agree that they had compromised the matter it was the duty of the Court to hear the suit on the merits. Against that decision an appeal was made to the Court of the District Judge and the learned District Judge has reversed the decision of the Subordinate Judge and directed the Subordinate Judge to take such evidence as may be adduced by the parties and decide the question whether the matter had been referred to arbitration by the parties, and whether the arbitrators had given a proper award. Against that order this petition has been made.

The learned Advocate for the petitioner has cited the cases *Dekari Tea Co. Ltd.* v. *Indian General Steam Navigatian Co. Ltd.* (1), *Amar Chand Chamaria* v. *Banwari Lall Rakshit* (2) and *Guimoni Dassi* v. *Tarini Charan* (3) in support of the proposition that an award made on a reference to arbitration without the intervention cf the Court during the pendency of a suit cannot be enforced unless consented to by both parties. The learned advocate for the opposite party has quoted the Full Bench cases in *Gajendra Singh* v. *Durga Kumari* (4), *Chandbasappa Garusantappa* v. *Basalinggayya Gokurnaya* (5) and *Subbaraju* v. *Venkataramaraju* (6) in support of the proposition that the view taken by this High Court is wrong and that it is open to the Ccurt to hear evidence whether the parties have compromised the matter under O. 23, R. 3. Upon consideration of all the cases cited before us we are of opinion that we should follow the decision cited before us of this High Court. We may state that the decision of our Court appears to us to be in the spirit of the Code. It does not appear on a plain view that O. 23, R. 3 can mean a reference to arbitrators for an award. The words are

" where the suit has been adjusted wholly or in part by any lawful agreement or compromise."

Reference to arbitrators and an award given by the arbitrators which award is not accepted by the parties do not appear on a plain view to come within the meaning of O. 23, R. 3. The rule appears to mean that the Court shall give effect to the agreement or compromise when the parties in an open Court agree to the same. If one party states that he compromised the matter out of Court, and the other party denies the same it is in our opinion, not the duty of the Court to stay the suit and to proceed to hear evidence on the fresh issue whether the parties out of Court had made a lawful agreement or not. If that were permitted, the law's delay which is already excessive, would be enormously increased. We prefer to follow the decision of our Court in the cases cited above.

It was lastly urged by the learned advocate for the opposite party that at best it is only an error of law on the part of the Court of appeal below and as there is no question of jurisdiction we ought not to interfere under S. 115. That section refers to any action in the exercise of jurisdiction illegally or with material irregularity. In this case, we are clearly of opinion that the order of the trial Court was correct in law and that the lower appellate Court committed an error in law reversing that order. In the result, this rule is made absolute, the order of the Court of appeal below is set aside and the order of the trial Court restored. The petitioner will get his costs in this Court the hearing-fee being assessed at two gold mohurs.

v.s. *Rule made absolute.*

1. AIR 1921 Cal 238=61 I C 919.
2. AIR 1922 Cal 404=69 I C 808=49 Cal 608.
3. AIR 1927 Cal 887=104 I C 360.
4. AIR 1925 All 503=88 I C 768=47 All 637 (F B).
5. AIR 1927 Bom 565=105 I C 516=51 Bom 908 (F B).
6. AIR 1928 Mad 1025=113 I C 632=51 Mad 800 (F B).

A. I. R. 1934 Calcutta 644

MITTER AND MCNAIR, JJ.

Jagadeshchandra Banerji and *others* —Defendants—Appellants.

v.

Taiyab Sardar and *others*—Plaintiffs —Respondents.

Appeal No. 10 of 1929, Decided on 8th January 1934, from original decree of Fifth Sub-Judge, Dacca, D/- 19th July 1928.

Adverse Possession — Co-sharer — There must be ouster or exclusion—Burden of proof is on party claiming title by adverse possession.

There can be no adverse possession by one cosharer as against others until there is ouster or exclusion. The possession of a cosharer becomes adverse to another cosharer from the

moment when there is an ouster, i. e., after there is an assertion of a hostile title by one cosharer against the other and to the knowledge of the latter. The burden of proving adverse possession or ouster is however on the party who claims to defeat the title of his cosharer by adverse possession: *Corea* v. *Appuhamy* (1912) *A C* 230; *Thomas* v. *Thomas*, (1855) 2 *K & J* 79; *AIR* 1918 *P C* 277; *AIR* 1918 *P C* 1; 19 *Cal* 253 (*P C*); *AIR* 1931 *P C* 48 and *AIR* 1919 *P C* 44, *Rel on.* [P 647 C 1; P 648 C 2]

Jogeshchandra Ray and *Kiranmohan Sarkar*—for Appellants.

Nirmalchandra Chakravarty—for Respondents.

Bhupendranath Das Gupta for *Sureshchandra Talukdar* for *Deputy Registrar*—for Minor Respondents.

Mitter, J.—The action, out of which this appeal has arisen, was an action for partition of a certain shikmi taluk, which formed the estate of one Bochai Sardar, after whom the taluk was named. There were several defendants to the suit. The plaintiff, Sheik Taayib Sardar, claimed 5 gandas 2 karhas 1 krant and 10 tils share in the taluk. According to the plaintiff, defendants 1 to 5, who are the appellants before us, namely the Banerjis of Muraparha, have only a six annas share of the taluk. According to the plaintiff, defendants 6 to 9 have got 19 gandas 3 karhas 7 tils share in the taluk. Defendants 10 and 11, according to the plaintiff's case, have got 3 gandas and 1 krant share and defendants 12 to 33 have got 8 annas 10 gandas 2 karhas 3 tils and the plaintiff himself has got 5 gandas 2 karhas 1 krant 10 tils share in the said taluk. The Subordinate Judge has granted a preliminary decree for partition and has directed a commissioner to make the allotments according to the respective shares of the parties.

Against this decision the present appeal has been brought by defendants 1 to 5 and the contention which has been advanced on their behalf is that the defendants appellants should have been held entitled to a partition of the share which they claimed, namely 14 annas 17 gandas 1 krant and 13 tils share in the said taluk. There is no dispute before us with reference to the share of defendants 6 to 9 and defendants 10 and 11. The dispute therefore really centres round the share of the plaintiff, which has already been mentioned as 5 gandas odd and the share of defendants 20, 22 to 24 and 26 to 33 in so far as this appeal is concerned. There is a cross-objection by some of the defendants who will be named hereafter and which will be discussed later on. The cross-objection is by defendants 12 to 19 and defendants 21 and 25. The cross-objection will be dealt with after we have decided the appeal.

The two substantial contentions which have been raised before us in this appeal are: (1) that the plaintiff and defendants 20, 22 to 24 and 26 to 33 have failed to make out their title to 5 gandas odd and 6 annas odd shares respectively of the shikmi taluk in question; and (2) that, even if they have established their title with reference to their respective shares, that title has been extinguished by adverse possession for more than the statutory period. Consequently, it is contended that the plaintiff's claim should have been dismissed and no declaration should have been made in favour of defendants 20, 22 to 24 and 26 to 33. On the other hand, a decree should have been given declaring defendant-appellants' title to 14 annas 17 gandas odd share of the taluk. On the question of title, as also on the question of adverse possession, the case of the plaintiff and that of the defendants 20, 22 to 24 and 26 to 33 must be discriminated. We propose to deal in the first place with the contention of the appellants, in so far as the plaintiff's share is concerned, it being observed that the plaintiff and some of the other defendants in the group of defendants 20, 22 to 24 and 26 to 33 have been represented by separate advocates before us. It is to be observed, at the outset, that the Record-of-rights which was prepared within 12 years of the institution of the suit, which was laid on 24th February 1927, is in favour of the defendants appellants and it shows that they are in possession of 14 annas 17 gandas odd share, which they have claimed by their written statement in the suit. It becomes therefore necessary for the plaintiff to establish that he is entitled to 5 gandas share in this taluk, by offering such evidence as would rebut the presumption arising from the entry in the Record-of-Rights, namely the statutory presumption under S. 103 (b) Ben. Ten. Act. The Subordinate Judge has come to the conclusion on a consideration of oral evi-

dence in the case that the plaintiff has established his title to 5 gandas odd share in the taluk.

It has been contended, on behalf of the appellant, that there is not sufficient evidence to rebut the presumption in favour of the defendants, arising out of the Record-of-Rights, and it is argued that the only evidence that has been given to show the relationship of the plaintiff with Bochai Sardar, the admitted owner of the taluk, is the evidence of the plaintiff himself, and that, consequently, it should be held according to the submission made by the appellants that his mere statement is not sufficient to rebut the presumption of the Record-of-Rights. The point to be noticed in this connection is that the plaintiff states in his examination-in-chief that his share in the disputed taluk is $5\frac{1}{2}$ gandas 1 krant and 10 tils. He gives, in cross-examination, the relationship between Bochai Sardar and these defendants and the plaintiff in this case. He says this:

"Kader's father was Habibulla Sardar. Habibulla has six sons—Kader, Rahim, Ala Bux, Karim, Nabu (Naku ?) and Nur Bux. Nawab Ali is Nur Bux's son. Karim has 5 sons—Kiyamaddi, Niyamaddi, Hafijuddi and two others whose names I do not remember. They are the younger ones. Nur Bux has two other sons—Imam Ali and Mukim. Adam Ali is Mukim's son. Imam Ali's sons are Mafi and Kabiluddi. Nabu's sons are Khoda Bux and Madari. Habibulla, Rabiullah and Ramjan were three brothers. Ramjan's son is Kantu. Boran is Kantu's son. Boran has three sons—Mehar, Madar Bux and Osman. Kantu's sons are Ainuddi, Minuddi and Jaimuddi. Ainuddi has three sons—Ali, Selim and Elim. Rabiulla's son is Amir. Amir's son is Kathu. Uzir's father was Kadu. Rahim's sons are Tukku and Asraf Ali (vide p. 21, Part 1 of the paper book.)"

Ramjan, Rabiulla and Habibulla are the three sons of Bochai Sardar. Having regard to the relationship between the parties and there being no issue in the Court below as to the precise extent of the share of the plaintiff, it is difficult for the appellants now to contend, as it is contended, that the plaintiff has not established what the precise share is which he has got in the taluk in question. Some endeavour has been made to throw doubt on the relationship, as deposed by the plaintiff, of the different defendants and the plaintiff himself and Bochai Sardar, on the ground that it seems somewhat singular that there should be no female heirs of Bochai Sardar in this long period between his death and the date when the plaintiff was deposing. We do not think that is an argument which can be accepted, for it is possible, in the absence of evidence to the contrary, to believe what the plaintiff has stated with reference to this genealogy, and the plaintiff said with reference to this genealogy that it is not improbable that there should not be a female heir in a particular family, the members of which are descended from a particular person. It is next said that the share would not be as much as the plaintiff claims, having regard to the fact that, from the copy of the registered kabala, dated 1st April 1855, which is printed at p. 1, Part 2 of the paper-book, it would appear that there are other persons in the line of descent from Bochai Sardar and reference is made in particular to the two names in the bond of p. 1, Part 2 of the paper-book, namely, Lal Sardar and Soban Sardar, who do not figure in the genealogy as given by the plaintiff. It is difficult to allow this contention to be raised now, for this document was never put to the plaintiff and the plaintiff was not asked, with reference to this document, to say as to whether Bochai had any other heirs as named in this document. In these circumstances, the evidence of the plaintiff with regard to the heirs of Bochai Sardar being left uncontradicted, we think it is sufficient to establish the plaintiff's title to 5 gandas odd share.

The next point raised on behalf of the appellants is that the plaintff's title to 5 gandas share has been extinguished by adverse possession of the defendants for more than the statutory period. The purchase by defendants 1 to 5 from the entire body of cosharers (descendants of Bochai Sardar) was so far back as the year 1855. The purchase was only in respect of 6 annas share. But in their written statement in para. 8, the defendants said that they had 14 annas 17 gandas 1 krant and 13 tils share, six annas of which was purchased under the deed of sale of 1855 and the 8 annas 17 gandas odd share was taken possession of by them upon the basis of an intended deed of sale, which deed could not be executed by reason of the circumstances mentioned in the said paragraph. The defendants have not

produced the deed of sale with reference to 8 annas odd share and consequently they fall back on the question of adverse possession or ouster of the cosharer. The learned advocate for the appellants has criticised the following finding of the Subordinate Judge on the question of ouster. The Subordinate Judge said:

"The question of limitation however depends upon the question whether the Sardars are the cosharers of the defendant's because there can be no right by adverse possession as against a cosharer."

It is said that this is an inaccurate statement of law and this has influenced the decision of the Subordinate Judge with regard to the question of ouster or adverse possession. It seems to us that this comment is just and, in our view, the Subordinate Judge has stated the proposition too broadly, when he says that there can be no right by adverse possession as against a cosharer. It would appear, from the authorities to which reference will presently be made, that the true legal position is that there can be no adverse possession by one cosharer as against others until there is ouster or exclusion. It becomes necessary to examine the true legal position with reference to some leading decisions of their Lordships of the Judicial Committee of the Privy Council. The first case to which reference may be made is the case of *Corea* v. *Appuhamy* (1). In that case Lord Macnaghten quoted a passage from the decision of Vice-Chancellor Wood in *Thomas* v. *Thomas* (2). The Vice-Chancellor expressed himself thus:

"Possession is never considered adverse if it can be referred to a lawful title."

If that passage stood alone, it might have been contended with regard to this case that the possession of a cosharer can never become adverse. But at p. 236 of the report, Lord Macnaghten observes this:

"The two learned Judges in the Court of appeal did not adopt in its entirety the suggestion of the trial Judge. They both held that Iseris entered as 'sole heir,' and that his title has been adverse ever since he entered. They held that he entered as 'sole heir,' apparently because he had it in his mind from the first to cheat his sisters. But is such a conclusion possible in law? His possession was in law the possession of his co-owners. It was not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result."

Their Lordships held that the possession of a cosharer becomes adverse to other cosharers from the moment when there is an ouster of the other cosharers. Their Lordships had next to consider the question in another case, namely, the case of *Muttunayagam* v. *Brito* (3), and Lord Dunedin referred to *Corea's* case (1) and observed as follows:

"This however depends on what was the character of C. Brito's possession as a matter of right. The learned District Judge seemingly overlooked the case of *Corea* v. *Appuhamy* (1), which the learned Judges in the Court of appeal took as decisive of the question. In that case it was held by this Board that the possession of one co-parcener could not be held as adverse to the other co-parceners. Lord Macnaghten, who delivered the judgment, cited the dictum of Wood, V. C., in *Thomas* v. *Thomas* (2): 'Possession is never considered adverse, if it can be referred to a lawful title.'"

In a case from India, namely the case of *Hardit Singh* v. *Gurmukh Singh* (4), their Lordships of the Judicial Committee applied the doctrine as laid down in the case of *Corea* v. *Appuhamy* (1) to this country and it is useful to reproduce what was said by Lord Buckmaster in delivering the judgment in the Judicial Committee:

"The finding of the two Courts that the property was originally joint is not challenged and the only question is that raised by issue 2. Upon this the Subordinate Judge of Ferozepore found in favour of the appellants, and his judgment was reversed by the Chief Court of the Punjab. In considering the soundness of this latter judgment it is important to bear in mind certain facts with regard to the possession of joint property, which distinguish it from property separately held. In the former case the phrase 'exclusive possession' has an equivocal meaning; in the latter it has not. If by exclusive possession of joint estate is meant that one member of the joint family alone occupies it, that by itself affords no evidence of exclusion of other interested members of the family. Uninterrupted sole possession of such property, without more, must be referred to lawful title possessed by the joint holder to use the joint estate, and cannot be regarded as an assertion of a right to hold it as separate, so as to assert an adverse claim against other interested members: *Lachmeswar Singh* v. *Manowar Hossein* (5) and *Corea* v. *Appuhamy* (1). If possession may be either lawful or unlawful, in the absence of evidence, it must be assumed to be the former. The fact therefore that this village Bhagsar has been occupied for many years by

1. (1912) A C 230=81 L J P C 151=105 L T 836.
2. (1855) 2 K & J 79=25 L J Ch 159=4 W R 135=1 Jur (n s) 1160.
3. AIR 1918 P C 277=(1918) A C 895=87 L J P C 146 (P C).
4. AIR 1918 P C 1=47 I C 626=64 P R 1918 (P C).
5. (1891) 19 Cal 253=19 I A 48=6 Sar 133 (PC).

the defendants and their predecessors is insufficient to prove exclusion of the plaintiffs without further evidence."

In the last case before their Lordships of the Judicial Committee of the Privy Council, namely, the case of *Govind Rao* v. *Rajabai* (6), Sir John Wallis explained the case of *Corea* v. *Appuhamy* (1) and said this :

"It was contended by Mr. Dube that, if they were not joint family property, they were held by the parties as tenants-in-common, and that the possession of one tenant-in-common was not adverse to the other, citing *Corea* v. *Appuhamy* (1). In that case however what was decided by the Board was that the possession would not be adverse until ouster."

In that case of *Varada Pillai* v. *Jeevarathnammal* (7) their Lordships quoted a passage from *Culley* v. *Doe* (8) to the following effect :

"Generally speaking, one tenant-in-common cannot maintain an ejectment against another tenant-in-common, because the possession of one tenant-in-common is the possession of the other, and, to enable the party complaining to maintain an ejectment, there must be an ouster of the party complaining. But, where the claimant, tenant-in-common, has not been in the participation of the rents and profits for a considerable length of time, and other circumstances concur, the Judge will direct the jury to take into consideration whether they will presume that there has been an ouster . . . . and, if the jury find an ouster, then the right of the lessor of the plaintiff to an undivided share will be decided exactly in the same way as if he had brought his ejectment for an entirety."

The true rule, which is deducible from these authorities, is that even the possession of a cosharer can be adverse to the other cosharer after there is an assertion of a hostile title by one cosharer against the other and to the knowledge of the latter. This being the true view of the law, what we have to consider is whether there is any evidence in this case, so far as the plaintiff is concerned, that there has been an exclusion or ouster for more than the statutory period of 12 years. It has been conceded on behalf of the respondent that there has been an assertion of a hostile title by defendants 1 to 5, who are purchasers from some of the cosharers, who are the descendants of Bochai Sardar, when the settlement proceedings terminated. But that does not assist the appellant, as such assertion was made within 12 years of the suit. The question therefore is whether there has been an assertion of hostile title to the knowledge of the plaintiff by defendants 1 to 5 or their predecessor-in-interest beyond 12 years of the suit. The burden of proving adverse possession or ouster is undoubtedly on the appellant, who claims to defeat the title of the plaintiff by adverse possession. In support of this case of adverse possession, the defendant appellants have relied in particular on cheque-murhis which have been marked as Ex. F-26 of the year 1314, corresponing to 1907, and Ex. F-15 of the year 1316, corresponding to 1909, and on a mortgage bond, Ex. K, dated 3rd Shraban, 1324, corresponding to 1917.

With regard to the cheque-murhis which were written beyond 12 years of the suit, it appears to be the case of the defendants that they were signed by the present plaintiff or his predecessor-in-interest and contains an admission that the defendant-appellants have 14 annas 17 gandas share in the taluk. It is to be noticed that these cheque-murhis were never put to the plaintiff. They were not shown to him. No opportunity was given to the plaintiff to say whether the cheque-murhis contained his signature. Reliance has also been placed on a number of kabuliyats which contained the admission of the members of the Sardar family to the effect that defendants 1 to 5 are the owners of the 14 annas odd gandas share. These documents begin from the year 1289, corresponding to 1882, and end with year 1304 and it is said that they are sufficient to constitute adverse possession for more than the statutory period. It appears that these are mere recitals by other parties in documents to which the present plaintiff or his predecessors-in-interest were no party and the plaintiff is not bound by any statement made in documents with which he has no concern. Unless it is shown that plaintiff had knowledge of these kabuliyats, it cannot be said that the title of defendants 1 to 5 was asserted to the knowledge of the plaintiff so as to defeat his title, if the adverse possession was exercised for more than the statutory period.

Then certain talab bakis were also produced. They are after all, the printed books of defendants 1 to 5. It has

6. A I R 1931 P C 48=130 I C 673=58 I A 106=27 N L R 113 (PC).
7. A I R 1919 P C 44=53 I C 901=46 I A 285=43 Mad 244 (PC).
8. (1840) 11 A & E 1008=3 P & D 539=9 L J Q B 288.

not been shown that the plaintiff had ever knowledge of the entries made in them. Lastly it is said that the zamindars, namely, the landlords of defendants 1 to 5, recognised their interest in the shikmi taluk to consist of 14 annas odd gandas share. That again is not sufficient, until it is shown that the plaintiff had knowledge of the same. It is argued for the respondent that the plaintiff had a very small share and that as the rent in respect of his share was never demanded from him by the defendant-appellants, nor was there any attempt made by the landlords to do so, no inference of adverse possession or ouster can be drawn against him from those circumstances. We are of opinion that these circumstances are not sufficient to constitute an ouster.

It remains to notice an argument which has been raised on behalf of the respondent, namely, that there can be no ouster when it is shown that the cosharer against whom ouster is pleaded was in possession of a part of the joint property. It is pointed out that the kha schedule property consisted of homestead land belonging to all the cosharers of the taluk and the homestead land formed part of the shikmi taluk and it is argued that, as the plaintiff was in possession of one portion of the joint property and the defendants were in possession of the other portion, that is sufficient to show that there has been no ouster or exclusion from the property in possession of the defendants so far as the plaintiff is concerned. No authority has been cited for this proposition, but we have already indicated that, taking the law to be as we have said, it has not been shown, to our satisfaction, that there has been any ouster of the plaintiff in respect of his share. We therefore affirm the finding of the Subordinate Judge and his decree so far as the plaintiff-respondent is concerned. The case of defendants 20, 22 to 24 and 26 to 33, in respect of whom the Subordinate Judge has granted a declaration to the extent of their 6 annas 10 gandas share odd, stands on a somewhat different footing. It has been argued for the appellants that none of these defendants have established by evidence that the Record of Rights is wrong. Beyond filing a written statement, these defendants have not cared to give their oath that their share in the disputed property which is sought to be partitioned is 6 annas odd gandas. The position of a defendant in a partition suit is like that of a counter-claimant and before a decree can be made in his favour declaring a particular share which he claims he must establish by evidence that he has got the interest in the joint property, which he claims and in respect of which he seeks partition. It has been argued on behalf of these respondents, one of whom only was represented by the Deputy Registrar, that there was an admission in para. 9 of the written statement of the defendants-appellants in respect of the shares of these defendants; and the passage which is relied on is to the following effect :

> "Neither the plaintiff nor defendants 12 to 33 have any shikmi right in any land of the shikmi taluk named Bochai Sardar, nor do they possess any land of the said shikmi taluk in exercise of any shikmi right. The entire shikmi right, which they once had, has completely been extinguished by sale and by adverse possession for more than 12 years."

It is difficult to say, from this statement, that there is a clear admission of the title of defendants 12 to 33 in this written statement. It therefore lay on the defendants to establish their title. In our opinion, they have failed to do that, as they have not entered in the witness-box to say what was their share and further the Record of Rights is entirely against them. In this view, we are of opinion that the decree of the Subordinate Judge, so far as defendants 20, 22 to 24 and 26 to 33 are concerned, cannot be sustained and it must be varied in view of the Record of Rights in this way: that defendants 1 to 5 are entitled to 14 annas 11 gandas 2 karhas and 3 tils share in the plaint lands. The decree of the Subordinate Judge must be varied in this way. It remains now to consider the cross-objections which have been filed by defendants 12 to 19 and 21 and 25. So far as defendants 18, 19, 21 and 25 are concerned, there are admissions in documents, Exs. A(2) and A(3), which carry us back to the year 1895, long beyond 12 years of the suit to the effect that the defendants-appellants have got 14 annas odd share in the taluk sought to be partitioned and the cross-objections have not been seriously pressed so far as these defendants are concerned and we do not think that there is any

substance in them, seeing that there has been an assertion of hostile title and acknowledgment of this title by these defendants 18 to 19, 21 and 25. With refrence to defendants 12 to 17 it appears that defendant 12 is in the same position as the other defendants and from the admission by him of the title of defendants 1 to 5 to the extent of 14 annas share long before the statutory period. But it is stated that the kabuliyat, which was executed by defendant 12, cannot affect the rights of defendants 13 and 14. Apparently this discrimination or distinction was not made before the Subordinate Judge and the Subordinate Judge, dealing with this part of the case, says this :

"Defendants 12 to 14 were owners of 11½ gandas share and they executed the kabuliyat, Ex. A 13."

No distinction seems to have been drawn with reference to the case of defendant 12 on the one hand and that of defendants 13 and 14 on the other hand. It is difficult to allow an objection of this kind to be raised here for the first time. It would also appear that these defendants, namely, defendants 13 and 14, have not entered in the witness-box to say definitely what their share is in the taluk in question. With regard to the cross-objection by defendants 15 to 17 the position is this: with reference to defendant 15 there was a kabuliyat showing his admission of the title of defendants 1 to 5 to the 14 annas odd gandas share. This kabuliyat was for a period long anterior to 12 years before the suit. Here again no distinction has been made between the case of defendants 15 to 16 and 17. We are of opinion that the cross-objections by these defendants are unsubstantial and must be dismissed. The result therefore is that the decree of the Subordinate Judge is varied by declaring the share of defendants 1 to 5 to be 14 annas 11 gandas 2 karhas and 3 tils. The rest of the decree of the Subordinate Judge will stand. It must be mentioned that there was an application on behalf of defendants 1 to 5 for the reception of additional evidence. We do not think that any ground has been made out for the reception of such evidence at this stage. The application is accordingly rejected. The costs for the printing of the additional papers need not be assessed. The plaintiff is entitled to the costs of this appeal; hearing-fee is assessed at three gold mohurs. The cross-objections of the defendants are dismissed with costs; hearing-fee being assessed at three gold mohurs.

MacNair, J.—I agree.

R.K. *Decree varied.*

A. I. R. 1934 Calcutta 650

M. C. GHOSE, J.

Annadaprosad Adak—Defendant 7—Appellant.

v.

Mihilal Adak—Plaintiff and *others*—Respondents.

Appeal No. 1560 of 1931, Decided on 25th August 1933, from appellate decree of Sub-Judge, Second Court, Hooghly, D/- 26th January 1931.

Hindu Law—Religious endowment — Debutter property never treated as secular one cannot be transferred to stranger.

Debutter property can be transferred in certain circumstances e. g., (1) where such transfer is allowed by custom, (2) where such transfer is made by one of the Shebaits to a co-shebait and (3) where all co-shebaits combine to make a transfer to a stranger. Therefore where the dedication is a proper dedication and the property is never treated by the shebaits as secular property a transfer not coming within the above exceptions to a stranger of such property is void. [P 651 C 1, 2]

Hiralal Chakrabarty—for Appellant.

Nanda Gopal Bannerjee — for Respondents.

Judgment.—This is an appeal by defendant 7 in a suit for declaration of the title of an idol Sridhar Jiu Bistu Thakur and for recovery and confirmation of possession. The suit was instituted by one of the Shebaits making the other Shebaits party defendants. The facts are not disputed. The property in suit is part of an ancient debutter property of the idol. Umesh Chandra Adak, one of the Shebaits, in 1921, made a gift of his Shabayati rights to defendant 1, who in 1924 transferred the same to defendant 7. The present suit was instituted in 1928. The learned Advocate for the appellant urges that (1) the Court below has not decided what kind of debutter the property in question is whether it is an absolute debutter or whether it is less complete debutter, and that (2) assuming that the property to be debutter, whether the transfer in this case was valid. Now on the question of the kind of dedication to an idol the learned Advo-

cate has quoted the case of *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* (1). In that case their Lordships stated that there were two kinds of dedication to an idol: (1) dedication of the completest kind where the idol is rightly regarded as a juridical person capable as such holding the property and (2) less complete endowments in which notwithstanding a religious dedication property descends (and beneficially) to heirs subject to a trust or charge for the purposes of religion. It is urged that the learned Subordinate Judge in appeal committed an error in law in throwing the onus of proof on the defendant to show that this debutter was not of a complete kind. It is urged that it is for the plaintiff to show that this debutter was of a complete kind. The facts found by the Courts below are that this is an ancient dedication, the date of the dedication has not been established, but it is an old dedication. As the property in suit appears to be the property of the idol which is existing at the present date and which is duly worshipped it may, in my opinion, be presumed that the dedication is a proper dedication.

The real question for determination is whether the transfer in this case ought to be declared invalid on the prayer of the plaintiff. The learned Advocate has rightly quoted authorities to show that the debutter property can be transferred in certain circumstances, e. g. (i) where such transfer is allowed by custom, (2) where such transfer is made by one of the Shebaits to a co-shebait and (3) where all co-shebaits combine to make a transfer to a stranger. The proposition is quite correct, but in this case there is nothing to show that there was any custom of transfer of the properties of the idol. In this case there is no instance on record that any of the debutter properties was transferred by any one in the past. As to transfer to a co-shebait such as was made in the case of *Nirode Mohini Dassi* v. *Shibdas Pal Dewagin* (2) neither defendant 1, to whom the first transfer was made, nor defendant 7, to whom defendant 1 transferred it, was a co-shebait of the deity.

Having regard to the findings of fact of the Courts below, I am of opinion that the property in this case was debutter and there was nothing to show that it was ever treated by the Shebaits as secular property. The transfer to a stranger in this case was rightly declared void by the Courts below. In the result the appeal fails and must be dismissed with costs.

K.S. *Appeal dismissed.*

1. (1904) 32 Cal 129 = 31 I A 203 = 8 Sar 698 (P C).
2. (1909) 36 Cal 975=3 I C 76.

A. I. R. 1934 Calcutta 651

GUHA AND NASIM ALI, JJ.

Kashim Ali and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeals Nos. 751 and 790 of 1933, Decided on 9th February 1934.

(a) Criminal P. C. (1898), S. 297—Admissibility or otherwise of confession on ground of its being made voluntarily must be decided by Judge—Criminal Trial.

A Judge cannot leave it to the jury to decide whether a confessional statement is voluntary or not. It is not open to the jury to reject the statement or accept the same in evidence. The Judge is required to decide the question of admissibility of the statement on a decision come to by him that it is voluntary or not; after the Judge's decision on the question of admissibility of the confessional statement depending on its voluntariness has been given which is binding on the jury as a decision on a question of law, the Judge is required to ask the jury to say whether the confessional statement if it is held to be voluntary is true or not, upon the materials before the Court, and so to give their verdict on the question of fact whether the statement is true or not. Where this is not done, the jury receive no proper direction from the Judge on a very vital question in the case and therefore there is a misdirection. [P 652 C 2]

(b) Criminal P. C. (1898), S. 297—Direction that accused may be convicted on his own retracted confession without corroboration is misdirection.

A direction to the effect that the accused might be convicted upon his own statements which had subsequently been retracted, without further corroboration is a misdirection. And a direction that statements of two accomplices may corroborate each other when these statements are independent is also a misdirection. [P 653 C 1]

(c) Criminal P. C. (1898), Ss. 162 and 297—To place before jury statements made to police by accused is illegal.

To place before the jury the statements made by the accused and contained in police papers for the purpose of corroboration or otherwise of their confessional statements used as evidence in the case is in direct contravention of the provisions contained in S. 162 and such reference in a charge to the jury is not permissible under the law. [P 653 C 1, 2]

Suresh Chandra Talukdar and *Ajit Kumar Dutt*—for Appellants.

Khondkar and *Nirmal Kumar Das Gupta*—for the Crown.

Judgment.—The appellants were tried for the commission of offences under Ss. 395 and 120-B/395, I. P. C., and were, on the unanimous verdict of the jury, before whom the trial was held, convicted by the learned Sessions Judge of Tipperah, and sentenced to various terms of imprisonment. The learned Judge has in his charge to the jury, dealt with the case very fully, but we regret to notice that there are certain misdirections in the charge on account of which the verdict of the jury has to be set aside and a retrial of the case against the appellants directed by us. It may be mentioned at the outset that the case for the prosecution depended mainly, if not solely, upon the statements of an approver and those of an accused person who had at one time confessed his guilt, but had had subsequently retracted the confession.

In regard to the confessional statement of the accused, Roshan Ali, which was retracted at the trial, what was stated by the learned Judge in his charge to the jury was that the statement was admitted in evidence by him (the Judge), but that it was open to the jury to reject it, if they considered that it was improperly recorded, or made on account of inducements or threats. It was then said that in the event of the juror's accepting Roshan Ali's statement, if that was accepted in evidence, it was evidence against Roshan Ali, and that as far as he was concerned he might be properly convicted upon it without further corroboration. With reference to the statements of Roshan Ali and to the statements of the approver, the learned Judge charged the jury as follows:

"If Roshan Ali's statement is admissible therefore you have before you statements of two accomplices. (The confessional statement of the approver has been admitted only as corroboration and contradiction of his evidence before you, and need only be considered on those points: It is the evidence of the approver in Court to which your main attention should be devoted.) Now can these statements of the two accomplices be used to corroborate each other? The answer to that question depends upon whether the two statements are independent. Obviously, if it could be shown that Karima and Roshan Ali had agreed among themselves to confess in the hope of saving their own skins, one statement would be virtually useless as corroboration of the other, but of this there is no evidence and indeed no suggestion. Also, if it could be shown that one statement was obtained fraudulently (as alleged by Roshan Ali) and compiled by the police expressly for the purpose of corroborating the former one, then the two could not properly be used to corroborate the other. In this case, Karim's statement was recorded several hours before Roshan Ali's statement. (I refer now to their statements to the police.) It has not been denied that the police officers knew of Karim's statement when Roshan Ali was arrested: indeed they must have done, and there is no reason why they should not, but it must obviously have been a lengthy statement and there is nothing to show that the police officers were carrying copies of it about in their pockets, although there is every certainty that they had the gist of it in their minds. But if, as has been alleged, the police concocted Roshan Al's statement, surely the loose threads of Karim's statement would have been gathered up in Roshan Ali's. Let us take an obvious example to see if this has been done: it is in evidence that Karima's description of the Dhupi who accompanied the dacoits is indefinite in the extreme. Now Roshan Ali is of the party living south of Harina, and Karim one of the Chandpur men; the former person therefore would be more likely to have khowledgc of this Dhupi. The police, had they been engaged in substantiating Karim's statement by the concoction of a false one purporting to come from Roshan Ali, would have at least repeated the reference to the Dhupi so far as it transpires in Karima's statement, and would have included any more precise identification which had come to them in the course of their inquiries. Yet far from the statement including a more detailed description of this Dhupi, there is no mention of one whatsoever in Roshan Ali's statement, which only refers to two Hindus, a Singh and a Shah who came with the Chandpur party. Is there anything to show that there is any connexion between Roshan Ali's statement and Karim's? If there is not and if you hold that the two statements were made independently of each other, without any connecting link (between) them forged either by themselves cr by the police, then the two statements may be used mutually to corroborate the other."

The position must now be accepted as settled that the Judge could not leave it to the jury to decide whether a confessional statement was voluntary or not. It was not open to the jury to reject the statement or accept the same in evidence. The Judge was required to decide the question of admissibility of the statement on a decision come to by him that it was voluntary or not; after the Judge's decision on the question of admissibility of the confessional statement depending on its voluntariness, has been given which was binding on the jury as a decision on a question of law, the Judge was required to ask the jury to say whether the confessional statement if it was held to be voluntary was true or not, upon the materials before the Court, and so to give their verdict on the question of fact whether the

statement was true or not. This was not what was done in the case before us; and the jury received no proper direction from the Judge on a very vital question in the case.

In our judgment, regard being had to the view taken by this Court in recent decisions bearing upon the question arising for consideration in connexion with matters referred to in the learned Sessions Judge's charge to the jury, noticed above, there are material misdirections in the charge. The learned Judge's direction to the effect that Roshan Ali might be convicted upon his own statements which had subsequently been retracted, without further corroboration, is not also, in our opinion, in accordance with the trend of judicial opinions on the point. We hold that the learned Judge's charge to the jury in this behalf amounts to misdirection. In regard to the statements referred to by the learned Judge in his charge to the jury as "statements of two accomplices" we are not satisfied that proper direction was given to the jury by saying:

"Now, can these statements of the two accomplices be used to corroborate each other? The answer to that question depends upon whether the two statements are independent."

In our judgment, no definite and clear indication was given to the jury with reference to the two statements; the statement of the approver and the retracted confession of Roshan Ali, and the jury were apt to be misled by the direction given by the Judge in this behalf. It appears further that the learned Judge referred to the statements of Roshan Ali and Karim to the police. Although it was sought to be argued before us by the learned counsel for the Crown that the Judge did not and could not possibly refer to the statements to the police, we are not at all satisfied that the reference to the statements to the police, when the Judge puts the matter like this: "I refer now to their statements to the police," had any other meaning than the obvious one that he was placing before the jury the statements contained in police papers examined by him, for the purpose of corroboration or otherwise of the confessional statements of Karim and Roshan Ali used as evidence in the case. The reference to the statements to the police as mentioned by the Judge in his charge to the jury, was in direct contravention of the provisions contained in S. 162, Criminal P. C.; and such reference was not permissible under the law. In our judgment, the statements in the police papers to which reference was made, materially influenced the jury in the matter of their verdict as to the nature of the confessional statements in this case, upon which the case for the prosecution mainly rested.

As indicated above, there are, in our judgment, material misdirections in the learned Judge's charge to the jury in the case before us; misdirections which could not but mislead the jury, and operate to the prejudice of the accused persons placed on their trial, before the Court of Session. The conclusion we have come to is that the ends of justice require that the verdict of the jury against the appellants in this Court should be set aside and we direct accordingly. The appeals are allowed. The verdict of the jury and with it the conviction and sentences passed on the appellants by the learned Sessions Judge of Tipperah, are set aside, and we direct the retrial of the appellants on the charges framed against them in the Court of Session.

V.S. *Retrial ordered.*

A. I. R. 1934 Calcutta 653

M. C. GHOSE, J.

Sukhomoy Biswas and *another*—Decree-holders—Petitioners.

v.

Asia Khatun — Principal — Opposite Party.

Civil Rule No. 33 of 1933, Decided on 5th April 1933, from order of Sadar Munsif, Sixth Court, D/- 9th December 1932.

Civil P. C. (1908), S. 151 — Alternative remedy open—Court has no power to act under S. 151.

Where the Civil P. C. provides an alternative remedy, the Court has no jurisdiction to act under S. 151. Thus where a party starts a case under O. 21, R. 100 and allows it to be dismissed for default, as the party has an alternative remedy under R. 103, the case need not be restored under the powers of S. 151 : *AIR* 1927 *Cal* 534 and *AIR* 1927 *Cal* 657, *Rel on*: *AIR* 1928 *Cal* 179, *not Foll.* [P 654 C 1, 2]

Bhupendra Nath Ray Chaudhury—for Petitioners.

Kanai Lal Saha—for Opposite Party.

Judgment.—In this case the decree-holders, petitioners in this case, brought a Title Suit in 1927 and obtained a decree in the appellate Court in 1929 and thereafter in May 1932 took delivery of possession of the decretal land.

Thereafter the opposite party filed an application under O. 21, R. 100, Civil P. C., complaining that she who was not a judgment-debtor had been dispossessed of her property. A Miscellaneous Case was thereupon started. The decree-holders filed their objection and were ready with evidence on 30th July 1932. But when the case was called on for hearing, the opposite party did not appear and the Miscellaneous Case was dismissed for default. Subsequently the opposite party filed an application under O. 9, R. 9, O. 47, R. 1 and S. 151, Civil P. C., for setting aside the aforesaid order of dismissal and for restoration of the Miscellaneous Case to its original number. The Court below by an ex parte order set aside the order of dismissal. But later the decree-holders appeared and stated that they had received no notice and got the order vacated. Then after hearing both parties the learned Court below set aside the order of dismissal and restored the Miscellaneous Case to its original file under S. 151, Civil P. C., holding that S. 151, Civil P. C., had application to the case. Against that order the present rule has been issued.

Before the learned Munsif it was contended on behalf of the decree-holders that S. 151 had no application to this case. The learned Munsif stated that it was well settled that if the Code contains specific provisions which would meet the necessities of the case in question, such provisions should be followed and the inherent jurisdiction should not be invoked. In the event of dismissal of a case under O. 21, R. 100, the aggrieved party has a direct remedy by way of regular suit under O. 21, R. 103. The question was argued whether in the circumstances the learned Munsif should take action under S. 151, Civil P. C. Two cases have been cited before the Court below; one is a Full Bench decision of the Madras High Court: *Alagasunderam Pillai* v. *Pichuvier*, *A. I. R.* 1929 *Mad.* 757, and the other is a decision of this Court: *Nabu Sahu* v. *Kamdev Maity* (1). The Court below found that the two decisions were contradictory and had followed the decision of this Court and held that it had jurisdiction to pass an order under S. 151, Civil P. C.

In appeal it is urged that the learned Munsif has committed an error of law in deciding the case as above. It is urged that the case of *Nabu Sahu* v. *Kamdev Maity* (1) which was decided by a single Hon'ble Judge of this Court in January 1927 was a case of a special character and that the trial Court was of opinion that it had made a mistake and thereupon gave relief under S. 151 in a case under O. 21, R. 100, and it was held in this Court that this order in the circumstances was a correct order. It is urged that the facts of this case are different from the facts of that case and it would be wrong to hold the observation of that case as applicable to the facts of the present case. It was observed by Lord Halsbury, Lord Chancellor, in the case of *Quinn* v. *Leatham* (2) that:

"every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law but governed and qualified by the particular facts of the case in which such expressions are to be found."

It is also pointed out that in two other cases, namely, *Sarat Krishna Bose* v. *Bisweswar Mitra* (3) and *Satyendra Nath Chaudhury* v. *Charu Chandra Majumdar* (4), the same learned Judge sitting in a Division Bench with another Judge held that it was clear law that where the Code provided an alternative remedy, the Court had no jurisdiction to act under S. 151, Civil P. C. Having regard to the decisions I am of opinion that the learned Munsif made an error in law in acting under S. 151 in this case.

It is also urged that even assuming that the Court had jurisdiction to act under S. 151, the facts of the case do not justify the order which was made by him. It appears that the opposite party is a woman whose father was looking after the case on her behalf but that when the case was called on for hearing

1. AIR 1928 Cal 179=107 I C 729.
2. (1901) A C 495=70 L J P C 76=17 T L R 749=65 J P 708=50 W R 139=85 L T 289.
3. AIR 1927 Cal 534=103 I C 69=54 Cal 405.
4. AIR 1927 Cal 657=104 I C 188.

he was found absent in Court. Afterwards he appeared and said that he had gone out to say his prayers. As the the learned Munsif pertinently observed, the man might have taken steps to have this matter brought to the notice of the Court before going out to say his prayers or he might have asked a pleader or some other person to respond to the call of the Court. The fact that he did not do so leads to the conclusion that his excuse was not reasonable. It is also pointed out that the Court examined the said man in the absence of the decree-holders and used that deposition against the decree-holders, the decree-holders having no opportunity to cross-examine him. I am of opinion that on the facts the order of restoration was not a correct order. The rule is made absolute with costs hearing fee being assessed at one gold mohur.

V.S. *Rule made absolute.*

A. I. R. 1934 Calcutta 655

ROY, J.

Mrs. E. V. Penheiro—Plaintiff.

v.

M. Minney—Defendant.

Suit No. 2025 of 1933, Decided on 31st January 1933.

(a) Fatal Accidents Act (13 of 1855), S. 1—Word "representative" includes in absence of executor or administrator any person for whose benefit right of action is given.

The word "representative" has a special meaning of its own. It has not the same meaning as "legal representative" in the Civil Procedure Code. The intention of the legislature is that in the absence of an executor or administrator any one or more of the persons for whose benefit the right of action is given shall be deemed to be a "representative" of the deceased for the purpose of maintaining a suit under the Act. The word "representative" in the Act cannot be treated as mere surplusage in the case of Europeans and Eurasians. It could not have been intended that in such a case where there is no executor or administrator, the persons for whose benefit the right of action was given should be without a remedy : 28 *Mad* 479, *Foll.* [P 658 C 1, 2]

(b) Fatal Accidents Act (3 of 1855), S. 1—Plaint in suit under this Act should be carefully drawn.

A plaint in a suit under the Fatal Accidents Act has to be very carefully drawn and should give full particulars of the persons for whom or on whose behalf the action has been brought and of the nature of the claim in respect of which damages are sought to be recovered. [P 658 C 2]

I. P. Mukerjee, P. P. Mukerjee and *D. P. Chatterjee*—for Plaintiff.

J. C. Clough—for Defendant.

Judgment.—This is an action under the Fatal Accidents Act (Act 13 of 1855). On 26th June 1933, at about 10 a. m., one Charles Penheiro, an assistant in Messrs. Liptons Limited was crossing Bentinck Street from west to east in order to reach Weston Street when he was knocked down by the defendant's motor car which was being driven from south to north along Bentinck Street by the defendant's driver. Charles Penheiro was seriously injured and died the same afternoon at the Medical College Hospital, death being due to fracture of the skull. On 4th August 1933, Mr. E. P. Swinhoe, a Solicitor, under instructions from Mrs. Charles Penheiro wrote to the defendant claiming Rupees 45,000 as loss and damages sustained by her by reason of her husband's death and threatening legal proceedings in default of payment. The claim was repudiated by Messrs. Orr, Dignam & Co., Solicitors, acting on behalf of the defendant, by their letter of 8th September 1933 ; but before that date and on 31st August 1933 this suit was filed. In the plaint, as it stood before the amendments to which I shall refer later, the only plaintiff was Mrs. Esther Virginia Penheiro, the widow of Charles Penheiro, and she sought to recover the sum of Rs. 45,000 or such other sum as may deem just to this Court as damages, which she on her behalf assessed at Rs. 45,000. It was stated in the plaint that Charles Penheiro had died leaving him surviving his widow, the plaintiff, and others who were not desirous of joining in the suit, and that the plaintiff had instituted the suit as representative of Charles Penheiro, deceased, for the benefit of herself.

In para. 3 of the plaint it was alleged that the defendant's motor car No. 19912 under the charge and control of the defendant's servant was being driven from south to north along Bentinck Street rashly and negligently at a rapid and dangerous speed and struck the said Charles Penheiro down and ran over him. As a result, Charles Penheiro received injuries, which are described in the plaint, and died. On 16th November 1933, Messrs. Orr, Dignam & Co., Solicitors for the defendant, asked for particulars: (1) as to all parties interested in the suit and the nature and extent of their interest, and (2) as to

the damages alleged to have been sustained. On 24th November they sent a reminder and on 27th November 1933, they received a reply to their letter of 16th November from Mr. E. P. Swinhoe, Solicitor for the plaintiff. In his letter Mr. Swinhoe stated that the children of his client, Mrs. Esther Virginia Penheiro, and her husband the late Charles Penheiro were not desirous of joining in the suit as they had agreed that their mother should get all the compensation. As for the particulars of damages asked for, the letter stated that the plaintiff's sole means of support during her married life was provided by her husband from his monthly salary of Rs. 175 and a varying monthly amount as allowance, etc., the total from both sources being Rs. 200, or thereabouts, and that by the death of the deceased the plaintiff had been deprived of the whole of this amount and consequently of her means of livelihood. On 29th November Messrs. Orr, Dignam & Co. wrote that the particulars furnished were not sufficient, and did not comply with the provisions of law and further that their client had been advised that the plaint did not disclose any cause of action and the suit as framed was not maintainable. In reply to the letter of 29th November, Mr. Swinhoe wrote on 2nd December stating that Charles Penheiro had left him surviving his widow and the children whose names were mentioned as his only heirs and legal representatives, and that the children had given up their rights and claims to the money, that might be recovered from the defendant as costs, compensation or damages, in favour of the plaintiff. The letter also gave particulars of the damages which the widow had sustained, making up the total of Rs. 45,000 claimed in the plaint.

In the meantime and on 22nd November 1933, the defendant had filed his written statement in which he took the point that the plaint did not disclose a cause of action, and that the suit as framed was not maintainable. He denied that his servant drove the car negligently or was guilty of the alleged or any negligence or that the motor car was being driven at a rapid or dangerous speed. He alleged that the accident was not caused or occasioned by any of the acts complained of but arose from inevitable accident and alternatively there was contributory negligence on the part of Charles Penheiro. Particulars were given of the alleged contributory negligence. It was submitted that the plaint did not disclose any damages which the plaintiff was entitled to claim and that the plaintiff was not entitled to recover Rs. 45,000 or any sum at all. On 4th December 1933, there was rather a curious letter written by Mr. Swinhoe to the defendant's solicitors calling upon them to give discovery of "certain facts" of which "your client is in possession" and "which are not personally known to my client". The letter went on to say :

> "For instance, your client is personally aware of the negligent and wrongful act which caused the death of my client's husband, and your written statement is not sufficiently clear to indicate properly the nature and extent and mode of the injury. And although your client was sitting in the car at the time of the said wrongful act, you have not disclosed all the facts connected with the said negligence and wrongful act of your client."

In his final address counsel for the defendant relied on this letter as indicating that the plaintiff had not made up her mind even on 4th December as to what case of negligence she was going to make and that up till then the only case of negligence was, as stated in para. 3 of the plaint, a case of the car having been driven at a dangerous speed. On 17th instant an application was made for an amendment of the plaint and as the defendant did not appear to oppose the application I made the order asked for. By the amendments made in the plaint we have now as plaintiffs, the widow and the four children of Charles Penheiro. There is a new paragraph (para. 2-A) in which it has been alleged that the added plaintiffs had agreed with the original plaintiff that all damages and compensation recoverable from the defendant should be enjoyed by the original plaintiff and another paragraph (para. 7) stating that Charles Penheiro left no will and that there is no executor or administrator of his estate. No additional written statement has been filed.

The hearing of this case started on the afternoon of Monday the 22nd and when counsel for the plaintiffs was opening his case he gave certain particulars of the negligence alleged in para. 3 of the

plaint. Counsel for the defendant contended that in para. 3 of the plaint the only negligence alleged was that the car was being driven at a rapid and dangerous speed and that the plaintiffs should not be allowed to go into any other case of negligence. I thought it right that I should allow the plaintiffs to go into the case made by counsel in his opening, and I directed counsel to furnish full particulars in writing of the negligence of which he complained and with regard to which he desired to lead evidence. The particulars have been furnished and are on the file. The following issues were submitted and accepted :

"(1) Does the plaint disclose a cause of action? (2) is the suit maintainable as framed ? (3) are the plaintiff's representatives of Charles Penheiro ? (4) are the plaintiffs entitled to maintain this suit ? (5) did the defendant's driver drive negligently in the following particulars : (a) was he driving at a rapid or a dangerous speed ? (b) did he negligently fail to sound his horn ? (c) did he negligently fail to heed a warning alleged to have been given by the deceased ? (6) was there contributory negligence as alleged in the written statement? (7) was the collision due to inevitable accident ? (8) is the plaintiff, Mrs. Penheiro, entitled to recover the sum of Rs. 36,000 claimed in the particulars or Rs. 350 for funeral expenses or Rs. 200 or any other sum as expenses alleged to have been incurred in the Police Court."

The first witness examined on behalf of the plaintiffs was Upendra Nath Roy, a Surveyor. He proved a plan (Ex. A) prepared by him of that portion of Bentinck Street where the accident took place, and its surroundings. The accuracy of this plan was challenged in certain particulars, but I do not think the alleged inaccuracies are very material. (After considering the evidence in the case his Lordship proceeded). That concludes the oral evidence in the case and I might say at once that I much prefer the testimony of the defendant and his witnesses. I have come to the clear conclusion on the evidence before me that the plaintiffs have failed to make out their case. I find that the deceased while crossing the road while he was still on the western tram track had for some reason or other hesitated and either stepped back or made a backward movement and that in consequence the driver of the car who had intended to pass the deceased on the left, finding that he might not be able to pass the deceased on the left, swerved his car to the right in order to pass the deceased on the right but the deceased suddenly changed his mind and dashed forward with the result that he got in the way of the car and the car hit him and knocked him down, although the driver had put on the brakes. In my view the driver did the correct thing when he turned to the right and if the deceased had not dashed forward there would have been no accident at all. The spot where the man was knocked down and the position in which the car was found after the accident shows that the account given by the defendant and his witnesses is the correct account.

The fact that a good portion of the dead man's body was protruding beyond the bonnet of the car proves that at the time of the impact the car could not have been travelling at a great speed. In my view, in the circumstances of the case the accident was unavoidable and no blame can attach to the driver of the car. I find that the accident was due to the conduct of the dead man. It is difficult to say why the deceased behaved in the way he did. The plaintiff's witness Mungul Mia stated that he spoke to the deceased while he was still on the western tram track and that the deceased spoke to Mungul Mia. It might be that at that time the deceased saw the car coming and he got flurried and could not decide as to whether he should move backward or forward. I am unable to accept the testimony of the witnesses Mungal Mia and Giribala. They were obviously persons of limited intelligence and their ideas of speed and distances are vague and uncertain. I cannot help doubting their capacity for proper or correct observation and it is difficult to say how much the witnesses had really seen of the accident. It is impossible to believe that the driver of the car made no effort whatsoever to avoid knocking the old man down. It is curious that though the accident took place in a busy street in Calcutta, and the evidence shows that there were a certain number of people about, the only two witnesses who should have come forward to give evidence in support of the plaintiffs' case were two persons who had known the deceased for some considerable time and who are likely to let their sympathies with the deceased's family in-

fluence their minds. I find that the car was being driven at a reasonable and proper speed and not at a rapid or dangerous speed. I find that the driver did sound his horn when he saw the deceased and there was no warning given by the deceased. Issues 5, 6 and 7 are decided in favour of the defendant.

The plaintiff's suit therefore fails. I think however I should give my views with regard to the other issues raised. I shall take up the consideration of Issues 1, 2, 3 and 4 together. It has been contended that the suit has not been properly framed as it has not been filed by the proper persons and has not been brought for the benefit of all the persons for whom it should have been brought. Counsel for the defendant argued that in the case of Europeans and Eurasians a suit under the Fatal Accidents Act (Act 13 of 1855) could only be brought by his executor or his administrator and the word "representative" in the Act had no application to such persons but was used only with reference to Hindus and Mahomedans. Reliance was placed by counsel for the plaintiffs on the case of *Johnson* v. *Madras Railway Company* (1), where this very point was considered and decided. In that case the argument advanced before me by learned counsel for the defendant had been advanced by the Advocate-General of Madras and was over-ruled by the Court, and the learned Judges held that the word "representative" in Act 13 of 1855 meant and included all or any of the persons for whose benefit a suit under the Act could be maintained. At one time I was inclined to doubt the correctness of the decision in the Madras case, but on further consideration I have definitely come to the conclusion that the Madras decision is right and I should follow it.

In my view the word "representative" in Act 13 of 1855 has a special meaning of its own. It has not the same meaning as "legal representative" in the Civil Procedure Code. It seems to me that the intention of the legislature was that in the absence of an executor or administrator any one or more of the persons for whose benefit the right of action was given should be deemed to be a "representative" of the deceased for the purpose of maintaining a suit under the Act. I do not think the word "representative" in the Act can be treated as mere surplusage in the case of Europeans and Eurasians. It could not have been intended that in such a case, where there is no executor or administrator, the persons for whose benefit the right of action was given should be without a remedy. I hold the plaintiffs are the representatives of the deceased within the meaning of the Act and are entitled to maintain the suit. I do not think there is much substance in the further objection made by counsel for the defendant that the suit had not been brought for the benefit of all the persons for whom it should have been brought.

On the plaint as amended it is clear that the children of the deceased are making no claim for damages at all and as all the persons for whose benefit the suit should have been brought are the plaintiffs before me and no further action can be brought in respect of the same subject-matter of the complaint the purpose of the Act has been served and I hold that the plaint substantially complies with the requirements of the statute. I must not however be understood to say that I approve of the way in which the plaint in this suit has been drawn. In my view a plaint in a suit under the Fatal Accidents Act has to be very carefully drawn and should give full particulars of the person or persons for whom or on whose behalf the action has been brought and of the nature of the claim in respect of which damages are sought to be recovered. I do not approve of the plaint in this suit but I cannot go to the extent of saying that it does not disclose a cause of action or that the plaint should not be entertained at all. Issue 8 deals with the question of damages recoverable by the plaintiffs in the event of their succeeding in the suit. In my opinion, the plaintiffs are not entitled to claim the funeral expenses or the expenses alleged to have been incurred in the police Court and if I had been disposed to make a decree in the suit I would have awarded a sum of Rs. 2,000 as compensation to be paid to the plaintiff, Mrs. Esther Virginia Penheiro. The suit will be dismissed with costs, including reserved costs.

V.S. *Suit dismisssd.*

1. (1905) 28 Mad 479=15 M L J 363.

* A. I. R. 1934 Calcutta 659

MITTER AND MCNAIR, JJ.

S. M. Khatumennessa Bibi: In re.

Civil Petn. Decided on 21st February 1934.

*** Civil P. C. (1908), S. 149 — Inability to raise money is not sufficient ground for permitting payment of deficit court-fee— Court-fees Act (1870), S. 4.**

Where an appellant deliberately and to suit his own convenience pays on his appeal an insufficient court-fee, the Court is not bound to receive the appeal and give the appellant time to make good the deficiency. Thus inability to raise money is not sufficient reason for the exercise of discretion vested in Court under S. 149: *A I R* 1914 *Bom* 249; *not Foll*; (*Case law discussed.*) [P 660 C 1, 2]

D. N. Bagchi and *Nilmani Goswami* —for Petitioner.

Mitter, J.—This matter comes before us for consideration as to whether in the exercise of our discretion under S. 149, Civil P. C., we should allow the appellant to put in the deficit court-fees. It appears that the appeal was filed with a court-fee of Rs. 2 only, whereas the court-fee payable is a much larger sum of Rs. 975, according to the Stamp Reporter's report. The ground as to why the appeal was filed with an extremely inadequate court-fee of Rs. 2 only, is set out in para. 5 of the petition of the appellant. It states that the said appeal was filed on affixing a court-fee of Rs. 2 only, as the petitioner could not, in spite of all her attempts, raise money to pay for the full court-fee, inasmuch as almost all her landed properties were covered by the mortgage decree, and that she had no other means left to meet the same. In other words the petitioner pleaded poverty and her inability on that ground to pay the court-fees on the day the memorandum of appeal was presented. It has been argued on behalf of the appellant that this a circumstance which ought to induce us to exercise our discretion for giving some time to the appellant to put in the amount of deficit court-fee; and it is stated that by reason of the provisions in the new S. 149 of the Code of 1908 the appellant is entitled to ask us to exercise the said discretion, in the circumstances of the present case. In this connexion, reliance has been placed on a decision of the Bombay High Court in the case of *Achut Ramchandra Rai* v. *Nagappa Bab Balgya* (1). That decision no doubt supports the contention of the appellant.

The learned Judges in that case took the view that having regard to change in the Code of 1908, the words of limitation which existed in S. 582-A in the old Code of 1882 having been removed, the legislature by the new provisions intended that the Court should have a free and unshackled discretion in this matter and that there was no ground for holding that S. 149 must be restricted to cases where there was a bona fide misunderstanding of the law as to valuation. There is no decision of this Court on this point. It may be pointed out that all the other High Courts in India have dissented from the Bombay view. Reference may be made in this connexion, to a decision of the High Court of Madras in the case of *Narayana Rao* v. *Seshamma* (2). The Madras High Court has gone so far as to hold that the new S. 149 as interpreted by the Bombay High Court has not been correctly understood. The learned Judges observed thus,

"Then we come to the present Code which for S. 582-A substituted a new S. 149 not confined to memorandum of appeals but giving the Court a discretion in all cases to allow the payment of the fee at any time. This, in our opinion, is the section which governs the present case, and with respect we are not satisfied as to the correctness of the ruling in *Achuta Ramchandra* v. *Nagoppa Bab Balgya* (1) that under the present Code O. 7, R. 11 is rendered applicable to memoranda of appeals by S. 148 so as to make it incumbent upon us to admit memoranda out of time where the conditions of the rule are complied with."

The same view has been taken in a decision of the Patna High Court, in the case of *Ram Sahay Ram Pande* v. *Lakshmi Narain Singh* (3). Sir Edward Chamier, Chief Justice and Mullick, J., held in that case, that where an appellant has deliberately, and to suit his own convenience, paid on his appeal an insufficient court-fee, the Court is not bound to receive the appeal and give the appellant time to make good the deficiency. Even if the Court has power to receive such an appeal, and allow time for the deficiency to be made good, it would be an unreasonable exer-

1. A I R 1914 Bom 249=21 I C 337=38 Bom 41.
2. A I R 1915 Mad 426=26 I C 33.
3. A I R 1917 Pat 26=42 I C 675=3 Pat L J 74.

cise of its jurisdiction to do so. At p. 76 of the report (3 *Pat. L. J.*) of the learned Judges observed:

"Section 149 of the present Code takes the place of S. 582-A of the Code of 1882 and vests a very wide discretion in the Court, but in my opinion S. 149 should not be construed in such a way as to nullify the express provisions of S. 4, Court-fees Act. When the amount of the court-fee payable is open to doubt, or the amount of the fee cannot be ascertained by the Court till the record is received, or it appears that the appellant has made an honest attempt to comply with the law, the Court may properly receive the appeal and allow time for the deficiency, if any, to be made good. In the cases before us the appellants have deliberately, and to suit their own convenience, paid on their appeals insufficient court-fees, in fact they had paid only a small fraction of the fees which they admit are payable by them. In such cases the Court is not, in my opinion, bound to receive the appeal and give the appellant time to make good the deficiency. Assuming that the Court has power to receive these appeals, and allow time for the deficiency to be made good, I think we should be exercising our discretion in an unreasonable manner if we were to do so."

The Bombay High Court evidently overlooked the provisions of S. 4, Court-fees Act, which runs as follows:

"No document of any of the kinds specified in Schs. 1 or 2 to this Act annexed, as chargeable with fees, shall be filed, exhibited, or recorded in, or shall be received or furnished by any of the said High Courts in any case coming before such Court in the exercise of its extraordinary original civil jurisdiction; or in the exercise of its extraordinary original criminal jurisdiction; or in the exercise of its jurisdiction as regards appeals from the judgments, other than judgments passed in the exercise of the ordinary original civil jurisdiction of the Court, of one or more Judges of the said Court, or of a Division Court; or in the exercise of its jurisdiction as regards appeals from the Courts subject to its superintendence; or in the exercise of its jurisdiction as a Court of reference or revision; unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document."

The language of this section, as was pointed out in an early decision of this Court, in the case of *Lakhi Narain Jogdeb* v. *Kirtibas Das* (4), is imperative and enacts that no document shall be received unless it bears court-fees of the requisite value. It is true that subsequently S. 149 has been introduced in the Civil Procedure Code, and S. 149 undoubtedly vests in the Court a discretion as to whether appeals filed with insufficient court-fees should be allowed to be received when proper court-fees are paid within the time allowed by the Court. The question is one of discretion and should be exercised on correct judicial principles, as has been indicated in a recent decision of their Lordships of the Judicial Committee of the Privy Council in the case of *Faizullah Khan* v. *Mauladad Khan* (5). In that case, it was pointed out by Lord Shaw in delivering the judgment, that in the special circumstances, that case was pre-eminently one for the exercise by the judicial authority of the discretion for giving an opportunity to add to the amount lodged the extra amount required or for deferring the question of the amount of fee under the Court-fees Act until final value was ascertained. That was an appeal from a decree with regard to accounts. Then their Lordships referred to S. 149, Civil P. C., and said:

"It will be observed that that discretion extends to the whole or any part of any fee prescribed, and can be exercised at any stage in the case, while finally, upon the extra payment being made, then the document is to have the same effect as if it had been paid in the first instance."

It can hardly be said that the discretion should be exercised in a case where the ground urged is that of mere inability to pay the requisite court-fees on the day the memorandum of appeal was presented to this Court. The Allahabad High Court has also taken the same view. Sir Shah Muhammad Sulaiman, the Acting Chief Justice, in the case of *Brijbhushan* v. *Tota Ram* (6) held that a Court is not bound to accept a memorandum of appeal when it has been brought to its notice that the memorandum is insufficiently stamped. The concession contemplated by S. 149, Civil P. C., cannot be claimed as of right. No doubt, the learned Chief Justice proceeds to observe, that if an insufficiently stamped memorandum of appeal is accepted by inadvertence, time may be given to the appellant to supply the deficiency. But if the Court is aware ab initio of the insufficiency of the stamp, it ought to return the memorandum to the appellant in order that he may, if the case admits, represent it properly stamped and apply for an extension of time under S. 5, Lim. Act; and the learned

4. (1913) 19 I C 971.

5. A I R 1929 P C 147=117 I C 493=56 I A 232=10 Lah 737 (P C).

6. A I R 1929 All 75=118 I C 228=50 All 980

Judge refers to the practice of some junior vakils of the Allahabad High Court, to file appeals with insufficient court-fee stamps, knowing that they are insufficient with a view to save limitation. The learned Judge further proceeds to observe that such deliberate attempts to get round the provisions of the Court-fees Act should not be tolerated. The same view has been taken by the Lahore High Court, and the latest decision is the decision of a single Judge of that Court, which refers to the earlier decisions. It is reported in the unauthorized reports of *A. I. R.* 1927 *Lah.* 884, where Jafar Ali, J., after pointing out that where the appellant's counsel acted with gross negligence in valuing the appeal, and thus it was presented with insufficient court-fees and the deficit was made good beyond limitation, held that the delay in making good the deficiency that occurred in consequence of clear negligence, cannot be condoned; and referring to the Bombay decision said,

"that the appellant's counsel relied on the Bombay case, but the charitable view taken in that case had not been followed by any other High Court including our own, and it was dissented from in the case of Madras High Court to which reference has already been made."

The Court of the Judicial Commissioner, Nagpur, has also taken the same view in a recent case in *Shyamlal* v. *Gourishankar*, *A. I. R.* 1929 *Nag.* 294. We think therefore that the ground which was put in para. 5 of the petition of the appellant in the present case, viz., inability to raise funds, is not a sufficient ground which would entitle us to exercise our discretion. But having regard to the Bombay decision and there being no clear authority so far as this Court is concerned, we, in the special circumstances of the present case consider that we should exercise our discretion and allow time to the appellant to put in the deficit amount of court-fee within a fortnight from this date. There is another prayer in this application which is based on an allegation made, in para. 11, that the petitioner Khatumennessa Bibi has been suffering from mental infirmity, and as the guardian ad litem appointed in the lower Court has declined to act as next friend in this Court, she may be permitted to be represented in this appeal by her relation Rashed Ali Mallik as her next friend. We grant this prayer and direct that Rashed Ali Mallik is allowed to prosecute this appeal on behalf of the said petitioner Khatumennessa Bibi.

McNair, J.—I agree.

v.s. *Order accordingly.*

A. I. R. 1934 Calcutta 661

MALLIK, J.

Jatindra Kumar Chakravarty—Auction-purchaser—Petitioner.

v.

Chandra Kumar Roy and *others*—Opposite Parties.

Civil Rules Nos. 1184 to 1186 of 1933, Decided on 13th February 1934.

(a) Bengal Tenancy Act (8 of 1885), Ss. 26-F and 144 (3) — Application under S. 26-F is to be made to that Court to which suit for possession of tenure holding would lie.

Where the holdings are within the jurisdiction of Court *A*, but these holdings are sold by Court *B* in execution of a decree for money, an application on behalf of the landlord for the exercise of his right of pre-emption under S. 26-F is to be made to Court *A* for by virtue of S. 144 (3) that is the Court to which a suit for the possession of the tenure holding would lie. [P 662 C 1]

(b) Bengal Tenancy Act (8 of 1885), S. 26-F — Landlord filing application and ready with challans—Challans passed next day—Held application was in order.

An application under S. 26-F was filed by a landlord. Along with his application the landlord produced challans in triplicate and was ready with the money. However the challans were passed the next day.

Held: that the landlord did all that he had under the law to do and therefore the application was in order. [P 662 C 2]

Atul Chandra Gupta, *Apurba Charan Mukherji* and *Manmatha N. Das Gupta*—for Petitioner.

Brojo Lal Chakravarti, *Romesh Ch. Sen*, *Birendra K. De*, *Nani Gopal Das* and *Romaprosad Mukherji*—for Opposite Parties.

Judgment.—These three Rules are directed against three orders made by the Munsif of Nabinagar in the District of Tippera by which three applications made on behalf of the landlords for the exercise of their right of pre-emption under S. 26-F, Ben. Ten. Act, were granted. The three holdings in connection with which the applications were made were all within the Nabinagar Munsifi. The holdings however had been sold by the Munsif, first Court, Brahmanberia, in execution of a decree for money exceeding Rs. 1,000. When the applications under S. 26-F were filed

before the Munsif of Nabinagar the landlords were ready with the money that was required by law to be deposited along with challans in triplicate. For some reason or other the challans could not be passed on that date but were passed on the next working day. When the applications were considered there was opposition coming from the side of the auction purchasers and the applications were resisted on two grounds. The two grounds were (1) that the Nabinagar Munsif had no jurisdiction to entertain the applications and (2) that in view of the provisions of S. 26-F, sub-S. 2, the learned Munsif ought to have dismissed the applications then and there in view of the fact that no deposit had at that time been actually made. Both these points were negatived by the Munsif and the learned Munsif as I have observed at the out-set granted all the three applications of the landlords. It is against these orders granting the applications that the present Rules are directed.

The two points which were taken in the Court below were also taken before me. I am clearly of opinion that there is not much substance in either of them. On behalf of the petitioner it was contended that the word "Court" mentioned in S. 26-F is the Court referred to in S. 26-F, Ben. Ten. Act. There is, however no authority for this view of the matter. On the other hand, the provisions of S. 144, sub-S. 3, Ben. Ten. Act, seems to me to be clear on the point. Under that section applications like those in the present case have to be made

"to the Court which would have jurisdiction to entertain suits for possession of the tenure or holding in connection with which the applications are made;"

that is to say, to the Court to which a suit for the possession of the tenure or holding in question would lie. As stated before all the three holdings were within the jurisdiction of the Nabinagar Munsifi and none of them was of a value exceeding Rs. 1,000. That being so, and remembering the provisions of S. 15, Civil P. C., the Court of the Nabinagar Munsif was, in my opinion, the proper Court to entertain the applications in the present case. If the sales had been held by the Munsif, first Court, Brahmanberia, it was apparently because the Munsif, First Court, Brahmanberia, was an officer having special powers to try suits up to the limit of Rs. 2,000 and the decree in execution of which the sales have taken place was for an amount of money exceeding Rs. 1,000.

The second point was, as I have said before, that the learned Munsif in view of the provisions of S. 26 F, sub-S. 2, Ben. Ten. Act, ought to have dismissed all the three applications when the money that was required to be deposited had not been actually deposited. It appears, however, that along with their applications the landlords produced challans in triplicate and were ready with the money that was required under the provisions of this Act. The landlords in the circumstances did all that they had under the law to do and if they did all that they had to do towards making a deposit what they actually did on the date when the applications were filed was in my judgment a deposit that was contemplated by the law to have been made by the applicants. It is to be remembered in this connection that these applications were made long before the last date for making them. It is to be remembered also that the learned Munsif after registering the applications permitted the money to be deposited which was nothing more than an office procedure for passing the challans. As I have observed at the outset there is no real substance in either of the two points which were urged before me on behalf of the petitioners. I would therefore discharge all the three Rules with costs, the hearing fee being assessed at one gold mohur in Rule No. 1184 and one gold mohur for the other two Rules.

V.S. *Rules discharged.*

A. I. R. 1934 Calcutta 662

COSTELLO, J.

Baikuntha Chandra Saha and *another* —Purchasers—Petitioners.

v.

Shamsul Huque and *others*—Opposite Parties.

Civil Rule No. 1369 of 1933, Decided on 22nd March 1934.

(a) Bengal Tenancy Act (1885), S. 26-F— No notice served on some landlords under Ss. 26-C and 26-E — Even such landlords have right of pre-emption — Right must be

exercised within reasonable time from knowledge of sale.

Section 26-F gives the right of pre-emption not only to those landlords on whom notices have been issued but also to those on whom notices have not been issued under S. 26-C or S. 26-E but who claim to be the landlords of the occupancy holding; the right to be exercised within a reasonable time of the knowledge of the sale : *A I R* 1932 *Cal* 289, *Foll.*

[P 664 C 1, 2]

(b) Bengal Tenancy Act (1885), Ss. 26-F and 188—Between S. 26-F and S. 188 latter is govering section—All cosharer landlords are necessary parties to application for pre-emption.

There are apparent inconsistencies between S. 26-F (4) (a) and the provisions of S. 188, but the governing section is S. 188 as there the provisions are precise and clear. It is therefore necessary that all the cosharer landlords should be in the proceeding either as applicants or as parties defendant : *AI R* 1933 *Cal* 460, *Foll.*

[P 665 C 1]

Phani Bhusan Chakraburty and *Kalipada Chakraburty*—for Petitioners.

Abdul Hossain—for Opposite Parties.

Order.—Although the amount at issue in this matter is very small the case raises one or two points of considerable interest and indeed of some public importance. The rule was directed against an order of the Munsif, 4th Court of Narayangunj, dated 19th June 1933, whereby he allowed an application made under S. 26-F, Bengal Tenancy Act. The application was made by three persons : Samsul Huque also known as Arman Meah, Kurchhia Akhtar Bibi and Khosa Akhtar Khatun. The first two were the son and daughter of a man named Sahebdi Sarkar and the third was one of his widows. It appears that he also left another widow named Ahladi. As respondents to the application or, to use the expression which appears in S. 188, Bengal Tenancy Act, as parties defendant to the application, a number of other persons were described as the representatives in law of the two brothers of Sahebdi Sarkar who had been cosharers with him in respect of the holding with which the application was concerned.

The present petitioners Baikuntha Chandra Saha and Prasanna Chandra Saha were also respondents to the application as being the transferees of the holding in question, they having purchased that holding at a sale held in execution of a decree in the second Court of the Subordinate Judge of Dacca. The price paid was Rs. 110 and the two Sahas as transferees had duly deposited on 5th July 1932, the landlord's fee of Rs. 33-1-0, the transmission fee of Rs. 3 6-0 and the procees fee of Re. 1 for serving notices, making in all a sum of Rs. 37-7-0. That was done in accordance with the provisions of S. 26-C, Bengal Tenancy Act. As the sale had taken place in execution of a decree the matter fell within the purview of S. 26-E, Bengal Tenancy Act, and the application was therefore made subject to the provisions of sub-S. (1), S. 26-F as regards the time within which such an application ought to be made. The Sahas as the transferees of the holding contended at the hearing that the application was out of time in that it had not been made within two months of the service of notice as mentioned in that sub-section. They also contended that the application was not in order by reason of the provisions of S. 188, Bengal Tenancy Act, on the ground that although it was an application for pre-emption made by cosharer landlords the whole of the landlord's interest was not fully represented by the persons who were parties to the proceedings either as applicants or as parties defendant.

Mr. Phanibhusan Chakraburty, who appeared in support of this rule, put before me a very able and cogent argument on both these points but as regards the first point he accepted the interpretation which I was disposed to put upon S. 26-F and ultimately conceded that my opinion was confirmed by a decision of Mitter, J., in the case of *Suryya Kumar Mitra* v. *Munshi Noabali* (1). It should be observed that the application was filed on 7th March 1933, by three applicants who were described by the Munsif as "minors and females". No notice such as is referred to in S. 26-F had been served on these cosharer landlords at all, but in some manner or other the fact that a transfer had taken place evidently came to their knowledge and they made this application within about six months from the time when notices had been served on some of the other cosharer landlords. Mr. Chakraburty was first disposed to argue and of course rightly from the point of view of his clients either that unless a notice was served the landlords could not make an application at all or that if a notice was served on some cosharer landlords the

1. A I R 1932 Cal 289=136 I C 871=59 Cal 15.

other cosharer landlords would be out of time after the lapse of the two months prescribed by S. 26-F. Mr. Chakraburty agrees however that there is a lacuna in the provisions of S. 26-F in that the section does not in terms indicate what is to be the position of cosharer landlords in circumstances such as the present where they receive no formal notice as required by the Act but happen to hear of the transfer from some other source.

I took the view and, as I have stated, my opinion is supported by that of Mitter, J., in his judgment in the case to which I have just referred that the only reasonable and equitable construction to be put upon the section is that where no notices are served the landlord can exercise his right to make an application for pre-emption within a reasonable time of the fact of the transfer coming to his knowledge. I pointed out to Mr. Chakraburty that the real purpose of S. 26-F is to give to a landlord the right to apply for what ls usually called pre-emption. It is to be noticed that the provision with regard to time within such an application is to be made is interpolated between two portions of the sentence which confers a right to apply, the language being in these terms:

"The immediate landlord of the holding or the transferred portion or share may, within two months of the service of notice issued under S. 26-C or S. 26-E, apply to the Court that the holding or portion or share thereof shall be transferred to himself."

It would of course have been much clearer if the section had read something like this: the immediate landlord of the holding or the transferred portion or share may apply to the Court that the holding or portion or share thereof shall be transferred to himself and a proviso added to some such effect as this: provided always that such an application shall be made within two months of the service of notice issued under S. 26-C or S. 26-E or within a reasonable time of the immediate landlord having knowledge of the transfer. Mitter, J., in the course of his judgment in the case *Surya Kumar Mitra* v. *Munshi Noabali* (1) said:

"The Act does not make any provisions with regard to cases where no notice has been issued on persons who claim to be the landlords of the occupancy holding which has been sold as contemplated by S. 26-C or S. 36-E. In such a state of things, I think it would be right to construe the section as giving the right of pre-emption not only to those landlords on whom notices have been issued but also to those on whom notices have not been issued under S. 26-C or S. 26-E but who claim to be the landlords of the occupancy holding—the right to be exercised within a reasonable time of the knowledge of the sale."

With the view stated in that passage I entirely agree. As regards the second point raised by Mr. Chakraburty it would indeed appear from the plain language of S. 188, Bengal Tenancy Act, that if one or more of a number of cosharers desire to make an application under S. 26-F, Bengal Tenancy Act, they must make all the other cosharers parties defendant to the proceeding. Sub-S. (1) of that section runs thus:

"Subject to the provions of S. 148-A, where two or more persons are cosharer landlords, anything which the landlord is under this Act required or authorised to do must be done either by both or all those persons acting together or by an agent authorized to act on behalf of both or all of them: Provided that one or more cosharer landlords if all the other cosharer landlords are made parties defendant to the suit or proceeding in manner provided in sub-Ss. (1) and (2), S. 148-A and are given the opportunity of joining in the suit or proceeding as co-plaintiffs or co-applicants, may (i) file an application under sub-S. (1), S. 26-F or under S. 26-J."

Had that section stood entirely alone or had there been no other provisions in the Act dealing with a point of this kind the matter would be beyond question. Mukherji and Guha, JJ., in the case of *Barkatulla Pramanik* v. *Ashutosh Ghose* (2), held that where an application for pre-emption under S. 26-F had been made by one cosharer landlord without making the other cosharers parties defendants to the proceeding and without framing the application in such a way as to give them an opportunity to join in the application even though the names of the other cosharers had been stated and their shares had been specified in the body of the petition, the application was not competent and was barred by reason of the provisions of S. 188, Bengal Tenancy Act. Some difficulty however is created by reason of the provisions of sub-Cl. (c), sub-S. (4), S. 26-F which says that:

"Where an application has been made by a cosharer immediate landlord under sub-S. (1), any of the remaining cosharer landlords, including the transferee, if one of them, may, within the period of two months referred to in that sub-section or within one month of the application, whichever is later, apply to join in

2. AIR 1933 Cal 460=145 I C 121.

the application of the cosharer immediate landlord aforesaid, and any cosharer landlord who has not applied under sub-S. (1) or has not applied to join under this sub-section shall not have any further power of purchase under this section."

Sub-clause (b), sub-S. (4) says:

"The application to join as a co-applicant shall be granted, if within such period as the Court may fix not exceeding beyond the period referred to in sub-S. (4) (a) the applicant deposits in Court for payment to the cosharer landlord who has made the application under sub-S. (1), such sum as the Court shall determine as the share to be paid by him for the purposes of sub-S. (2)."

Then sub-S. (5) deals with the situation that arises if the deposits are made. It seems to me that the expression in sub-S. (4) (a) "apply to join in the application of the cosharer immediate landlords" scarcely accords with the provisions of S. 188. The original application could only have been made if the cosharer landlords were made parties defendant. The phrase "apply to join in the application" scarcely seems to indicate that the cosharer landlords have already been made parties in the proceeding as defendants or, as I should prefer to say, respondents to the application. It looks very much as if this is another instance of the many inconsistencies and indeed contradictions to be found in the Bengal Tenancy Act. Both the points raised in these proceedings might very well receive the attention of the legislature if a remedy is contemplated by way of amending or redrafting any of the provisions of the Bengal Tenancy Act. It is not necessary for the purpose of these proceedings that I should attempt to reconcile definitely the apparent inconsistencies between S. 26-F (4) (a) and the provisions of S. 188. I think however that I must take it that the governing section is S. 188 as there the provisions are precise and clear.

It does not appear that in the case to which I have just referred *Barkatulla Pramanik* v. *Ashutosh Ghose* (2) the attention of the Court was particularly directed to the provisions of S. 26-F (4) (a). In the present instance I should have been prepared to hold that at any rate it is necessary that all the cosharer landlords should be in the proceeding either as applicants or as parties defendant. Mr. Chakraburty has argued that it is upon that footing that the present proceedings were not in order or, to use the words employed by Mukerji, J., and Guha, J., "the application as framed was not fit to be entertained at the time of the trial." If that in fact had been the position it might have been reasonable that I should have held that the learned Munsif was not competent to deal with the application at all unless and until the applicants had put the proceeding in proper shape and fully complied with the provisions of S. 188. But upon a careful and indeed searching consideration of the judgment given by the Munsif and having heard all that Mr. Chakraburty on one side and Mr. Abdul Hossain on the other had to say as regards the facts of the case I am disposed to come to the conclusion that the learned Munsif was satisfied that the whole of the landlord's interest in the holding transferred was represented by the persons who are parties in the proceeding. The position was this: The holding originally vested in Sahebdi Sarkar, Mahammed Abu Sarkar and Asamadi Sarkar, three brothers. The applicants, as I have stated, were the representatives of Sahebdi Sarkar and the parties defendant other than the two transferees were Mohammad Abu Sarkar himself and the heirs and representatives of Asamadi Sarkar. On the face of it it would appear that the whole of the interest of the three brothers was represented in the proceedings.

It is contended on behalf of the present petitioners Baikuntha Chandra Saha and Prasanna Chandra Saha as the transferees of the holding that there was an outstanding interest which was originally held by Ahladi as one of the widows of the first brother Sahebdi Sarkar. The applicants' case was first of all that this widow had died and that her heir was a man named Mahomed Abu—a nephew. They also seem to have made a case at some stage of the trial that even if Ahladi's interest had not passed to Mahomed Abu she had made a gift of it by a deed to a man named Sarafat who was one of the respondents in the proceedings. As regards this matter the learned Munsif said:

"It is true that one of the widows of Sahebdi was Ahladi and that she was an heir. But she is dead and the opposite parties say that one Mahomed Abu is her heir. Petitioner's case is that she made a gift of her share to Sarafat and a copy of a registered deed of gift was filed but

could not be proved owing to absence of attesting witness. There is no convincing evidence that Mahomed Abu is Ahladi's heir and the opposite parties also did not cause any notice to be served upon him"

actually he said they had not caused any notice to be served upon him or Nabin Saha. I am not concerned with Nabin Saha at all.

"That would show to some extent that they could not be believed to be cosharers, though had they been cosharers it would have been incumbent to make them parties notices or no notices."

Then he said: "Thus I hold that the application is not barred under S. 188, Ben. Ten. Act." Now endeavouring to look into the mind of the learned Munsif as far as one can do anything of the kind, and having regard to what has been said by the learned Advocates respectively I have come to the conclusion that what the learned Munsif really meant was this: It had been contended that the interest of Ahladi, which was a very small share indeed amounting only to 1/48th had either passed to the person who, the applicants said, was her heir or it had been transferred by her to Sarafat. The Munsif then took the view that the applicants themselves could not base their case upon Mahomed Abu being an heir and as they had not attempted to suggest that the lady had any other heir he could only come to the conclusion that she in fact had no heir. He disposed of the suggestion that there had been a gift to Sarafat by saying that it had not been proved. In any case that is of small importance, because if it had been proved that there had been a gift to Sarafat he undoubtedly was one of the persons who were on the Record. He seems to have been of opinion that if in fact, the lady had had any heir other than Mahomed Abu then the applicants would undoubtedly have raised the point. The munsif, in my judgment, must have come to the conclusion that the lady died without heirs and that therefore her interest in the holding had fallen back into the family, if I may so put it, and had become vested in the other representatives of her late husband Sahebdi. In these circumstances the learned Munsif held that all the representatives of the interest originally vested in the three brothers were on the record and that therefore the proceedings were in order.

In the result, having regard to the view I have expressed with regard to S. 188 as well as S. 26-F, concerning the time limit the matter is really concluded by the findings at which the learned Munsif arrived. This Rule must therefore be discharged with costs, hearing fee one gold mohur.

R.K. *Rule discharged.*

A. I. R. 1934 Calcutta 666

S. K. GHOSE, J.

Khudiram Kundu—Petitioner.

v.

Surendra Mohan Chakraburty and *another*—Opposite Parties.

Civil Rule No. 109 of 1934, Decided on 7th June 1934, from order of Dist. Judge, Pabna and Bogra, D/- 3rd January 1934.

(a) Bengal Village Self-Government Act (1919), S. 93—S. 93 does not affect powers of High Court under Civil P. C. (1908), S. 115 and Government of India Act (1920), S. 107.

The provision in S. 93 does not affect the powers of the High Court as derived from S. 115, Civil P. C., and S. 107, Government of India Act. [P 667 C 1]

(b) Bengal Village Self-Government Act (1919), S. 81—Time to move application for transfer must be granted.

Under S. 81, the Union Court is bound to give the defendant an opportunity to move the application for transfer inspite of the objection of any other party to the suit. [P 667 C 1]

Jatish Chandra Banerjee—for Petitioner.

Nilmoni Goswami for *Woopendra Nath Neogi*—for Opposite Parties.

Judgment. — The petitioner in this rule is defendant 2. A suit was brought against two defendants by the plaintiff opposite party 1 in the Baliaghata Union Court, District Bogra, being Suit No. 110 of 1933. On the allegations made in the petition, the suit appeared to be one for recovery of arrears of rent which under S. 75, Bengal Village Self-Government Act, would not lie in a Union Court. On 12th November 1933, before the suit was actually brought to a hearing, the petitioner, defendant 2, made an application under S. 81 of the Act for time in order to move the petition for transfer. But the Union Court refused the application on the ground that it was objected to by defendant 1 because he being a poor man would not be able to conduct the case at Bogra. Thereafter the Union Court decreed the

suit. The petitioner filed a motion before the District Judge, but it was summarily rejected. It is contended for the opposite party in this Court that the present application under S. 115, Civil P. C., and S. 107, Government of India Act, would not lie because by S. 93, Bengal Village Self-Government Act, the provisions of the Civil Procedure Code, would not apply to any suit before the Union Court. This provision however does not affect the powers of the High Court as derived from S. 115, Civil P. C., and S. 107, Government of India Act.

On the merits of the application it does not appear that the learned Judge at all considered the question whether there was any failure of justice. Under S. 81 of the Act, the Union Court was bound to give defendant 2 an opportunity to move the application for transfer inspite of the objection of defendant 1. In these circumstances, the rule must be made absolute, the orders complained against must be vacated, and the suit will be transferred to the Court of the Musif at Bogra for trial. The petitioner will get his costs of this rule, hearing fee one gold mohur.

V.S. *Rule made absolute.*

A. I. R. 1934 Calcutta 667

MALLIK, J.

Abdul Aziz and *others* —Plaintiffs—Petitioners.

v.

Rahimullah and *others* — Opposite Parties.

Civil Rule No. 545 of 1933, Decided on 14th February 1934, from decree of Second Court Sub-Judge, Chittagong, D/- 7th January 1933.

Contract Act (1872), S. 70—*A* holding tenure of *B*—Rent decree obtained against *B* by superior landlord and tenure sold—*A* making deposit to avoid sale—*A* is entitled to contribution from *B*—Contribution.

A had a raiyati holding at a fixed rate in a tenure of *B*. In execution of a rent decree obtained by the superior landlord against *B* the tenure was put up to sale and was sold. *A* deposited the decretal money plus 5 per cent. of that amount and thereby had the sale set aside. *A* then instituted a suit for contribution against *B*:

Held, that as *A* had a lawful insterest in making the payment and by which *B* was benefited, *A* was entitled to contribution from *B*. *AIR* 1922 *Cal* 353, *Dist.* [P 667 C 2]

Narendra K. Das—for Petitioners.

Chandra S. Sen and *Durgesh Prosad Das*—for Opposite Parties.

Judgment. — This Rule is directed against an order made by the Subordinate Judge, Second Court, Chittagong, exercising Small Cause Court powers whereby the petitioners' suit for contribution was dismissed. The facts on which the petitioners brought the suit were briefly these. The petitioners had a raiyati holding at a fixed rate in a tenure of the principal defendants. In execution of a rent decree obtained by the superior landlord against the principal defendants the tenure was put up to sale and was sold. The petitioners who as stated before had a raiyati holding at a fixed rate in the tenure deposited the decretal money plus 5 per cent. of that amount and thereby had the sale set aside. On these facts the plaintiffs instituted a suit for contribution against the principal defendants; namely, the tenure holders and it was the dismissal of that suit that has given rise to the present Rule.

The ground on which the learned Judge dismissed the plaintiffs' claim was that the payment made by the petitioners was a voluntary one and that being so, according to the learned Judge the petitioners were not entitled to have any decree in the case. The finding of the learned Judge is, in my opinion, an erroneous one. There is, in my judgment, no getting over of the provisions of S. 70, Contract Act, in the present case. There cannot be any doubt and indeed it has been found by the learned Judge that by the payment made by the petitioners the principal defendants were benefited. On behalf of the opposite party it was urged that the petitioners had no lawful interest in making the payment and in support of this contention reliance was placed on the decision of this Court in the case of *Gopeswar Banerji* v. *Brojo Sundari Debi* (1). The Calcutta case *Gopeswar Banerji* v. *Brojo Sundari Debi* (1) is in my judgment clearly distinguishable. In that case the payment had been made by a reversioner and as I understand the judgment in that case the reversioner was held not to have a lawful interest in making the payment for the reason that the interest which he had was only

1. AIR 1922 Cal 353=67 I C 40=49 Cal 470

an expectant interest, interest which the reversioner may never have been able to realise. The interest which the petitioners in the present case had was certainly not an interest of that kind. Their interest was an existing interest and when in addition to that it is remembered that the payment made by the petitioners was an act done with the approval of the Court I am of opinion that the petitioners in the present case had a lawful interest in making the payment.

I would therefore make the Rule absolute with costs: hearing fee one gold mohur. The order of dismissal made by the lower Court will be set aside and the petitioners will get a decree for the decretal amount plus 5 per cent. of that amount against the principal defendants. The liability of each of the principal defendants will be in accordance with their respective share in the taluk in question which I am told by the learned Advocates on both sides can be ascertained from the record-of-rights.

V.S. *Rule made absolute.*

A. I. R. 1934 Calcutta 668

ROY, J.

Niladri Nath Mukherjee and *others*—Plaintiffs.

v.

Satis Chandra Mukherjee and *another*—Defendants.

Suit No. 2400 of 1930, Decided on 10th January 1934.

(a) Will—Construction of—Bequest by implication — Declaration that wife shall become owner of movable property and copyright in books to be reckoned as movables —No bequest of copyright held created.

An erroneous recital in a will amounting to a declaration that the testator supposed that a party who is referred to in the will, will be full owner is no evidence of an intention to give by the will and cannot be treated as a bequest by implication: *English law discussed.* [P 670 C 2]

The testator by Cl. 3 of his will provided as follows: "On my demise my wife shall become full (absolute) owner of my entire movable properties according to law. Consequently there is no necessity of any will in respect of the same also. The copyright in my books is reckoned among movable properties."

Held: that on a true construction of the will, there was no bequest of the copyright in the books by the will either expressly or by implication. [P 670 C 2; P 671 C 1]

(b) Limitation Act (1908), Art. 40—Infringment of copyright for period within three years of suit is not barred by limitation.

A claim to recover compensation in respect of infringement of copyright for a period within three years of the suit is not barred by limitation. [P 671 C 1]

(c) Copyright — Suit by coowner for compensation for infringement of copyright — Other co-owner joined alleging that principal defendant claimed to have licence from him—Order cannot be made against such coowner for account of moneys received by him—Co-owners.

N claimed damages from the principal defendant *S* for infringement of copyright. As to Defendant 2 who was a co-owner of the copyright, *N* merely alleged that *S* claimed to have obtained a license from defendant 2 to print, publish and sell the books. *N* however denied such license and alleged that, if given, was without authority.

Held: that there could be no order against defendant 2 for an account of the money received by him from *S* and as against him, the suit must be dismissed as without any cause of action. [P 669 C 1]

S. B. Sinha and *S. N. Rudra*—for Plaintiffs.

H. D. Bose, *S. R. Das Gupta*, *S. C. Roy Chowdhry* and *U. C. Laha*—for Defendants.

Judgment.—The plaintiffs are grandsons of the late Rai Bahadur Bankim Chandra Chatterjee, the well-known Bengali author and novelist, being the sons of his daughter Sreemati Nilabja Kumari Debi who died sometime in November 1910. The Second defendant is the sole surviving son of another daughter of the late Rai Bahadur, Sreemati Sarat Kumari Debi who died on 17th December 1927. The first defendant is the proprietor of the Basumati and the Basumati Press and carried on business as a book seller and publisher in Calcutta. The plaintiffs claim that they along with the second defendant became the owners of the copyright in certain books of the late Rai Bahadur Bankim Chandra Chatterjee on the death of Sarat Kumari Debi and they complain in this suit of an infringement of their copyright by the first defendant on and from 23rd December 1927. The only allegation made against the second defendant in the plaint upon which it might be suggested some relief could be claimed against the second defendant is to be found in para. 7. That paragraph runs as follows:

"The first defendant alleges that he has obtained licence from the second defendant to print, publish and sell the said books. The plaintiffs do not admit that the said licence

was given but if it was given in fact, they contend that the second defendant had and has no authority to grant the said licence without the consent of the plaintiffs."

The learned advocate for the second defendant has contended that the plaint as framed discloses no cause of action against his client and the suit should be dismissed as against him. It was submitted by counsel for the plaintiffs that on his present plaint he was entitled to ask for an account from the second defendant of the moneys which the second defendant had obtained from the first defendant by granting the licence mentioned in the plaint to the first defendant. In my view, the plaintiffs cannot obtain any decree in this suit against the second defendant for an account of the moneys realised by him from the first defendant against whom the plaintiffs claim damages for infringement. It is true that in prayer (d) of the plaint the plaintiffs have claimed discovery, accounts and inquries as to damages against the first and second defendants but I do not think any foundation has been laid in the plaint for any claim for an account of the moneys realised by the second defendant from the first defendant. The suit must therefore be dismissed against the second defendant. The first defendant has challenged the title of the plaintiffs to the copyright in the books and the first issue raised by the learned counsel for the first defendant namely "Have the plaintiffs any interest in the copyright of any of the books mentioned in the plaint ?" is the really important issue for decision. The plaintiffs claim title to the copyright in the books by inheritence and it is conceded that if by his will dated 23rd May 1890 the late Rai Bahadur Bankim Chandra Chatterjee had made no testamentary disposition of the copyright in his books in favour of his widow Sreemati Rajluckshmi Debi the plaintiffs and the second defendant jointly became the owners of the copyright on the death of Sreemati Sarat Kumari Debi. There is no dispute about the facts in the case. Rai Bahadur Bankim Chandra Chatterjee died on 8th April 1894 leaving a will dated 23rd May 1890. He left him surviving his widow Srimati Rajluckshmi Debi and his two daughters Srimati Sarat Kumari Debi and Srimati Nilabja Kumari Debi. Letters of administration to the estate of Bankim Chandra Chatterjee with copy of the will annexed were granted to Srimati Rajluckshmi Debi on 21st July 1894. In November 1910 Nilabja Kumari Debi died leaving her three sons, the present plaintiffs. On 19th August 1919 Srimati Rajluckshmi Debi died. By her will dated 2nd September 1894 and her Codicil dated 10th March 1907, probate whereof were granted by this Court on 25th November 1920, Srimati Rajluckshmi Debi bequeathed the copyright in her husband's books to her daughter Srimati Sarat Kumari Debi. Rajluckshmi Debi claimed to have got the copyright in the books herself by a bequest under the will of Bankim Chandra Chatterjee. On 19th September 1926, Sarat Kumari by a registered deed made a gift of the copyright in the books to the second defendant.

On 17th December 1927, Srimati Sarat Kumari died leaving the second defendant Brojendu Sunder Banerjee, her only surviving son and as I have already said the plaintiffs claim that on the death of Srimati Sarat Kumari Debi they became the owners of the copyright in the books along with Brojendu. On 27th December 1927, Mr. D. N. Gupta, a Solicitor acting under instructions from the plaintiffs wrote and addressed a letter to defendant 1 informing him that the plaintiffs had become entitled jointly with Brojendu to all the properties belonging to the estate of the late Rai Bahadur Bankim Chandra Chatterjee including the copyright in his books and requesting him not to make any payment to the second defendant in respect of the books without notice to the plaintiffs. It appears that the first defendant has been printing and publishing the books of Rai Bahadur Bankim Chandra Chatterjee for some time past pursuant to arrangements made with Srimati Rajluckshmi Debi and Srimati Sarat Kumari Debi. After the letter of 22nd December 1927 certain further letters passed between the Solicitors of the plaintiffs and the Solicitors of the second defendant to which no specific reference need be made. On 4th April 1928, there was an agreement between the first defendant and the second defendant where by the first defendant was given a licence to

print and publish the books mentioned in the plaint except the five books specifically referred to in para. 5 of the written statement. On 18th December 1930, the present suit was filed. The publication of the books by the first defendant from and after 23rd December 1927 has been complained of as an infringement of the plaintiffs' rights. It is not disputed that if by the will of Rai Bahadur Bankim Chandra Chatterjee the copyright in the books had not been bequeathed to Rajluckshmi Debi, the plaintiffs are rightly the owners of the copyright along with the second defendant. The question for determination therefore is whether or not on a proper construction of the will of Rai Bahadur Bankim Chandra Chatterjee there was a testamentary disposition of the copyright in the books mentioned in the plaint in favour of his widow Rajluckshmi Debi. Learned counsel for the plaintiffs has submitted that there are no words in the will indicating that the testator intended to make a gift of his movable properties or the copyright in his books by his will and that on the contrary the terms of Cl. 3 of the will made it clear that the testator did not consider it necessary to make any testamentary disposition in respect of those properties. The testator in Cl. 3, states that there was no necessity to make any will in respect of the movable properties as on his demise his widow would become full owner of the movable properties under the law. The widow undoubtedly under the law would be the owner of the movable properties left by her husband though her powers of disposal might be limited. Counsel for the first defendant has argued that the testator intended that his widow should have an absolute estate with full power of disposal in her lifetime and not simply a widow's estate in the movable properties, and as under the ordinary law she would have only a Hindu widow's estate the Court should hold that the testator by implication made an absolute gift or bequest of the moveable properties including the copyright to his widow by his will. Counsel submitted that the testator must have been under the impression that under the ordinary law his widow would get an absolute estate n the moveables with full power of disposal. I am by no means certain that the testator was under any such impression. It is true that in Cl. 3 of the will the testator says that on his demise his wife would become full owner of his movable properties according to the law, but it is hardly possible to argue from those words by themselves that the testator must have thought that a Hindu widow has an absolute estate in moveable properties with unlimited power of disposal. Be that as it may, what I have to ascertain is whether the testator by his will made a gift of the copyright in his books in favour of his wife either by express words or by implication. Learned Counsel on behalf of the plaintiff has cited various reported cases in which the question as to whether in the particular wills concerned there was a gift or bequest by implication or not had been considered and discussed. He has also drawn my attention to certain passages in Jarman on wills (7th Ed. at pp. 597, 600) I need however only refer to the case of *Adams* v. *Adams* (1) in which Vice-Chancellor Wigram laid down the principle of construction in these words:

> "The question in all these cases is whether the testator has actually made any gift; and the gift, if there be any, must be found either in express words or by implication. Where a testator, in one part of his will has recited that he had given a legacy to a certain person, but it has not appeared that any legacy was given, the Court has taken the recital as conclusive evidence of an intention to give by the will, and fastening upon it, has given to the erroneous recital the effect of an actual gift. Where however the testator says that only which amounts to a declaration that he supposes that a party who is referred to has an interest independent of the will, such a recital is no evidence of an intention to give by the will, and cannot be treated as a gift by implication. The distinction between the two cases is marked and obvious. In the former, the erroneous recital is evidence of an intention to give by the will, inadvertently not expressed".

In the latter, as it is expressed by Mr. Jarman:

> "Such recitals do not in general amount to a devise; for, as the testator evidently conceived that the person referred to possessed a title independently of his own, he does not intend to make an actual disposition in favour of such person."

1. (1842) 1 Hare 537 = 6 Jur 681 = 11 L J Ch 305.

The other cases cited were *Wright* v. *Wyvell* (2), *Wilson* v. *Morley* (3), *Hall* v. *Lietch* (4), *In re*: *Rowe Pike* v. *Hamlyn* (5) and *Haverty* v. *Curtis* (6). The principle laid down in the case of *Adams* v. *Adams* (1) has not been disputed in any of the cases cited. After carefully considering the matter I have come to the conclusion that the testator did not expressly or by implication make a gift by his will of the copyrights in the books to his widow Rajluckshmi Debi. That being my view, it follows that the copyright in the books formed part of the undisposed of residue and that the plaintiffs on the death of Srimati Sarat Kumar Debi on 17th December 1927 became entitled to the copyright in the books along with the second defendant Brojendu Sunder Banerjee. That disposes of the first two issues raised by counsel for the first defendant Satis Chandra Mukherjee. An issue was raised by counsel for the first defendant as to the maintainability of the suit and it was argued that having regard to the fact that the plaintiffs did not claim in their plaint any declaration of title to property, the present suit was not maintainable. I do not think there is any force in this argument and I decide the issue in favour of the plaintiffs. There was a further issue as to limitation, but as Counsel for the plaintiffs did not make any claim in respect of any infringement prior to three years before suit, the plea of limitation was not pressed; and I do not think there was any substance in the point. As regards the second defendant, I have already held that the plaintiffs are not entitled to any decree against him on the plaint as framed. That disposes of all the issues except the issue as to the exact reliefs that the plaintiffs are entitled to. It was not disputed that if the title of the plaintiffs to the copyright in the books were established there had been an infringement of copyright except with reference to the five books mentioned in para. 5 of the written statement. Counsel for the plaintiffs has given up the claim in respect of those five books. Counsel for the first defendant has conceded that there should be a reference as to damages and that an enquiry should be directed to ascertain the profits made by the first defendant by the publication and sale of the books mentioned in the plaint except the five books mentioned in para. 5 of the written statement and that the plaintiffs should get 3/4ths share of the profits. There will therefore be a reference to such officer as the Registrar may appoint. Counsel for the plaintiffs has in addition asked for an injunction in terms of prayer (c) of the plaint and for an order in terms of prayer (b) of the plaint and for discovery in terms of prayer (d) of the plaint against the first defendant. I think the plaintiffs are entitled to these orders and I make a decree accordingly. The plaintiffs will have the cost of the suit against the first defendant. As regards the second defendant, the suit as I have already said will be dismissed but I do not think in the circumstances of this case, and particularly having regard to the written statement filed by him in the suit, I should make an order for costs in favour of the second defendant against the plaintiffs.

R.K. *Order accordingly.*

2. (1689) 3 Leving 259.
3. (1877) 5 Ch D 776=46 L J Ch 790=25 W R 690=36 L T 731.
4. (1870) 9 Eq 376 = 18 W R 423=23 L T 298.
5. (1898) 1 Ch 153=67 L J Ch 87=46 W R 357=77 L T 475.
6. (1895) 1 Ir R 23.

A. I. R. 1934 Calcutta 671

ROY, J.

Niladri Nath Mukherjee and *others*—Plaintiffs.

v.

Madan Theatres Ltd., and *another*—Defendants.

Suit No. 2399 of 1930, Decided on 10th January 1934.

(a) Copyright Act (1911)—Owner of copyright had sole right of representation and performance also before enactment of copyright Act (1911)—*Obiter.*

Obiter.—Even before passing of the copyright Act of 1911 the owner of a copyright had the sole right to the representation and performance of his works and not only to the printing and and publication thereof. [P 672 C 2]

(b) Copyright Act (1911), Ss. 1 and 2—Copyright in books not denied—Performance of those works amounts to infringement.

Where the existence of the copyright in the books has not been denied, it follows that the representation and performance of those works by the defendant amounts to an infringement of copyright under Ss. 1 and 2, Copyright Act of 1911 : *A I R* 1924 *Cal* 595, *Rel on.* [P 672 C 2]

S. B. Singha and *S. N. Rudra* — for Plaintiffs.

K. P. Khaitan, Agarwalla, S. C. Roy and *U. C. Laha*—for Defendants.

Judgment.—This is another suit by the three grandsons of Rai Bahadur Bankim Chandra Chatterjee who were the plaintiffs in Suit No. 2400 of 1930, *Niladri Nath Mukherjee* v. *Satish Chandra Mukuerjee* (1), for the recovery of damages for infringement of copyright. The facts are not in dispute. Counsel for the plaintiffs handed in to me a chronological list of events which was admitted by counsel for the defendants and which I have directed should be kept on the file. The issues submitted in this suit were practically the same as in suit No. 2400 of 1930 and were the following :

(1) Have the plaintiffs any interest in the copyright in any of the books mentioned in the plaint? (2)Has the defendant company infringed the plaintiffs copyright as alleged in para. 5 of the plaint ? (3)Is the suit barred by limitation ? (4). What reliefs, if any, are the plaintiffs entitled to ? (5). Is the suit maintainable having regard to the fact that the plaintiffs do not claim any right or declaration of title to property?

By my judgment in the last suit I have held that the plaintiffs are entitled to the copyright claimed along with defendant 2 and I decided the issues as to maintainability of the suit and limitation in favour of the plaintiffs. Counsel for defendant 1 in this suit intimated to me at the outset that so far as those issues were concerned he would not advance further argument as he had been following the arguments in the last case. Issues (1), (3) and (5) are decided in favour of the plaintiffs.

Counsel for defendant 1 Madan Theatres Limited has however argued that though the plaintiffs might be entitled to the copyright in the books there had been no infringement of copyright. The infringement complained of in this case as has been alleged in para. 5 of the plaint is that the defendant Madan Theatres Limited had represented and performed or caused or permitted to be represented and performed the works mentioned in the plaint or parts thereof at places of dramatic and public entertainment in Calcutta. In its written statement the defendant company admitted what had been alleged in para. 5 of the plaint but denied that the representation or performance was unauthorised or wrongful. They never disputed that copyright existed in the works mentioned in the plaint but only contended that the plaintiffs had no interest in the copyright. Counsel for the defendant company however sought to argue in Court that the rights of the parties were governed by the old Copyright Act (Act 20 of 1847) and that the plaintiffs' copyright in the books could only be infringed if the defendant printed the books.

There is no substance in this argument but I do not think it is necessary to discuss the matter at all as in my view it is not open to the defendant company to raise this point on the present pleadings. The existence of the copyright in the books not having been denied, it follows that what the defendant company had done amounted to an infringement of copyright under Ss. (1) and (2) Copyright Act of 1911 (1 and 2 Geo. V.c. 46). Reference may be made in this connexion to the case of *Sitanath Basak* v. *Mohini Mohan Singh* (2), which was cited by learned counsel for the plaintiffs. Issue 2 is therefore answered in the affirmative. With regard to Issue (4) I do not think the plaintiffs are entitled to any relief against defendant 2 and the suit should be dismissed against him.

As against defendant 1 there will be a decree for an injunction and for discovery as claimed in prayers (b) and (c) of the plaint. There will be a reference as to damages and an enquiry will he directed to ascertain the profits made by defendant 1 by the infringements complained of and the plaintiffs will be entitled to 3/4th share of such profits. The reference would be to such officer as the Registrar may appoint. The plaintiffs will be entitled to the costs of this suit against defendant 1. There will be no order for costs with regard to defendant 2.

R.K. *Order accordingly.*

1. A I R 1934 Cal 668.

2. A I R 1924 Cal 595=81 I C 754.

A. I. R. 1934 Calcutta 673

MALLIK AND JACK, JJ.

Surendranath Sen—Plaintiff—Appellant.

v.

Municipal Commissioners, Mymensing—Defendant—Respondent.

Appeal No. 3120 of 1931, Decided on 4th December 1933, from appellate decree of Dist. Judge, Mymensingh, D/- 25th May 1931.

(a) Bengal Municipal Act (1884), Ss. 97 and 280—Valuation of holding for water-rates—During currency of such valuation different valvation of same holding is illegal—No proceedings to realize rate under new valuation—Suit for mere declaration lies—Specific Relief Act, S. 42.

To the valuation of a holding made in connexion with the fixing of the water-rate S. 97 which lays down that the life of such a valuation is five years applies. During the currency of such a valuation if there is another and a different valuation of the same holding subsisting is made for the purposes of Municipal rates this later valuation is illegal and ultra vires, and in such a case if the Municipality has done nothing towards realisation of the aforesaid illegally assessed rates, a suit for having the later valuation declared illegal and ultra vires without any prayer for consequential relief is maintainable: 22 *Mad* 270, (*P C*) *Rel on.* [P 674 C 1, 2]

(b) Bengal Municipal Act (1884), S. 96—Acceptance of old valuation is compliance with S. 96.

To adopt the valuation of a holding previously made may be taken as a determination of the valuation, and an acceptance of the old valuation would be a sufficient compliance with the provisions of S. 96, specially when non-acceptance of the old valuation would lead to an absurd situation. [P 674 C 2]

C. C. Biswas and *Harisdas Gupta*—for Appellant.

S. C. Basak and *Ramendra Chandra Roy*—for Respondent.

Mallik, J.—This appeal arises out of a suit for a declaration that an assessment made by the Municipality of Mymensingh on the plaintiff's holding is illegal and ultra vires. The facts which are relevant for the purpose of this appeal are briefly these: In the Municipality of Mymensingh there was up to the year 1928 no tax on holdings but what is known as tax on persons. The Municipal Commissioners decided by a resolution that with effect from 1st April 1929 there should be a charge and that taxation from that date would be not on persons but on holdings and in order to give effect to that resolution they made an assessment on all the holdings after making valuations of the same. The plaintiff's holding was taxed on the basis that the annual letting value of the same was Rs. 3,000. This figure, however, on the objection of the plaintiff, was reduced to Rs. 1,800. Before the Commissioners decided to levy tax on holdings they had, in the year 1928 levied a water rate on holdings within the Municipality, and for levying that water rate there had been a valuation of the plaintiff's holding in which the letting value of the same had been fixed at Rs. 1,260. According to the plaintiff's case when the plaintiff filed an objection to the valuation of his holding at Rs. 3,000, the objection was heard by four out of ten Commissioners who had been appointed for the purpose before 1929, and although the four Commissioners reduced the figure Rs. 3,000 to Rs. 1,800 they followed a procedure not warranted by law. On these allegations the plaintiff asked for a declaration that the assessment on his holding was illegal and ultra vires, on the ground that it had been made not in accordance with law, and that the Commissioners in dealing with his petition of objection had acted in violation of the provisions of the Bengal Municipal Act.

The plaintiff's case was resisted by the defendent on the allegation that there had been nothing wrong or illegal either in the assessment or in the disposal of the petition of objection and that the plaintiff's suit was not maintainable in view of the provisions of S. 42, Specific Relief Act—the plaintiff not having asked for any consequential relief in the shape of an injunction restraining the defendant Municipality from realising the tax assessed on the plaintiff's holding. The Court of First Instance found the points in favour of the plaintiff and gave him a decree. On appeal this decision was reversed by the learned District Judge who held that there had been nothing wrong or ultra vires in the assessment and also that S. 42, Specific Relief Act, was an insuperable bar to the plaintiff's suit. The plaintiff has appealed to this Court. A number of points have been taken on behalf of the appellant before us. One of the main points was that the Municipality had no authority to take a fresh valuation on the plaintiff's holding when there was another valuation, the

valuation made in connexion with the fixing of the water-rate still subsisting that valuation having been made in 1928 and its currency not having expired when the new valuation was made. This contention seems to me to be well-founded. The valuation that had been made in connexion with the fixing on the water-rate had been made under S. 280, Municipal Act, and that valuation having been made when there was no previous valuation for the purpose of levying a holding tax, the provisions of S. 97 were applicable to the case. S. 97 lays down that the life of such a valuation is five years. That being so, at the time when the new valuation was made in 1929 there was another and a different valuation of the same holding subsisting. This was clearly an absurd situation to have two different valuations of the same holding, standing side by side at the same time and to act upon these two different valuations for different purposes.

Dr. Basak for the respondent attempted to meet this contention of the appellant on two grounds. In the first place, he argued that although there are provisions in the Act for accepting the valuation previously made for the purpose of levying 'holding' tax for the purpose of levying water-rate there is no corresponding section in the Act for accepting water-rate valuation for the purposes of valuation for 'holding' tax; and secondly, he drew our attention to the provisions of S. 96 which lays down that in making assessment for holding tax the valuation of all holdings without any exception must be determined. As regards the first ground it is true that there is no provision in the Act for using water-rate valuation for the purpose of valuation for 'holding' tax. But that is no reason why the Municipality should be allowed to do something that would lead to an absurd position, namely, having two different valuations of one and the same holding standing side by side. Then as regards the second ground S. 96 no doubt says that in making an assessment for a 'holding' tax there must be a determination of the valuation of all the holdings without any exception. But to adopt the valuation of a holding previouly made may, I am inclined to think, be taken as a determination of the valuation and an acceptance of the old valuation would, in my opinion, be a sufficient compliance with the provisions of S. 96, specially when it is remembered that non-acceptance of the old valuation would lead to an absurd situation. I would therefore hold that the assessment of the plaintiff's holding based as it was on a valuation which had been made in contravention of the law was illegal and ultravires. In this view of the matter it would not be necessary to consider the other points raised by the appellant in connexion with the procedure followed by the Commissioners in disposing of the plaintiff's petition of objection to the assessment.

On behalf of the respondent an argument was advanced before us that the plaintiff's suit was barred under S. 42, Specific Relief Act, inasmuch as the plaintiff did not ask for any consequential relief in the shape of an injunction on the defendant Municipality restraining them from realising tax from the plaintiff. But it does not appear that the defendant Municipality had done any act towards such realisation. Besides, if the second valuation is pronounced void the assessment by the Municipal Commissioners together with the second valuation on which it was based falls to the ground and there would remain nothing but the previous valuation to go upon in making an assessment of the plaintiff's holding and no necessity for asking for any consequential relief: in this connexion see the observations of Lord Macnaghten in 22 Mad. 270 (1). For the reasons recorded above I would allow the appeal, set aside the decree of the lower appellate Courtand restore that of the Court of first instance. The plaintiff will have his costs throughout.

Jack, J.—I agree.

v.s. *Appeal allowed.*

1. Fischer v. Secretary of State (1899) 22 Mad. 270=26 I A 16 (PC).

A. I. R. 1934 Calcutta 674

MUKERJI, J.

Prosannadeb Raikat—Appellant.

v.

Purna Chandra Shaha and *others*—Respondents.

Appeal No. 1069 of 1934, Decided on 27th February 1934.

(a) Court-fees Act (1870), Sch. 1, Art. 1—Suit for enhancement of rent— No prayer for recovery of rent — Suit is governed by

Art. 1, Sch. 1 and not by S. 7, paras. (1) and (2) or S. 7 (iv) (c).

Where a suit is filed for enhancement of rent of a tenure but there is no prayer for the recovery of any rent, the value of the suit for purposes of court-fees is the amount to which the rent is prayed to be enhanced. Such a suit is neither governed by S. 7 (i) or (ii) nor by S. 7 (iv) (c). Provisions of Court-fees Act, discussed : 1919 *Pat* 541; 39 *Cal* 704: 13 *M I A* 248, (*P C*) and 31 *Mad* 14; 1927 *Pat* 123, *Ref.* [P 677 C 2]

(b) Court-fees Act, (1870), S. 7 (xi) (b)—Tenure holder is tenant within the section —"Right of occupancy" does not include rights of tenure-holder.

A tenure-holder is a tenant within the meaning of S. 7 (xi) and the words "right of occupancy" used in Cl. (b) of that section are to be understood in the popular and more general sense of a right by virtue of which a tenant remains in actual and physical possession as it were of the tenancy and so does not include the rights of a tenure-holder. A tenure-holder occupying any part of his tenure is included in the term having a right of occupancy but this would not make him any the less a tenure-holder; vide S. 7, sub-S. (4), Ben. Ten. Act, which speaks of a tenure-holder himself occupying a portion of the land. [P 678 C 1]

Jitendra Kumar Sen Gupta and *Rajendra Bhusan Bakshi*—for Appellant.

S. C. Baisak and *Rupendra Kumar Mitter*—for Government.

Judgment.—In the suit which has given rise to this reference the plaintiff, the proprietor, prayed for enhancement of the rent of the defendants who are tenure-holders. The existing rent of the tenure was Rs. 32-14-0 as per year, and the prayer was to enhance it to Rs. 2,000 a year. There was no prayer for recovery of rent for any period. The two rival contentions urged before me are as follows:

On behalf of the Government it has been contended that the case comes under S. 7 (2), Court-fees Act, 1870: while it has been urged on behalf of the plaintiff, now appellant, that the computation should be as under S. 7 (11) (b) of the Act. The report of the Stamp Reporter was in these words:

"In such cases court-fees are payable under S. 7, para (1) as in the case of claims for money. The plaintiff having claimed rent at this rate can be said to be claiming that amount of money. If it be said that the rent is a periodical payment then it would come under S. 7, para. (2)."

The report of the Taxing Officer shows that before him the Stamp Reporter relied, and perhaps more strongly on S. 7 (4) (c) urging that the suit was to obtain a declaratory order viz., "the liability of the tenure to enhancement, with a consequential relief, viz. the finding that the amount of enhancement is due."

Before me it has not been, as indeed it cannot be, said on behalf of the Government that S. 7 (1) applies, because the suit is not a suit for recovery of money, as it must be, to come within that provision. So far as para. (2), S. 7 is concerned, it is not easy to hold that a claim seeking to establish a right to maintenance or to annuity at a certain amount is similar to a claim seeking to have the existing rent enhanced to a certain figure, though rent, in itself, may be a sum periodically payable. I agree in the view taken by Das, J., of the Patna High Court in 1919 Pat. 541 (1), that the words "other sums payable periodically" in S. 7 (2) must be construed as implying sums payable in the nature of maintenance and annuities upon the rule of ejusdem generis, a view which has been maintained in later decisions of that Court. It is true that suits for arrears of rent are suits for money within S. 7 (1) but that is not because arrears of rent come within the expression "arrears of other sums" used in that paragraph but within the word "money" used therein. The word "money" used in that paragraph includes and therefore is of wider import than the several items mentioned within brackets in that paragraph. "Maintenance" is a term which is well-understood and needs no explanation importing ordinarily a conception of amounts payable for life to a person by virtue of his standing in a particular relationship with somebody else, and though the obligation to make the payment may often be defined in a contract, the original relationship which gives rise to the obligation is not necessarily contractual.

"'Annuity' is a yearly payment of a certain sum of money granted to another in fee for life or years charging the person only : see Co. Litt, 144 (b)."

Rent though payable periodically, is payable on account of a relationship of landlord and tenant which in its nature is essentially contractual and so represents a consideration which has got its counterpart. The contention of the Government in my opinion is not well founded. S. 7 (4) (c) also, in my opi-

(1) Kali Charan v. Kesho Pershad Singh, (1919) Pat 541=51 I C 15=4 Pat L J 561.

nion, cannot apply, for there is no consequential relief really asked for in the case even if it is conceded that what is asked for is in the nature of a declaration. Although various forms of declaration may be asked for as ancillary to a prayer for a consequential relief a declaration without any prayer for a consequential relief in order to be maintainable must be only a declaration that the plaintiff is entitled to a legal character or to any right to any property: 39 Cal. 704 (2). The prayer in the present case cannot be construed as for a declaration of that character and so Sch. 2, Art. 17 also, in my opinion, will have no application.

The contention of the plaintiff appellant also, in my opinion, is equally untenable. Para. (11), S. 7 deals with certain suits between landlord and tenant. When the Court-fees Act of 1870 was enacted, there was before the Legislature Act 8 B. C. of 1869 which was only a reproduction of Act 10 of 1859 with its procedural portion amended. The latter Act was an Act to amend the law relating to the recovery of rent in the Presidency of Fort William in Bengal. There was no other Act of the legislature relating to the law as to landlord and tenant in other places. Even a cursory examination of the provisions of para. (11) of S. 7 will satisfy one that the draftsman of the paragraph had before him either Act 10 of 1859 or Act 8 B. C. of 1869. In para. (11), S. 7 the word "tenant" is used and that word must necessarily be taken as implying all kinds of tenants. But in the different clauses of the paragraph the word "tenant" wherever used, has either been left unqualified or has been qualified by other words or expressions. In Cl. (a) the word "tenant" has been used without any qualification; in Cl. (b) we find the expression "tenant having a right of occupancy;" in Cl. (e) appeared originally the expression "occupancy of land from which a tenant has been illegally ejected by the landlord." Cl. (cc) was introduced by Act 6 of 1905, which also altered the word "land" to "immovable property." in Cl. (e) and also in the last sentence of the paragraph. It is not necessary to set out here the history of law as to landlord and tenant prior to Act 10 of 1859; much of it so far as Bengal is concerned will be found in the judgment of Fredor, J., 3 W. R. Act 10, p. 29 (3). But it is important to note that:

> " the expression 'right of occupancy' was used for the first time by the legislature in 1859 and instead of the classification of raiyats into the khud kast and paikast, a new one was introduced less complex in character and with incidents more favourable to the cultivating classes. Possession and cultivation of land and payment of rent were all that were necessary to confer on that raiyat this right of occupancy (vide Mitra on Land Law of Bengal, Edn. 2, p. 337)."

I have quoted the extract only to show the cardinal elements in the conception of a "right of occupancy." There is no reason why the word "tenant" used in para (9), S. 7 should be understood in a sense, that is to say, as tenants in respect of agricultural and not of non-agricultural tenancies. But when one comes to read the clauses of that paragraph as they stood in the Court-fees Act of 1870 one cannot fail to find that most of the clauses were drafted with a view to be applied to some particular class or classes and not others out of the five classes of tenants contemplated by Act 10 of 1859 or Act 8 (B. C.) of 1869 and also to some of the different classes of suits which were contemplated by those Acts. While this cannot be denied, the question to be considered is whether or not the legislature in enacting the Court-fees Act of 1870 and using therein the words 'occupancy' in S. 7, Cl. (9), and "right of occupancy" (in S. 7, Cl. (9), (b) and Sch. 2, Art. 5) intended to limit the meaning of those words to the sense in which the expression "right of occupancy was used in those Acts or in the later Act of the legislature, e. g., the Bengal Tenancy Act of 1885. To make the question further clear I think I may give an example taken from Act 8 (B.C.) of 1869 itself, which is to my mind pertinent. In that Act, on the question of enhancement, there are Ss. 14 and 15 applying to the case of a raiyat holding without or on expiry of a written engagement, there is S. 16 applying to dependent talukdars or intermediate tenure-holders, and there is also S. 18 applying to the case of raiyats having a right of occupancy. In a suit for enhancement under that Act, was S. 7, Cl. (9) (b) intended to apply only if

(2) Mt. Deokali Koer v. Kedarnath, (1912) 39 Cal 704=15 I C 427.

(3) The Great Rent Case 3 W R Act 10 p. 29.

the suit was under the last mentioned section?

Now, although the expression "right of occupancy" was not used by the legislature anywhere in its statutes prior to Act 10 of 1859, the expression itself was not unknown. It has a meaning which was well-understood and which was more comprehensive than what it received from the legislature in that Act. In this connexion, I cannot do better than refer to the decision of the Judicial Committee, delivered by Sir Richard Colville in 13 M. I. A. 248 (4). The suit in that case was commenced before Act 10 of 1859 had come into operation. Dealing with the right of a Bengal Zemindar to enhance the rent of rent paying lands within his zemindari their Lordships explained the nature of his right and said:

"It (i. e., a suit to enhance the rent) assumes that the defendant has some valid tenure or right of occupancy in the land which forms the subject of the suit."

Also,

"Regulation 8 of 1793 however does not apply a uniform rule to all tenures and rights of occupancy. It may be broadly said that it divides them into two great classes, viz., Taluks within the meaning of the 51st Section, and ryotty and other under-tenures for which provision is made by the 49th Section."

Again,

"In the present suit the respondent has come into Court treating the defendants to the suit as ryots, having a right of occupancy in certain lands at a variable rent."

This judgment, in my opinion, plainly indicates that there was a popular meaning attached to the expression "right of occupancy" wider than the meaning it came to have in Act 10 of 1859 and including such meanings as were subsequently given to it by other Acts of the legislature. At the same time, as the judgment also indicates, there was also a distinction between "tenures" and "right of occupancy," the latter expression denoting such rights under which a tenant could be in actual physical possession, as it were of the subject-matter, while by the former word a superior interest was meant. I am of opinion that it was in this sense that the expression "right of occupancy" was used by the legislature in the Court-fees Act of 1870.

In Cl. (e) the word 'occupancy' has been used; but it has not been said "from which a tenant having a right of occupancy has been illegally ejected" but only "from which a tenant has been illegally ejected;" and therefore the application of this clause in my opinion was not intended to be limited to ryots with occupancy right. In other words, in my opinion the clause was not intended to be confined to cases arising under the proviso to S. 22, Act 8 (B. C.) of 1869. I think, I should agree in the view taken by the Madras High Court that the words "occupancy of land" and "ejected" are properly applicable to the case of ryots or persons in actual physical possession rather than to others who hold superior interests: see 31 Mad. 14 (5), at p. 16. The expression "right of occupancy" has also been used in Sch. 2, Art. 5, Court-fees Act, 1870, and as used there the expression must include the interest of an occupancy ryot, 11 C. L. R. 91 (6), though I am not of opinion that it can be read as being synonymous with a "right of occupancy" under any of the Acts relating to landlord and tenant. I am therefore of opinion that the plaintiffs appellants' contention cannot be acceded to.

The question then is, by what provision of the Court-fees Act, 1870 should the present suit be governed. I am disposed to take the view that the suit is based upon a plaint not otherwise provided for in this Act within the meaning of Sch. 1, Art. 1 of the Act. The value of the suit, in my opinion, is the value of the relief asked for, namely, the enhancement which has been claimed. A claim for enhancement of rent is in one sense a claim for assessment of fair and equitable rent; indeed S. 7, Ben. Ten. Act, itself says that the rent may be enhanced up to such limit as the Court thinks fair and equitable. In the case of a claim for assessment of rent, where the tenancy is a yearly one it has been held that Sch. 1, Art. 1 applies and that the value of the claim is the value of one year's rent: 1927 Pat. 123 (7). I see no reason why the claim for enhancement should not be dealt with on the same footing. I am of opinion that court-fees should have

4. Bama Soondery Dassyah v. Radhika Choudhurani, (1869) 13 M I A 248 (P C).

5. Palaniappa Chetti v. Sithravelu Servai (1908) 31 Mad 14=17 M L J 478.

6. Bibi Nurjahan v. Morfun Mandal, (1882) 11 C L R 91.

7. Dhanukdhari Tewari v. Mani Sonar, 1927 Pat 123=100 I C 913=6 Pat 17.

been paid on the plaint on Rs. 2,000, minus Rs. 32-14-0, and that the court-fees payable on the memorandum of appeal should be on Rs. 2,000 minus the amount up to which the rent was enhanced by the Court below.

My answers to the questions formulated by the Taxing Officer are the following: (1) a tenure-holder is a tenant within the meaning of S. 7 (11) and the words "right of occupancy" used in Cl. (b) of that section are to be understood in the popular and more general sense of a right by virtue of which a tenant remains in actual and physical possession as it were of the tenancy and so does not include the right of a tenure-holder. (2) Yes. This would not make him any the less a tenure-holder: vide S. 7, sub-S. (4), Ben. Ten. Act, which speaks of a tenure-holder himself occupying a portion of the land. (3) Under Art. 1, Sch. 1 of the Act as explained above.

G.B. *Order accordingly.*

A. I. R. 1934 Calcutta 678

Special Bench

GUHA, NASIM ALI AND KHUNDKAR, JJ.

Hafijuddi and *others*—Accused—Appellants.

v.

Emperor—Opposite Party.

Death Ref. No. 1 and Appeals Nos. 81 and 151 of 1934, Decided on 27th April 1934.

(a) Criminal Trial—Motive—Conspiracy—Murder—What may be motive for individual may not be motive for others — Penal Code (1860), S. 120-B, 302.

What may be a sufficient motive for an individual or a group of individuals may or may not be sufficient motive for others; and it is therefore necessary to give importance to the occurrence itself, to the participation of the accused persons in the same, and see if they were responsible for the crime, although it may not be possible definitely to hold that the motive ascribed was not sufficient or commensurate with the nature of the crime. [P 679 C 2]

(b) Criminal Trial—Corroboration of approver must be independent of accomplice —Criminal P. C. (1898), S. 337.

The testimony of the approver ought to be corroborated in material particulars in the matter of circumstances of the crime and also in the matter of identifying the accused with the offence. The corroboration must be independent of the accomplice; and the evidence of one accomplice cannot corroborate the evidence of another; the evidence of either requires corroboration before it can be acted upon. [P 680 C 1]

(c) Criminal Trial—Evidence—Testimony of accomplice and of witness who knew commission of crime but did not disclose it—Degree of credibility to be attached to the evidence of these stated.

The testimony of a person who may not be an accomplice in a strict sense of the term but a person who in any way helped in the commission of the offence for which the accused are tried, or was cognisant of it, and omitted to disclose it for a time, is not a testimony as could justify a conviction, except where there is corroboration. So far as the statutory provisions are concerned, there is nothing in law to justify the proposition that evidence of a witness, who happens to be cognisant of a crime, or who made no attempt to prevent it, or who did not disclose its commission, should only be relied on to the same extent as that of an accomplice. The real question in such a case is the degree of credit to be attached to the testimony of such a witness; and that depends on all the facts and circumstances of the particular case; it may not be possible to place much reliance on the evidence coming from persons falling within the description given above, but they are not accomplices and it leads to confusion of thought to treat them as 'practically accomplices' and then apply the rule as to their credibility, instead of judging their credibility on a careful consideration of all the particular facts of the case affecting the evidence: 21 *Cal* 328; and 26 *Mad* 1, *Ref.* [P 680 C 1, 2]

Suresh Chandra Talukdar, Ajit K. Dutt and *Camell*—for Appellants.

Z. A. Rahim—for the Crown.

Judgment.—The prisoners Hafijuddi (Hafijuddin) alias Bengu, Asgar Ali, Har Chandra De (Chowkidar) alias Hari Chandra De alias Hari Chowkidar, Kalai Prodhan, Syed Ali (Haji), Kadam Ali Sarkar Maharam Ali Talukdar alias Mohor Ali, Abdul, Jahar Ali and Kali Prosonna De, were tried before the Sessions Judge of Tippera and a Jury, as concerned in the murder of one Hari Dutta alias Proka Chandra Dutta, on 12th March 1933. The accused Hafijuddi, Maharam Ali, and Kalai Prodhan were charged substantively with murder, under S. 302, I. P. C.; all the accused were charged under S. 149 read with S. 302, I. P. C., and they were further charged under S. 120-B read with S. 302, I. P. C. In consonance with the majority verdict of the jury, the learned Sessions Judge convicted Hafijuddi Asgar Ali, Har Chandra De Chowkidar and Kalai Prodhan under Ss. 120/302, 147 and 149/302, and under each of the Ss. 120-B/302 and 149/302, I. P. C., and sentenced them to death. The prisoners Kadam Ali, Abdul, Jahar Ali, Kali Prosonno De and Maharam Ali, were in

accordance with the verdict of the majority of the jurors, convicted under Ss. 120-B/302, I. P. C., and they were sentenced by the Judge to transporation for life. In the case of Syed Ali the majority verdict of the jury that he was guilty under Ss. 147, 149/302, I. P. C., was accepted, and he was sentenced by the Judge to death. The case is before us on reference by the Sessions Judge under S. 374, Criminal P. C., and on appeal by the prisoners. The Judge it appears has taken particular care in trying to determine the nature of the majority verdict of the jury, and has tried to follow the line indicated by the verdict of the jury in passing sentences on the accused persons. Those found by the Judge to have been present at the occurrence, were sentenced to death: those whose presence was not established in evidence, but who consented tacitly to a conspiracy to murder, were sentenced to transportation for life.

The learned Judge's charge to the jury appears to be exhaustive, and all the material points arising for consideration in the case were analysed and the evidence bearing upon them was carefully summarised. The motive for the crime in which so many persons were concerned had to be considered and the evidence of conspiracy to murder had to be carefully sifted. The reason why no names were mentioned in the First Information Report of the occurrence had to be discovered, and in that connexion the indifference shown by the President Panchayet of the Union within which the place of occurrence was situate came in for consideration. The evidence as to conspiracy; the assembling of the accused persons on different occasions before the occurrence; the occurrence itself and participation of the prisoners in the same; their flight after the occurrence; had to be separately considered. So far as the oral evidence goes there was the evidence of the approver Syed Ali; there was the evidence of eye witnesses to the occurrence, of witnesses who saw certain of the accused running from the scene of occurrence. On the question of motive, there is a body of documentary evidence that the deceased Hari Dutta had been on litigating terms with several of the accused persons, and that he had almost invariably been successful. Evidence was given to establish that there was a baithak some ten days or so before the occurrence at Kalai's house in which it was decided that Hari Dutta was to be done away with, and evidence was placed before the Court also that the accused persons assembled at Kadam Ali's house, on the evening of the occurrence. The confession of the approver, his deposition before the committing Magistrate, and his evidence before the Court of Session, was taken to be the basis of the case for the prosecution, and evidence was led to prove the presence of the different accused persons at the conspiracy to murder, and at the occurrence.

The case of the individual accused received the consideration of the Judge and the jury, and the materials on the record touching each of them had to be kept in view, regard being had to the nature of the verdict of the jury, and to the Judge's own conclusions arrived at before recording an order of conviction and before passing sentences. The questions arising for consideration generally in the case, which relate to the case of all the accused persons, have to be determined on the materials on the record, before the case of individual accused can be taken into consideration. The motive for the crime has, in our judgment, been established ; and it may as well be mentioned that what may be a sufficient motive for an individual or a group of individuals may or may not be sufficient motive for others, and it is therefore necessary to give importance to the occurrence itself, to the participation of the accused persons in the same, and see if they were responsible for the crime, although it may not be possible definitely to hold that the motive ascribed was not sufficient or commensurate with the nature of the crime. In the case before us, the evidence discloses facts and circumstances from which the presence of an intention to do away with the deceased Hari Dutta could be guessed.

There was evidence led for the purpose of establishing conspiracy to murder Hari Dutta. The approver, examined as a witness, speaks of a baithak at Kalai's house and there is the evidence of Abdul Hamid and Fazar Ali on this part of the case. There was further the

assembling or gathering of men at Kadam Ali's house, as has already been mentioned. The approver and the witness Sahar Ali speak to that. The evidence bearing upon the baithak at Kalai's house, and upon the gathering in the evening of the occurrence at Kadam Ali's house was commented upon very severely on the ground that it came from the approver and some witnesses who are in the position of accomplices, we are invited to reject that evidence, and hold that conspiracy to murder has not been established. The position is very well settled by the authority of decisions in England and in this country that the testimony of the approver ought to be corroborated in material particulars in the matter of circumstances of the crime and also in the matter of identifying the accused with the offence. The corroboration must be independent of the accomplice; and the evidence of one accomplice cannot corroborate the evidence of another: the evidence of either requires corroboration before it can be acted upon. It has been held in this Court that the testimony of a person who may not be an accomplice in a strict sense of the term but a person who in any way helped in the commission of the offence for which the accused are tried, or was cognisant of it, and omitted to disclose it for a time, is not a person whose testimony could justify a conviction, except where there is corroboration: see 21 Cal. 328 (1).

So far as the statutory provisions are concerned, there is nothing in law to justify the proposition that evidence of a witness, who happens to be cognisant of a crime, or who made no attempt to prevent it, or who did not disclose its commission, should only be relied on to the same extent as that of an accomplice. The real question in such a case was the degree of credit to be attached to the testimony of such a witness; and that depends on all the facts and circumstances of the particular case. As it has been said, it may not be possible to place much reliance on the evidence coming from persons falling within the description given above, but they are not accomplices, and it leads to confusion of thought to treat them as "practically accomplices" and then apply the rule as to their credibility, instead of judging their credibility by a careful consideration of all the particular facts of the case affecting the evidence: see the observations of Davies, J., in the case of 26 Mad. 1 (2). The evidence of conspiracy, as led in the case before us, coming from the approver, who has been corroborated in material particulars or circumstances arising for consideration in the case, is sufficient to establish the same. The evidence of the approver has, in our judgment, been corroborated by Abdul Hamid, and Fazar Ali, whose testimony we are unable to reject, for the reason given by the learned counsel for the defence, that they were in the position of accomplices. On the same ground we hold that the approver's evidence taken along with the evidence of the witness Sahar Ali, has established the fact of the gathering on the evening of the occurrence. The approver and the witnesses mentioned above, prove the existence of a conspiracy, and as the Sessions Judge has put it, in view of what happened subsequently, those present as deposed to by the witnesses and taking part in the discussion would be liable under the conspiracy charge.

In the category of persons present at the baithak at Kalai's house some ten days or so before the occurrence and at the rendezvous at Kadam Ali's house on the evening of the occurrence, must in our opinion be included the accused Syed Ali. In view of the above conclusion arrived at by us on the questions of conspiracy, we do not consider it necessary to go into the other two incidents mentioned in the evidence bearing upon this part of the case: the gathering at Alauddin's house, and the decoying of Hari Dutta as spoken to by Abdul Karim, on the day of occurrence. In our opinion disbelieving the evidence relating to these incidents would not take away anything from the evidence of conspiracy to which reference has been made above. On the evidence of the approver, and on the corroborative evidence of the other three witnesses Hamid Khan, Fazar Ali and Sahar Ali, relating to the conspiracy, and on the details given by them, we hold that it

1. Ichan Chandra v. Queen-Empress, (1894) 21 Cal 328.

2. Emperor v. Edward William Smither, (1903) 26 Mad 1.

has been established that all the accused persons were parties to a conspiracy to commit a murderous assault on Hari Dutta. At this stage it may be mentioned that the discrepancies in the approver's evidence do not, in our opinion, make that evidence unreliable, on material particulars, and the discrepancies do not help the accused so far as their presence at the gatherings at Kalai's house and at Kadam Ali's house and their intention to attack Hari Dutta are concerned.

In regard to the First Information Report in the case, no assailants were named in the same. The evidence indicates that Jonab Ali met some of the witnesses before he went to the police station for lodging the first information report there. According to the defence the absence of names in the First Information Report indicated that there was no recognition of the assailants, but only subsequent accusations on suspicion. There is however ample ground for holding upon the materials before us, that the absence of names was occasioned by fear, and in this connexion mention may be made of the circumstance, made reasonably clear by evidence on the record, that the local President Panchayet Gafar Ali was biased against the prosecution or hostile to the investigation. The neighbouring President, Jagadis Pal, had to lend his support to the police, and there was some defect manifest on the first report of the crime, and in the investigation by the police.

After the evidence to the conspiracy to murder, the question of real importance that arises for consideration is the evidence of the eye witnesses to the occurrence. There are some divergent statements in the deposition of some of these witnesses to a horrible attack at the dead of night, who could hardly realise what was happening before them. Inspite of the inconsistencies, discrepancies and divergences, we are not in a position to discard the evidence given by the witnesses to the occurrence as we were asked to do so far as the material facts deposed to by them are concerned. The evidence as to the recognition of the accused persons as men taking part in the occurrence is, in our judgment, sufficient and has to be acted upon.

There were then the witnesses who saw the flight of the accused persons, and there were two witnesses, who stated that they were prevented from leaving their houses by some of the assailants. It was sought to be made out, on the side of the defence, that regard being had to the spots from which some of the witnesses are said to have seen the accused persons individually, the evidence of those witnesses could not be accepted as true. Reference was made to the Settlement Map in this connexion ; but on the materials before us, no conclusion of any value can be arrived at on the data placed before us. On the evidence of the witnesses to the flight of the accused after the occurrence, taking that evidence along with the evidence of the eye-witnesses, we have arrived at the conclusion that the accused persons took part in the occurrence, and fled from the scene as spoken to by the witnesses examined on the side of the prosecution. On this part of the case, the approver's evidence had to be made the basis of the case for the prosecution, and that evidence has been in our opinion corroborated in material particulars and circumstances by the other evidence, of which mention has been made above, on the question of recognition of the accused persons, as persons who took part in the occurrence.

The evidence against each of the individual accused has been summarised by the Sessions Judge in his charge to the jury ; and no useful purpose will be served by our adverting to that evidence in any detail. It is moreover, unnecessary for us to do so, in view of the definite conclusion we have arrived at on the materials before us. In our judgment a case of conspiracy to commit a murderous assault on Hari Dutta, the deceased, has been satisfactorily established, by evidence relating to the baithak in Kalai's house some days before the occurrence, and to the gathering in the evening of the occurrence at Kadam Ali's house, taking into consideration the materials placed on record, for the purpose of proving motive for the crime so far as the accused persons are concerned. The accused persons were present as assailants at the scene of occurrence, armed with weapons of different description, meant for attacking Hari Dutta, with the intention of

causing wounds on him that might result in his death. On the evidence as it stands, we have no hesitation in coming to the decision that the accused persons were members of a criminal conspiracy to compass that intention. It is not possible on that evidence to hold definitely who amongst the ten prisoners, dealt the fatal blow or blows, or who took what actual part in the murderous assault committed in pursuance of the agreement. In consonance with the decision we have arrived at we hold that the prisoners, all the ten, are guilty of the offence of conspiracy to commit the offence punishable under S. 304 (Part 1), I. P. C.

On a careful consideration of the facts and circumstances of the cases, regard being had to the evidence relating to the origin of the criminal conspiracy, and to the evidence connecting the individual accused with the murder, the sentence we propose to pass on the prisoners is that each of them should undergo rigorous imprisonment for seven years. The result of our decision as mentioned above, is that the conviction of the prisoners Hafijuddi, Asgar Ali, Hari Chandra De, Kalai Prodhan for the offences of which they have been convicted as also the sentence of death passed on them by the learned Sessions Judge are set aside, and they are convicted under Ss. 120-B/304 part 1, and sentenced each of them to seven years' rigorous imprisonment. The conviction of the prisoner Syed Ali under Ss. 149/302, I. P. C., and the sentence of death passed on him are set aside; Syed Ali is convicted under Ss. 120-B/304 I. P. C., and sentenced to seven years' rigorous imprisonment. The conviction of the prisoners Kadam Ali, Abdul, Jahar Ali, Kali Prosonna De and Maharam Ali under Ss. 120 B/302, I. P. C., is set aside; they are convicted under Ss. 120-B/304, part 1, I. P. C., and are each of them sentenced to undergo rigorous imprisonment for seven years.

V.S. *Order accordingly.*

A. I. R. 1934 Calcutta 682

LORT-WILLIAMS AND M. C. GHOSE, JJ.

Khirod Behari Dutt—Appellant.

v.

Man Gobinda and *others*—Respondents.

Appeal No. 2041 of 1931, Decided on 16th March 1934, from appellate decree of Dist. Judge, Bankura, D/- 31st March 1931.

Contract Act (1872), S. 2 — Ordinarily party to contract can sue—But there may be equity in third person to sue on contract.

Though ordinarily only a person who is a party to the contract can sue on it, where a contract is made for the benefit of a third person, there may be an equity in the third person to sue upon the contract: 32 *All* 410 (*PC*); 1914 *Cal* 129; 1918 *Cal* 941, *Foll*; and 1930 *Mad* 382 (*FB*) *not Foll.* [P 690 C 2]

H. D. Bose, Bankim Chandra Mukherji and *Satish Chandra Sinha*—for Appellant.

Satcouripati Roy, Santimoy Majumdar, Sailendranath Banerjee and *Bireswar Chatterjee*—for Respondents.

Lort-Williams, J.—This appeal arises out of a suit for arrears of rent. The facts are not disputed. The plaintiff is the usufructuary mortgagee of the Zemindar (defendant 7). The Dutta defendants (defendants 1 to 6) are the Zemindar's tenants of the jama in suit consisting of seven moujas in pergana Shyamsundarpur. The Panda defendants (defendants 8 to 17) held the land in darmokarari lease under the Dutta defendants by a kabuliyat wherein it was stipulated that the Pandas would pay the Dutta's mokarari rental direct to the Zemindar and would indemnify the Duttas against any claim made by him. Further it was stipulated

"as security for the due discharge of my liabilities for the said jama and the said Trust (Barat) as described above in the present kabuliyat, I do hereby create a charge (pratibandhak) upon my mokarari interest in the moujas of Jharya and Shyampur, both in my khas possession."

This is an agreed translation. The kabuliyat was acted upon by all the parties interested, in respect of former payments of rent. That is to say the Pandas used to pay the Zemindar's rent direct, and the arrangement was accepted by him. The sole question for decision is, whether the plaintiff can rely upon this contract which was made between the Pandas and the Duttas, and get a decree for his rent against the Pandas. On this point what was the old rule of the English Common law is

beyond dispute. 'No one but the parties to a contract can be bound by it or entitled under it': Anson, Law of Contract (Edn. 16) 274. 'A third person cannot become entitled by the contract itself to demand the performance of any duty under the contract,' Pollock, Principles of Contract (Edn. 9), 212, 220. 'No man can enforce a contract to which he is not a party, even though he has a direct interest in the performance of it,' Salmond and Winfield, Law of Contracts, 18. The law was stated in positive and unmistakable terms in 1 B. & S. 393 (1), and in (1915) A. C. 847 (2), Viscount Haldane, L. C., said (p. 853): 'In the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitumtertio* arising by way of contract.' But to this rule Courts of Equity introduced exceptions. 'A contract can create no right or liability in a person who is not a party to it; unless he can claim or be charged through a party, as in the case of a cestui que trust claiming through a trustee; or a principal claiming or being charged through an agent': Leake on Contracts (Edn. 7), p. 301.

The necessity for the Common law rule arose out of the implications of the old Common law action in assumpsit. The reason for the exceptions was the necessity to provide some escape from the harsh and inelastic bonds of the old rule. Like so much else in the progressive growth of English law, this expansion was achieved by means of the dual fictions of trust and agency. In India there are no reasons legal, historical or otherwise, why we should shrink from a frank recognition of this fact. A careful examination of the English decisions on the point leads inevitably to the conclusion that they were based upon fiction. This tendency began prior to the decision in (1861) 1 B. & S. 393 (1)[1]. Thus in 2 Leav. 210 (3), a donee beneficiary was allowed to sue in assumpsit, though she was not a party to the contract and gave no consideration. But its rapid extension was due to Courts of Equity which recognised a right in a contract beneficiary. Thus in (1756) Ambler 330 (4) the defendant had promised a widow that if she would consent to his being appointed a co-administrator with her deceased husband's estate, he would pay the debts of the deceased to the extent of any deficiency in the assets. The plaintiff a creditor of the deceased, brought a bill in equity to enforce this promise and obtained a decree on the ground, as stated by Lord Hardwicke, that the promise was for the benefit of the creditors, and the widow was a trustee for them.

This was probably the origin of the use of the conception of a trust for the benefit of a contract beneficiary. It is clear that in that case this was a fiction. There was no trust fund to be administered either by the defendant or the promisee. Doubtless the defendant and the widow were trustees of the deceased husband's estate, but this was not the object of the contract, but the payment of any deficiency in the estate. For this neither he nor she ever held any property or money in trust, nor did Lord Hardwicke call him a trustee. It was the widow who was called the trustee for the creditors of the promisee made by the defendant, and calling her a trustee was merely a device for making the defendant keep his promise. But this conception was invented by the Chancery Court, and used to undermine and nullify the rule of the common law and to enforce rights in third persons which the common law refused to recognize. In particular it was used to avoid the Common law doctrine of "lack of privity of contract" and "stranger to the consideration." Sometimes the theory of agency was used for the same purpose. The promisee was said to have received the promise as agent for the third party. The next case to be considered is 3 Mer 582 (5). Parker was indebted to both Williams and Gregory. In consideration of an assignment by Parker of all his property to Williams. Williams promised Parker that he would pay £900 to Gregory in settlement of Parker's debt to Gregory. Later Gregory and Parker brought their bill in equity against Williams to com-

1. Tweddle v. Atkinson (1861) 1 B & S 393.
2. Dunlop Tyre Co. v. Selfridge (1915) A C 847=84 L J K B 1680=31 T L R 399=59 S J 439=113 L T 386.
3. Dutton v. Poole, (1677) 2 Leav. 210.
4. Tomlinson v. Gill, (1756) Ambler 330.
5. Gregory and Parker v. Williams, (1817) 3 Mer 582.

pel the performance of his promise made to Parker. The Master of the Rolls, Sir William Grant, held that the bill was maintainable and decreed the payment by Williams of £900 to Gregory, on the ground that Parker acted as trustee for Gregory and "Gregory may derive an equitable right through the mediation of Parker's agreement," though he was not a party to it, nor furnished any part of the consideration.

This decision rested on Lord Hardwick's theory as stated in (1756) Ambler 330 (4) and it was not suggested that the property conveyed by Parker to Williams was held by Williams as a trust fund for the benefit of Gregory. Williams was required to pay Gregory because he made a promise to Parker for the benefit of Gregory, Parker, the promisee was the trustee; and Williams, the promisor was not. The word trust was not used in the contract. The money was to be paid to Gregory and not to Parker, the promisee. Parker was not intended to become and never, in fact, became a trustee of the £900. In 30 Ch D 57 (6) a husband contracted to pay money to trustees for the support of his wife and children. The trustees refused to sue; and the Court said there was no trust by virtue of which the children could sue in their own names. But the wife, as a beneficiary who had the children to suppcrt, obtained a decree for everything promised. She was not the promisee, and the promise was not to pay money to her. In 4 Hare 67 (7), a father executed a sealed covenant in which he promised certain persons named therein that his executor or administrator would pay to them the sum of £60,000 in trust for the benefit of the promisor's illegitimate sons. The promisees named as trustees declined to act or to enforce the contract. One of the beneficiaries brought his own bill against the executors of his father's will, and obtained a decree for the payment of the money direct to him. Here no money was ever held in trust. There was merely an executory covenant to pay money to be held in trust. The Vice Chancellor held that the covenantees were trustees of the covenant, even though they never assented to it, and that the beneficiary could enforce it. But it is clear that no trust fund was ever created. The Court was merely enforcing an executory contract to create a trust fund, and did it by declaring that the named promisees were trustees of the covenant. The covenantor said nothing of such a trust as this. Until the fund was created, the plaintiff was merely a beneficiary of the contract, if he could enforce a contract to create a trust fund, he should be able to enforce a contract to pay money in any other manner.

There are several cases holding that a creditor can give an enforceable right to a third person by merely directing his debtor to pay the debt to the third person or to make an investment for him, the debtor assenting thereto. Thus in 11 Hare 88 (8), Paterson borrowed £300 and promised the lender to repay part of it by investing in consols for the promisee's children. The debtor never made the investment and paid the debt to the lender, because the lender countermanded the direction to make it. A bill by the children in the administration of the promisee's estate was sustained, even though they had known nothing of the transaction until after the attempted revocation. No fund was ever in the hands of the defendant as a trustee. In 38 L J Ch 46 (9) at the creditors's request, his debtor promised to pay the amount of the debt to third parties creditor saying that he "could trust him to pay the pay the money according to directions." In these cases the creditor can be held to have made himself a trustee of the right to performance by the debtor; but it seems that the Court may have regarded the debtor as the trustee, although he merely made a promise to pay his debt in a new way, and did not segregate any part of his general assets as a trust fund. These cases might have been, but were not, regarded as cases of oral assignments of the debt; otherwise, they were merely contracts by a debtor to pay to a third person. Courts of equity having declared the promisee to be a trustee, the Court of exchequer proceeded to hold that the

6. Gandy v. Gandy, (1884) 30 Ch D 57=54 L J Ch 1154=33 W R 803=53 L T 306.
7. Fletcher v. Fletcher, (1844) 4 Hare 67=8 Jur 1040=14 L J Ch 66.
8. Paterson v. Murphy, (1853) 11 Hare 88=17 Jur 298=22 L J Ch 882.
9. Parker v. Stones, (1868) 38 L J Ch 46=19 L T 259.

promisee could sue on the contract and recover, not merely nominal damages, but the full amount promised for the benefit of the third party. In 6 M. & W. 467 (10), the defendant, as an officer of the Palace Court, had given a bond to the Knight Marshal of that Court, as security for the due performance of the duties of his office, and that he should take sufficient bail from all persons arrested by him. In an action by a creditor against the debtor, the defendant released the debtor on insufficient bail, with the result that the creditor lost his money. Thereupon the Knight of Marshal brought an action of debt on the defendant's bond for the benefit of the creditor. It was argued that the plaintiff could recover only nominal damages, because the defendant's breach had caused him no loss. The Court held however that the plaintiff could recover the full amount of the injury suffered by the creditor.

The bond was a contract between the defendant and the plaintiff which partly benefited third parties, but there was not a word in the bond itself to indicate that the plaintiff was acting as a trustee for them. Clearly, the concept of a trust was used in this case only for the purpose of enabling a third party, who was one of a class benefited by the contract, to recover damages in a common law action for its breach. The performance promised by the defendant was not payment of money to anybody. The damages awarded belonged to the creditor. They were not a trust fund which the defendant had promised to pay to the plaintiff, or that the plaintiff had promised to hold in trust. In 8 Ex. 299 (11), the plaintiffs chartered a vessel of the defendant to carry a cargo from Liverpool to Calcutta; and the defendants promised, in the charter party to consign the vessel to Ewing & Co. at Calcutta on the usual terms, one of them being that the consignees might procure the homeward freight at £5 per cent commission. The defendant consigned the vessel to Ewing & Co., but did not permit them to procure the homeward freight, thereby depriving them of the commission and depriving the plaintiffs of a part of that commission, which, by reason of an arrangement with Ewing & Co., the plaintiffs would have received. It was held that the plaintiffs could maintain an action for the full amount of the commission so lost by them and by Ewing & Co. The Court said that the contract was made for the benefit of Ewing & Co.; and Parke, B., remarked (p. 302): "I entertain no doubt whatever that the plaintiffs are entitled to recover the whole amount as trustees for Ewing & Co."

Clearly, the only reason for holding that the promisees were trustees for Ewing & Co. was, that the contract, if performed, would have resulted in a benefit to them. Plaintiffs' recovery of the full amount was directly dependant upon the right of Ewing & Co. to the expected commission. The word trustee was not used in the contract. If such a contract makes the promisee a trustee, and creates a right to the commission in Ewing & Co. as cestuis que trust, there is no reason why the same result should not follow where two parties make an ordinary commercial contract under which, if performed, a third will benefit. The promisee, in these cases, was only a trustee to the extent that he must allow the use of his name. With respect to the money, if it came into his hands at all, his duty was to pay it over to the rightful owner; he was a mere conduit.

In 6 Ch. 671 (12), the plaintiff rendered services to the promoters of the defendant company and they promised that he should receive £2,000 from the company. Later, when the company was formed, its articles of association provided that £2,000 should be paid to Walker, one of the promotors, for the benefit of the plaintiff. The plaintiff sued the company in his own name for the £2,000. It was held that the defendant company's promise to pay the £2,000 was made to the promoter as trustee for the plaintiff; and that the plaintiff had "a right to come here and obtain the benefit of the arrangement entered into between Walker and the company" (p. 677). The Court cited 3 Mer. 582 (5) as an authority to that effect. It seems clear that the plaintiff was not the promisee and that he gave no consideration for the defendant com-

10. Lamb v. Vice, (1840) 6 M & W 467=8 D P C 360=9 L J Ex. 177=4 Jur 341.
11. Robertson v. Wait, (1853) 8 Ex. 299=22 L J Ex 209=1 W R 132.
12. Touche v. Metropolitan Ry. W. Co., (1871) 6 Ch 671.

pany's promise. The plaintiff was merely a beneficiary of the contract, and Walker, the promisee, was called a trustee merely to enable the plaintiff to enforce a contract made by others under which, if performed, he would benefit. In the ordinary sense of the term there was no trust in any of the cases now under discussion. The concept of trust was being used as a mere device for the recognition and enforcement of the right of a third party beneficiary created by a contract to which he was not a party.

In the case of 16 Ch. D 290 (13) in consideration of the admission of R. H. Harper as an underwriting member of Lloyd's Samuel Harper wrote to Lloyd's: 'I beg to tender my guarantee on his behalf, and to hereby hold myself responsible for all his engagements in that capacity'. R. H. Harper defaulted on certain marine insurance policies, and Lloyd's sued Samuel Harper on the guarantee contract, for the benefit of the holders of such policies. It was argued that Lloyd's had suffered no injury, and were entitled only to nominal damages. It was held however that they could recover the amount that was due to the holders of the insurance policies. The cases of (1756) Ambler 330 (4), 6 M. & W. 467 (10) and 3 Mer. 582 (5), were approved and followed. Lloyd's, the promisees were said to have received the guarantee promise as trustees for the benefit of many third parties, including the holders of insurance policies issued by R. H. Harper. Fry, J., said (p. 309) :

"In my opinion the action can be maintained for the whole amount covered by the guarantee. It appears to me from the cases which were cited in the course of the argument, especially (1756) Ambler 330 (4) and 6 M & W 467 (10) that where a contract is made for the benefit and on behalf of a third person, there is an equity in that third person to sue on the contract; and the person who has entered into the contract may be treated as a trustee for the person for whose benefit it has been entered into."

In the Court of Appeal, James, L. J., said (p. 315) :

"I am of opinion that Fry, J., was well warranted in the conclusion at which he arrived that the engagement was made with the Committee as trustees for and on behalf of the person beneficially interested."

Speaking on the argument that Lloyd's could recover no more than nominal damages, Lush, L. J., said (p. 321) :

"That, to my mind, is a startling and alarming doctrine, and a novelty, because I consider it to be an established rule of law that where a contract is made with A for the benefit of B, A can sue on the contract for the benefit of B and recover all that B could have recovered if the contract had been made with B himself."

In this case the contract was merely an ordinary contract of guarantee, made partly for the protection of Lloyd's, partly for the protection of its members, and partly for the protection and security of third persons who might do business with R. H. Harper. If in such a contract the promisee is a trustee for the benefit of third persons the same is true of the promisee in any contract that is made for the benefit of a third person. If the promisee can recover in an action on such a contract the full amount that is due to the third person, he does so because the Court recognizes a legally enforceable right in that third person, and not because the promisee himself has a right to such an amount. The amount so recovered belongs to the third person and not to the promisee. With respect to this money the promisee has no other duties as trustee except to pay the amount so collected, immediately to the third person. Where this is so it is a barren formality to require the suit to be brought in the name of the promisee and the beneficiary should be allowed to maintain suit directly in his own name. In some cases, the beneficiary of the contract might be held to be a cestui que trust on either of two grounds. Two partners have agreed that on the death of one, the survivor shall pay to his widow a sum of money out of the business income, or that the widow shall have an interest in the business. Such contracts have been enforced in favour of the widow as against the creditors of the deceased partner : see 10 Hare 163 (14), 25 Ch. D 89 (15) and 1 Ir. Ch. 176 (16). This could be justified either on the ground that the promisee the deceased partner, was a trustee for his wife on the principle of (1756) Ambler 330 (4) or on the ground that the promisor, the surviving partner, promised to take over the busi-

13. Lloyd's v. Harper (1880) 16 Ch. D 290=50 L J Ch. 140=29 W R 452=43 L T 481.

14. Page v. Cox (1851) 10 Hare 163.
15. Re. Flavell (1883) 25 Ch. D 89=53 L J Ch. 185=32 W R 102.
16. Drimmie v. Davies (1899) 1 Ir. Ch. 176.

ness assets in trust for the benefit of the widow.

There are a few cases in which the plaintiff was denied a remedy, although the facts cannot be distinguished from those in (1756) Ambler 330 (4). Apparently this was because the Court considered that some trust fund in the possession of one of the contracting parties was necessary. The possibility of regarding the promisee as a trustee of the contract right did not occur to the Court. In (1919) A. C. 801 (17) Walford was a broker for the charterers of a ship and negotiated a charterparty with the defendants as owners. In that contract the defendants promised the charterers to pay a commission to the broker. The broker sued the owners on this promise and got judgment. Lord Birkenhead, L. C., said (1919) A. C. pp. 805-806:

"A charterparty is, of course, a contract between owners and charterers, and it is elementary that so far as the brokers are concerned, it is res inter alios acta; but the parties in the present case, by an interlocutory and very sensible arrangement, have agreed that the matter shall be dealt with as if the charterers were co-plaintiffs."

Thereupon he discussed and followed the case of 8 Ex. 299 (11) and the Court held that the contract created in Walford a right to his commission against the shipowners. The learned Lords regarded the charterers as having contracted as trustees for the broker Walford in face of the fact that Walford himself negotiated the contract as agent for the charterers. Lord Wrenbury said (p. 813):

"We have here to do with a contract between two parties reserving a benefit of a third . . . . . a contract to which he himself, I agree, was not a party."

Lord Finlay said (p. 811):

"We must regard the charterer as having entered into that bargain in the interests of the broker and as a trustee for the broker."

Lord Birkenhead said (pp. 806-807):

"The broker, in effect, nominates the charterer to contract on his behalf, influenced probably by the circumstances that there is always a contract between charterer and owner in which this stipulation, which is to enure to the benefit of the broker, may very conveniently be inserted."

In 2 K. B. 498 (18), at p. 506, Scrutton, L. J., said:

"That objection, which has existed so long as I have been at the bar has always been avoided, on the authority of 8 Ex. 299 (11), by the charterers suing as trustees for the broker, or by the shipowners not taking the objection that the brokers were not parties to the charterparty."

Bankes, L. J., said (p. 504):

"The plaintiffs were not parties to the contract alleged to be contained in the charterparty, but it was arranged. in order to avoid any amendment, and in order to bring the plaintiff within the decision of 8 Ex. 299 (11), that an action should be treated as brought by the charterers for the benefit of the plaintiffs. That is possible, and that the contract inserted in the charterparty between the charterers and the shipowners can be treated as a contract made by the charterers in the interests of the brokers, and on which they, the charterers, can sue as trustees for the brokers, must be taken to be established law since the decision in 8 Ex. 299 (11), a decision which has never been questioned."

The absence of the promisee (the charterer) as plaintiff was held to be made immaterial by the agreement of the plaintiff and defendant to try the case as if the promisee were a co-plaintiff. If he had been the plaintiff, he could have recovered Walford's agreed commission as trustee, and Walford could have compelled its payment over. If Walford had had no right to it by virtue of the contract, assuredly the charterer would not; and the subsequent stipulation between Walford and the owner would not itself create one. Nor would the issues be res judicata as against the charterer, for he was a party neither to the suit nor to the stipulation. And if the beneficiary Walford had no legally recognized right prior to the stipulation, the House of Lords would not have recognized and enforced such a right merely because the defendant stipulated with him that the issues should be determined just as if a third person were in fact a party plaintiff. In giving judgment that the defendant must pay Walford in accordance with the contract with the charterer, the House of Lords clearly recognized that that contract had itself created an enforceable right in Walford to the promised commission, and it enforced that right by a direct judgment in his favour against the promisor. This was in spite of the fact that Walford did not give the consideration for the defendant's promise and that he was not the promissee in the contract. Walford had rendered services to the charterer; but the defendant's contract was in con-

17. Les Affreteurs etc. v. Walford (1919) A C 801=88 L J K B 861=35 T L R 542=24 Com Cas 268=121 L T 393.
18. Walford v. Les Affreteur etc, (1918) 2 K B 498=87 L J K B 1215=145 L T 212=34 T L R 572=23 Com Cas 461.

sideration for the payments made by the charterer of the vessel, not in consideration for those services.

In 1 Ir. Ch. 176 (16), the defendant promised his partner by a deed to pay annuities to the promisee's children. The Court held that the children and the promisee's executors could maintain suit on the sealed contract. The Vice Chancellor said (pp. 181-182):

"The defendant's contention is based on the Common Law rule that in the case of contracts under seal no one can sue who is not a party to the deed. That rule is fully stated in the case of 1 B. & S. 393 (1), namely, that a stranger to the contract, that is to say, a person who is not a party to the contract, and from whom no consideration moved, cannot sue upon it. The test seems to be whether such a person could be sued upon the contract. Now here the daughters and sons were not parties to the contract, nor did any consideration move from them, nor could they be sued upon the contract. But this rule did not prevail in equity, and since the Judicature Act the rules in equity are to prevail in cases where such a conflict exists. The equitable rule was that the party to whose use or for whose benefit the contract had been entered into has a remedy in equity against the person with whom it was expressed to be made."

What is the nature of the trust that was created by the Courts in 1919 A. C. 801 (17) and (1756) Ambler 330 (4)? Nothing was held in trust by the promisor; and no property or money was to be paid to the promisee or was to be held by him as a trust fund. The performance that was agreed upon in these two cases was a payment by the promisor direct to Tomlinson and to Walford; in 6 M. & W. 467 (10), it was merely the exercise of sufficient care in the taking of bail bonds; in 16 Ch. D. 290 (13), it was the causing of R. H. Harper to pay his debts to his creditors. All that the promisee could be said to hold in trust therefore was the contract 'right;' and in none of the foregoing cases was this a right that money should be paid to the promisee, which he was to hold as a trustee for the third person. When it is said that the promisee is a trustee of the contract right that the promised performance shall be rendered, we are merely saying that the facts create a right in the third party. The facts that create the resulting legal relations among the three parties are nothing but a promise by *A* for a consideration moving from *B* to render a performance to *C*. There is no more reason for holding *B* to be a trustee, than for holding *C* to have an enforceable right. The result aimed at is the same in either case, and the procedure should be the same in attaining it. In Walford's case the House of Lords recognized that the participation of the trustee is a mere encumbering formality except for the purpose of making the judgment conclusive against him, and that the right to the money is actually in the beneficiary. It is indeed cumbrous procedure that might require, first, a suit by the trustee, and then, secondly a suit by the beneficiary, when the net result required by the law is that the money shall be paid to the beneficiary.

If it be possible and desirable to declare that a promisee may be a trustee of a contract right by virtue of a mere promise to him to pay money to a third person, it is equally possible and desirable to declare him to be a trustee of a right created by any other kind of promise made for a third person's benefit. In neither case is there recognition of a trust for the purpose of conserving property or affording protection for an incompetent beneficiary; in both cases alike it is for the purpose of compelling performance by a promisor who has received a consideration for his promise. The expansion of the trust concept to include cases such as these is an instance of the growth of law by fiction. In England it has often been by fiction that old rules have been avoided, discredited, and finally broken down. The result is the same whether reached by fiction or not, and there is no reason in India why we should not openly recognize the fact that fiction has been employed, that a change has been worked in the law by its use, and that the time has come to state the result in terms that will no longer mislead.

Whatever may have been the necessity in England whether historical, procedural or otherwise, of making use of such fictions in order to give to a third party the right to enforce a contract made between others, there seems to be no similar necessity for importing these anomalies into India—except possibly so far as suits on the Original Side of the Chartered High Courts are concerned. There the English Common Law is enforced, but on the appellate side and in the mofussil Courts the English Common Law is not and has not ever

been followed. The first report of the Commissioners, appointed in 1853 to consider the reform of the Judicial establishments of India stated inter alia:

"The Mofussil Courts, on the other hand, had nothing to do with English law but were amenable in all respects to the Regulations of Government, and when Hindu or Mahomedan Law did not apply, or when no Regulations were applicable, were directed to proceed according to justice, equity, and good conscience. That is to say, in cases for which no law was provided, the Judges were authorized to use the best discretion they possessed. (See Rules and orders, Calcutta High Court (O. S.) Preface, p. 15)."

The Act of 1861 for establishing High Courts of Judicature in India, provided for the abolition of Supreme Courts and Sudder Courts and the establishments of High Courts

"which should have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of such last mentioned Courts (S. 9.)

The Letters Patent of 1865 provided in Cl. 21 that

"the law or equity and rule of good conscience to be applied by the said High Court of Judicature at Fort William in Bengal, to each case coming before it in the exercise of its appellate jurisdiction, shall be the law or equity and rule of good consience which the Court in which the proceedings in such case were originally instituted ought to have applied to such case."

Nor is there anything in the Indian Contract Act which prevents the recognition of a right in a third party to enforce a contract made by others, which contains a provision for his benefit. In the United States of America this is frankly recognized. S. 136, American Law of Contract, as stated by the American Law Institute, provides that

"a promise to discharge the promisee's duty creates a duty of the promisor, the creditor beneficiary, to perform the promise."

According to Scots Law:

"When parties contract, if there be any article in favour of a third party, at any time, est ius quaesitum tertio, which cannot be recalled by either or both of the contractors, but he may compel either of them to exhibit the contract, and thereupon the obliged may be compelled to perform; 1 Stair's Inst. Law of Scotland, 95."

In 32 All. 410 (19) where the appellant executed an agreement with the respondent's father that in consideration of the respondent's marriage with his son (both being minors at the time) he would pay to the respondents Rs. 500 a month in perpetuity for her betel-leaf expenses, &c., from the date of her reception, and charged certain properties with the payment, with power to the respondent to enforce it, it was held that the respondent, although no party to the agreement, was clearly entitled to proceed in equity to enforce her claim. Their Lordships of the Privy Council said that the case of 1 B. & S. 393 (1) was inapplicable, that this case was an action of assumpsit,

" and that the rule of Common law on the basis of which it was dismissed is not, in their Lordships' opinion, applicable to the facts and circumstances of the present case. Here the agreement executed by the defendant specifically charges immovable property for the allowance which he binds himself to pay to the plaintiff; she is the only person beneficially entitled under it. In their Lordships' judgment, although no party to the document, she is clearly entitled to proceed in equity to enforce her claim. Their Lordships desire to observe that in India and among communities circumstanced as the Mahomedans, among whom marriages are contracted for minors by parents and guardians, it might occasion serious injustice if the Common law doctrine was applied to agreement or arrangements entered into in connexion with such contracts."

In 1914 Cal. 129 (20) Jenkins, C. J., and Mookerjee, J., held that where the transferee of a debtor's liability has acknowledged his obligation to the creditor for the debt to be paid by him, under the provisions of the registered instrument conveying to him all the moveable and immovable properties of the original-debtor, and the acknowledgment was communicated to the creditor and accepted by him, the arrangement between the creditor and the transferee did not amount to a novation within the meaning of S. 62, Contract Act; that the obligation undertaken by the transferee was for, and intended to be for, the benefit of the creditor; and that the creditor is entitled to sue the transferee on the registered instrument. They relied upon 3 Mer. 582 (5); 6 Ch. 671 (12); 30 Ch. D. 57 (6) and other English cases. Jenkins, C. J., remarked at p. 144:

" We have here then a position in which it would be, in accordance with the principles of justice, equity and good conscience, the abiding rule in these Courts, that the plaintiff should be entitled to enforce this claim against defendant 5. If we were governed by 1 B & S

19. Khwaja Muhammad Khan v. Husaini Begum (1910) 32 All 410=7 I C 237=14 C W N 865=37 I A 152 (P C).

20. Debnarayan Dutt v. Chunilal Ghose, 1914 Cal 129=20 I C 630=41 Cal 137.

393 (1) there might possibly be a difficulty in our way, but it has to be borne in mind that 1 B & S 393 (1) was a decision on a form of action peculiar to the Common law Courts in England and that the case was influenced by the rule that no action in assumpsit could be maintained upon a promise unless consideration moved from the party to whom it was made. Here we have a definition of consideration which is wider than the requirement of the English law; S. 2 (d), Contract Act. And it has been laid down by Sir Barnes Peacock in a Full Bench decision of this Court in relation to the Courts in the mofussil, 1867 B. L. R. Sup. Vol. 675 (21), that in those Courts the rights of parties are to be determined according to the general principles of equity and justice without any distinction, as in England, between that partial justice which is administered in the Courts of law and the more full and complete justice for which it is frequently necessary to seek the assistance of a Court of equity. The rules and the fictions which have been in many cases adopted by the Common law Courts in England for the purpose of obtaining jurisdiction in cases which would otherwise have been cognizable only by the Courts of equity, are not necessary to be followed in this country where the aim is to do complete justice in one suit. More than that we now have ample authority for saying that the administration of justice in these Courts is not to be in anv way hampered by the doctrine laid down in 1 B & S 393 (1). That I take to be the result of the decision of the Privy Council in 32 All. 410 (19). In the report of that case, in 14 C. W. N. 868 there is an interlocutory remark of Lord Macnaughten which indicates the limits imposed on a Court of Common law. He there says 'supposing she (that is the plaintiff) were an English woman, it is true she could not bring an action in the King's Bench Division but could she not bring a suit in equity'?. The answer of the learned counsel was 'yes.' It is possible that this distinction can be explained by the history of the action of assumpsit which was a development of the writ of trespass. In the old writ in indebtitatus assumpsit it was alleged that the defendant 'not regarding his said promise and undertaking but contriving and fraudulently intending craftily and subtly to deceive and defraud' had not paid and so forth. The breach of contract was charged as deceit and it was only the person deceived who could sue. The bar then in the way of an action by the person not a direct party to the contract, was probably one of procedure and not of substance. In India we are free from these trammels and are guided in matters of procedure by the rule of justice, equity and good conscience. The case with which we are now dealing finds a close parallel in 3 Mer. 582 (5) and also in the more recent cases of 6 Ch. 671 (12) and 30 Ch. D. 57 (6). There is a valuable exposition of the law by Lord Hatherley in the first of these last two cases which was adopted by Cotton, L. J., in the second. The Lord Chancellor said, 'The case comes within the authority that where a sum is payable by A. B. for the benefit of C. D., C. D. can claim under the contract as if it had been made with himself.' That appears to me to be a principle which is of distinct use in the consideration of this case. It appears to me that we have therefore in the circumstances of this case, a condition of affairs in which it would be right to hold that the plaintiff is entitled to enforce his claim in this suit."

21. Rambux Chittangeo's case (1867) B L R Sup Vol. 675.

This case was followed in 1918 Cal. 941 (22), and other cases. It is true that there are other cases both in the Calcutta High Court and in other Courts in India in which a contrary view has been taken, such for example, as 1930 Mad. 382 (23), a Full Bench decision in which all the cases were discussed: 1926 Cal 1009 (24); 1928 Cal. 518 (25) and 1933 Cal. 407 (26). These cases seem to be in conflict with Debnarayan's case (supra) which I propose to follow. If that case can be explained, and it is felt desirable to explain it, by pretending that there was something in it in the nature of a trust or agency, then, in my opinion, in the present case the facts constituted a trust or agency just as much as in that case, or in the English cases to which I have referred. However, I prefer to base my decision on a frank recognition that these are fictions and that in India no necessity arises for resorting to them.

In the present case all the parties were before the Courts below and are before us, and neither common sense nor convenience, equity nor good conscience require me to force the parties into further and unnecessary litigation. In my opinion, the plaintiff is entitled to enforce the contract in suit. Therefore, the appeal is allowed with costs here and below and the judgment of the District Judge of Bankura modified. There will be a decree in favour of the plaintiff for his claim and costs against defendants 8 to 17, and against defendants 1 to 6 for any balance which may remain outstanding after executing the decree against defendants 8 to 17. Defendants 8 to 17 will in addition pay the costs of defendants 1 to 6 and defendant 7.

22. Dwarika Nath v. Priyanath, 1918 Cal 941 =36 I C 792.
23. Subbu Chetti v. Arunachalam Chettiar 1930 Mad 382=124 I C 55=53 Mad 270 (FB).
24. Jiban Krishna v. Nirupama Gupta 1926 Cal 1009=96 I C 846=53 Cal 922.
25. Krishna Lal Sadhu v. Pramila Bala Dasi 1928 Cal 518=114 I C 658=55 Cal 1315.
26. Jagadamba Debya v. Bibhuti Bhusan 1933 Cal 407=143 I C 723=60 Cal 767.

M.C. Ghose, J.—(After stating facts, the judgment proceeds.) In this case there were two contracts. The first contract was between the plaintiff's predecessor and Dutts defendants whereby Dutts agreed to pay plaintiff Rs. 220, a year as rent of the tenure. The second contract was between Dutts and Pandas whereby Pandas agreed to pay Rs. 520, a year as rent of the sub-tenure; they further agreed with Dutts to pay the sum in two lots, viz. Rs. 300 to Dutts and Rs. 220 to plaintiff. I do not see how the contract between Dutts and Pandas can have the effect of releasing Dutts from the effect of the former contract between the landlord and Dutts. In my opinion, Dutts are bound to pay the rent, Rs. 220 a year, to the plaintiff, they cannot escape the liability by reason of their contract with Pandas that Pandas would pay the amount for them. This appears clear from the terms of the contract between Dutts and Pandas. In para. 6 of Panda's kabuliat it was stated:

"If on account of my neglect in paying the rents the Raja institutes a case against you I shall pay you the litigation expenses. If any harm is done to your mourashi interest on account of the said rent, I or my heirs and successors shall make good the loss or damage that may result therefrom to you or your heirs and successors."

It is clear from the terms of the kabuliat that Dutts reserved the rights to demand and obtain from Pandas the whole of the rent, Rs. 520. If Pandas failed to pay the rent to the superior landlord and produce the rent receipt to Dutts within the time Dutts were entitled to sue Pandas for the same, in my opinion the decree made against Dutts must stand. The next question is whether the decree should also be made against Pandas. My learned brother has discussed all the leading cases. I agree to the proposition of law that though ordinarily only a person who is a party to the contract can sue on it, where a contract is made for the benefit of a third person, there may be an equity in the third person to sue upon the contract. The question is whether the contract between Dutts and Pandas was a contract made for the benefit of the plaintiff. It is clear that the contract was made primarily for the benefit of Dutts. They wanted to enjoy an income of Rs. 300 a year without doing any work for it, without either collecting the rent from the raiyats or paying the rent due to the superior landlord. It is urged that the contract was also for the benefit of plaintiff. On the other side it is urged that the benefit to the plaintiff, if any, was very slight; rent is the first charge upon the tenure; if Dutts do not pay the rent the plaintiff may get a rent decree against them and put up the tenure to sale free of incumbrances, but against Pandas the plaintiff can only have a money decree.

My learned brother holds that the plaintiff benefited by the contract between Dutts and Pandas and he is entitled on the strength of it to get a decree against Pandas. I was inclined to hold that the plaintiff should be given a decree against Dutts alone, and Dutts should be left to sue Pandas in a separate rent suit. It was urged that it was now too late for Dutts to sue Pandas, the claim for the period being barred by limitation. In these particular circumstances I accept my learned brother's view that a decree may be made both against Dutts and Pandas in the form proposed by him.

V.V. *Appeal allowed.*

A. I. R. 1934 Calcutta 691

COSTELLO, J.

Behary Lal Roy and *others* — Petitioners.

v.

Pulin Behary Paul and *another*—Opposite Parties.

Civil Rule No. 1304 of 1933, Decided on 20th March 1934.

Bengal Tenancy Act (1885), S. 26 (f) (3)—'Annulling encumbrances' includes mortgage paid off in ordinary way — Landlord can pre-empt only what is transferred.

The expression 'annulling encumbrances' on the property as used in sub-S. (3) of S. 26-F does cover a case where the mortgage is paid off in the ordinary way and is not restricted to 'annulling encumbrances' such as are provided for in connexion with sales in execution of decrees for rent. S. 26-F contemplates that the landlord shall be entitled to acquire by pre-emption whatever has been transferred to the original transferee. [P 692 C 2; P 693 C 1]

Chandra Sekhar Sen and *Rakhal Chunder Dutt*—for Petitioners.

Monmothonath Das Gupta — for Opposite Parties.

Judgment.—In this case the present petitioners made an application under S. 26-F, Ben. Ten. Act, for the purpose

of securing the transfer to them as landlords of a certain holding it having previously been sold in execution of a money decree obtained in the second Court of the Subordinate Judge of Comilla against a man named Dengu Charan Debnath and some others and purchased by persons who are the opposite parties in the proceedings.

The sale had been confirmed on 15th June 1932 and shortly thereafter and within the time specified in S. 26-F the present petitioners as landlords deposited with the Collector Rs. 89-15-0 as the landlords' transfer fee under S. 26-D, Bengal Tenancy Act. The petitioners after having received notice of the transfer on 31st August 1932 applied on 1st November 1932 for a re-transfer of the holding to them under S. 26-F of the Act after depositing the price of the holding together with compensation at the rate of ten per cent. The opposite party appeared on 9th December 1932, and on 22nd December 1932 they put in a petition stating that they had annulled an encumbrance on payment of Rs. 1,200 which the petitioners were liable to pay with interest at 12½ per cent. per annum under the provisions of sub-S. (3), S. 26-F. The learned Munsif of Comilla by his judgment of 31st July 1933 made an order that the application by the landlords should be allowed if they deposited within fifteen days from that date the landlords' transfer-fee Rs. 89-15-0, with interest at 12½ per cent. per annum from 27th May 1932, to 15th August 1933 and in addition Rs. 1,200 with interest at 12½ per cent. per annum from 8th November 1932 to 15th August 1933 and directed that the matter should be put up for final decision on 15th August 1933, thereby giving the petitioners fifteen days' time within which to make the payments specified. The payments were not made and accordingly on 15th August 1933 the final order was made dismissing the application. It is against that order that these proceedings have been taken.

Mr. Sen on behalf of the petitioners has argued that the learned Munsif was wrong in requiring the petitioners to pay the amount of the mortgage money which had been expended by the opposite party for the purpose of getting rid of the mortgage then subsisting upon the property. The petitioners in the proceedings endeavoured to establish that the transaction was not a bona fide one and that therefore there was never a genuine mortgage at all. On that question of fact the learned Munsif said:

> "I am of opinion from the evidence on the record that the opposite parties made a bona fide payment of Rs. 1,200 on 22nd Kartick, 1393 and thus annulled the encumbrance of Ex. A1."

which was the mortgage in question. Mr. Sen has argued that the expression "annulling encumbrances" on the property as used in sub-S. (3), S. 26-F, does not cover a case where the mortgage is paid off in the ordinary way but only applies to "annulling encumbrances" such as are provided for in connexion with sales in execution of decrees for rent. I see no reason at all for putting that limited construction on the expression. It is quite true that S. 26-C which deals with transfer inter partes in the ordinary way by registered instruments does provide in sub-S. (6) that

> "any sum payable on account of a mortgage of the holding shall be deemed to be the consideration money or part thereof"

whereas in the present instance the sale really took place under the provisions of of S. 26-E. At the same time however it must be borne in mind that the language of the Bengal Tenancy Act is not always quite as accurate and as explicit as one would wish ; but looking at the matter broadly it seems to me on reading sub-Ss. (2) and (3) S. 26-F that it was intended that before a landlord could exercise his right of pre-emption he should pay not only the actual consideration money or the value of the property but any one or more of the three classes of sums set out in sub-S. (3), that is to say, money paid in respect of rent for the period after the date of transfer or as the landlord's transfer fee or in annulling encumbrances on the property and upon those sums he should also pay the equivalent of 12½ per cent. per annum from the date of payment of any one of those sums. It seems to me that it would be manifestly unjust that the transferee who had paid a certain sum upon the footing that there was an encumbrance on the property should be required to retransfer the property to the landlord upon the basis that it was free from such encumbrance. If on the other hand, it is to be taken that the landlord acquired the property subject to the encumbrance then there would

seem to be no reason in equity why, if in fact that encumbrance is annulled in the sense of being removed by payment of the amount of the mortgage, he should not pay such sum as has been paid to redeem the mortgage. I see no reason at all for putting upon the expressions "annulling encumbrances" the narrow interpretation which Mr. Sen was suggesting.

Mr. Sen also made a grievance of the fact that the Munsif had not acceded to the request which had been put forward by the landlords that they should be allowed to take a transfer of such portion of the holding as was not actually subject to the mortgage, it being a fact in the present case that only a portion of the holding was actually comprised within the terms of the mortgage in question. The answer to that is that S. 26-F only contemplates a transfer to the immediate landlord of the holding for the transferred portion or share thereof; in other words it only contemplatcs that the landlord shall be entitled to acquire by pre-emption whatever has been transferred to the original transferee, and not what has been transferred and divided up to suit the convenience or pocket of the landlord. In my opinion the landlord must take the whole of what is transferred or nothing.

I have no doubt whatever that the learned Munsif has dealt with this application properly, and applying his mind to the question whether the landlords ought to be required to pay the amount of the mortgage or not he has come to a decision on it. In these circumstances, quite apart from what is the correct view of the law, there seems to be no reason at all why this Court should interfere under S. 115, C. P. C. This rule must therefore be discharged with costs, hearing fee-one gold mohur.

v.v. *Application rejected.*

A. I. R. 1934 Calcutta 693

MITTER AND MCNAIR, JJ.

Saburannessa—Plaintiff —Appellant.

v.

Sabdu Sheikh and *others*—Defendants —Respondents.

Letters Patent Appeal No. 16 of 1933, Decided on 20th March 1934, against judgment of Mukerji, J., D/- 13th March 1933.

(a) Transfer of Property Act (1882), S. 54 — Hibabilewaz is nothing but sale — It is governed by S. 54 if it is immovable and is of value contemplated by that section — Mahomedan Law.

A Hibabilewaz is in reality a sale, and has all the incidents of a contract of sale. A transaction of this character is nothing but a sale; therefore where the property is immovable and is of the value of rupees one hundred and upwards, it must be effected by a registered instrument as required by S. 54, T. P. Act, which relates to sales : 4 *I C* 466; 1927 *Cal* 808 and 1928 *Lah* 516, *Rel on.* [P 693 C2]

(b) Mahomedan Law — Marriage is like contract of sale.

The marriage under the Mahomedan law is a Civil Contract and is like a contract of sale. Sale is a transfer of property for a price. In the contract of marriage the wife is the property and the dower is the price. [P 694 C 1]

Satindra Nath Roy Choudhury — for Appellant.

Mitter, J.—This is an appeal under S. 15, Letters Patent, from a judgment of my learned brother Mukerji, J. The appeal is on behalf of the plaintiff. Her suit has been defeated on the ground that the deed on which she founded her claim not having been registered according to the provisions of S. 54, T. P. Act, no title passed to her. It appears from the plaintiff's own statement in the plaint, that her husband made a gift of immovable property in exchange for the dower. The character of such a transaction has been regarded as a kind of sale in a decision of this Court to which reference has been made by Mukerji, J., viz., the case of 4 I. C. 466 (1). This transaction is governed by S. 54, T. P. Act, and the consideration money being admittedly over one hundred it could only be made by a registered instrument.

It has been contended on behalf of the appellant that a dower is not really a consideration for the marriage and it is in the nature of a gift and therefore the deed did not require registration. It appears clear from the statement which has been quoted that it is not a gift pure and simple, but a Hibabilewaz as understood by the Mahomedan law. It is in reality a sale, and has all the incidents of a contract of sale. The High Court of Calcutta has held that a transaction of this character is nothing but a sale; therefore where the property is immovable and is of the value of rupees one hundred and upwards, it

1. Abbas Ali v. Karim Buksh, (1909) 4 I C 466.

must be effected by a registered instrument as required by S. 54, T. P. Act, 1882, which relates to sales. Reference may be made in addition to the case above referred to, 4 I. C. 466 (1), to the decisions in the cases of 1927 Cal. 808 (2) and 1928 Lah. 516 (3) which support the view we take. In our opinion, the learned Judge has rightly held that the transaction requires registration.

It has further been contended that the matter being one relating to marriage under the Mahomedan law, should be governed by the personal law of the Mahomedans, and it is argued that the transaction, whatever its real character may have been, is saved from the operation of British Laws by the provisions contained in S. 37, Bengal N. W. P. and Assam Civil Courts Act 12 of 1887. Mukerji, J., has rightly negatived this contention and we are in entire agreement with him. The marriage under the Mahomedan law is a civil contract and is like a contract of sale. Sale is a transfer of property for a price. In the contract of marriage the wife is the property and the dower is the price. There is therefore no substance in the second point raised. The result is that the appeal fails and is dismissed. There will be no order as to costs as the learned advocate who appeared before Mukerji, J., has intimated to us that he has no instructions to appear in this Letters Patent appeal.

McNair, J.—I agree.

V.S. *Appeal dismissed.*

2. Sarifuddin v. Mohiuddin, 1927 Cal 808 = 105 I C 67=54 Cal 754.
3. Fateh Ali v. Muhammad, 1928 Lah 516 = 119 I C 258=9 Lah 428.

A. I. R. 1934 Calcutta 694

BUCKLAND, AG. C. J.

On difference between

LORT-WILLIAMS AND M. C. GHOSE, JJ.

Durga Das Das—Plaintiff—Appellant.

v.

Nalin Chandra Nandan and *others* — Defendants—Respondents.

Appeals Nos. 549 and 550 of 1933, Decided on 9th March 1934, from original orders of Sub-Judge, First Court, Alipur, D/- 17th November 1932.

(a) Civil P. C. (1908), O. 19, R. 3 — Affidavit should state grounds of belief.

An affidavit is defective if the deponent does not say which part is based on information and which on belief, nor does he state the grounds of his belief : 37 *Cal* 259, *Rel on.* [P 696 C 2]

(b) Civil P. C. (1908), O. 39, R. 1 — Overt act towards alienation of properties must be proved.

The plaintiff must prove some overt act towards the alienation of the properties such for example as negotiations or offers for sale, and that the property is in danger of alienation before any order can be made under the provisions of O. 39, R. 1. [P 696 C 2]

(c) Civil P. C. (1908), O. 38, R. 5 — Mere vague allegations are not sufficient—Present intention of obstruction or delaying execution of decree must be proved

Where there is nothing in documents filed by way of objections by the defendants to an application under O. 38, R. 5 to show that the defendants ever had any intention of obstructing or delaying the execution of any decree which might be passed against them, or with such intent were about to dispose of their property, it cannot be said that the Judge could be satisfied "otherwise" within the meaning of R. 5 (1). And the mere fact that a defendant has in the past mortgaged or disposed of his property is not a sufficient ground for levying attachment. There must be a present intention : 1922 *Bom* 276: 1921 *Bom* 69 and 1926 *Cal* 855, *Rel on.* [P 697 C 1]

(d) Civil P. C. (1908), O. 38, R. 5 and O. 39, R. 1—Prima facie case must be made out before either injunction or attachment can be granted.

The plaintiff must make out a prima facie case before either injunction or attachment can be granted. Moreover the Court must be satisfied that interference is necessary to prevent injury which is irreparable, and that the mischief or inconvenience which is likely to arise in consequence of withholding the relief will be greater than that from granting it: 1930 *Sind* 287 and 17 *I C* 219, *Ref.* [P 697 C 1]

(e) Civil P. C. (1908), O. 38, R. 5 and O. 39, R. 1 — Orders passed under these rules are discretionary — Hence appellate Court will not lightly interfere with such orders.

The order passed under O. 38, R. 5 and O. 39, R. 1 are discretionary and an appellate Court will not interfere with the exercise of a lower Court's discretion unless satisfied that the Judge acted on wrong principles. The mere fact that the appellate Court might have taken a different view is not a sufficient ground for interference. If the Judge rightly appreciates the facts and applies to those facts the true principles, that is a sound exercise of judicial discretion: 1930 *Sind* 287 and 26 *Mad* 168, *Ref.* [P 697 C 2]

(f) Civil P. C. (1908), O. 38, R. 5 and O. 39, R. 1—Neither attachment nor injunction ought to be lightly granted.

Neither injunction nor attachment ought to be lightly granted. It would be a serious thing if persons in possession were restrained from making use of the property merely because a suit had been instituted about it. It is only where it is essential that property should be kept in its existing condition pending the suit that the Court should interfere : 1920 *Cal* 276, *Rel on.* [P 698 C 2]

Sarat Chandra Rai Chaudhuri and *Urukramdas Chakerbertty* — for Appellant.

M. C. Ghose, J.—These two appeals were argued by Mr. Sharat Chandra Rai Choudhuri on 15th February last. My learned brother, on hearing him proposed to dismiss them summarily. I proposed to admit them for hearing. I do not propose to say more than certain of the arguments advanced by Mr. Rai Chaudhuri which inclined me in favour of admission of these appeals. He urged that the learned Subordinate Judge committed an error in making adverse remarks on the plaintiff's case. He should have noted that the plaintiff was a small child when his mother died and his elder sister, defendant 2, took care of him and defendant 1 who married her came to live as Ghar Jamai, and during his infancy they exercised their influence on him.

During his minority, his case is that they and defendant 3 managed the estate and embezzled large sums of money and when he was 20 years old, they induced him to execute three deeds of release to the extent of one lac of rupees on the representation that his father desired that the gifts should be made, but that there was nothing in his will to that effect. The learned Subordinate Judge criticised the affidavit filed on behalf of the plaintiff; but having regard to the provisions of O. 38, R. 5 (1) and O. 39, R. 1 which provide that the facts might be proved by affidavit or otherwise the learned Judge should have taken into account the admission of defendant 3 that immediately before the suit he had been trying to dispose of one of the properties. All these properties had been bought during the time they were managing the estate. The learned Judge was wrong to criticise the plaintiff for not paying sufficient court-fees for consequential relief, inasmuch as the suit should be valued according to the statement of the plaintiff. The plaintiff stated in the plaint that he was in his possession of all the six properties, that he himself was in direct possession of one property and the other five properties were let out to tenants from whom he was getting rents and that the learned Judge was wrong in holding that the defendants were in possession of the properties.

It was suggested that the appeals were made very late. It was urged in reply that the petitions were made immediately the suit was filed and they were disposed of on 17th November and thereafter the plaintiff made no delay but immediately obtained copies of the necessary documents and filed the appeals in the beginning of December and it was not his fault that the appeals were not heard till the middle of February. In my view, we should admit these appeals, look at the records and hear the parties before forming our final opinion.

Lort-Williams, J.—These are two appeals from a judgment of Mr. Hiralal Mukherjee, Subordinate Judge at Alipur refusing to grant two applications by the plaintiff (1) for attachment of property before judgment under O. 38, R. 5, Civil P. C. and (2) for a temporary injunction under O.39, R. 1, Civil P.C. The plaintiff's father died in January 1929, leaving considerable property both moveable and immovable and a will under which plaintiff became sole owner of the estate. He attained his majority in August 1929 and took out letters of administration in November. In 1933, when he was 22 years of age, he brought the present suit against his sister and her husband, and the Manager of the estate. The plaint is a long, rambling and scandalous pleading, full of unncessary and irrelevant matter, and deficient in particulars. It offends against all the rules of pleading contained in O. 4, Civil P. C., and, if any attention were paid in the Subordinate Courts to the rules of pleading and procedure, it ought to have been struck out long ago under O. 6, R. 16, as tending to prejudice, embarrass and delay the fair trial of the suit. So far as it is possible to ascertain from this confused document what the plaintiff claims, he seems to allege that he was a person of weak intellect, and under the control and dominance of the defendants, who conspired together to defraud him. That, inter alia, they took possession of all his properties, and used the money belonging to his estate to buy, in their own names, certain other properties, enumerated 1-6 in

Schedule 'Chha' and induced him by fraud to execute three deeds of release for sums amounting to one lac of rupees. He asks for a declaration of title to the properties in Schedule 'Chha,' and for accounts. He does not ask for possession or for any other consequential relief, or for an injunction.

The defendants deny the allegations of fraud in toto, admit the deeds, which were duly registered, and which they say, the plaintiff executed voluntarily two years after he attained majority, and in accordance with the wishes of his father, and state that they purchased the properties in Schedule 'Chha' with their own money. The application for attachment related of course to defendants's own properties, and was in respect of plaintiff's claim for accounts. The application for an injunction, related to the properties in Schedule 'Chha,' which plaintiff sought to restrain defendants from alienating. The pleadings and affidavits disclose the following facts. The properties in Schedule 'Chha' are in the possession of the defendants. They have built houses thereon, and have been living there for some time and have let out part to tenants, from whom they collect the rents. Their names are registered as owners and they pay the Municipal taxes. The title deeds to properties 1-4 were left, with other properties, in plaintiff's house, and have been misappropriated by him. The title deeds to properties 5 and 6 are in the possession of the manager to whom they belong. He borrowed money in 1933 by hypothecating property No. 5 only, for the purpose of buying another house, and transferred the title-deeds to the mortgagee. Subsequently, in order to pay off the mortgage, he decided to sell the property and executed a bainapatra. This was long before the institution of the suit, but on hearing of the suit he postponed registration of the document, returned the baina money, with costs and fees thereon, to the purchaser, recovered the document, and filed it in Court. The Subordinate Judge did not deal with the matter summarily but heard the pleaders at considerable length and after carefully considering all the facts and documents he refused both applications. His reasons for refusing an injunction were :

1. That the plaintiff's affidavit is inadequate and defective. He alleges, in Para. 12 thereof simply that the defendants are trying to dispose of the properties in Schedule 'Chha' and states that his allegation is based partly on information which he believes to be true and partly on belief. He does not say which part is based on information and which on belief, nor does he state the grounds of his belief, contrary to the provisions of O. 19, R. 3, Civil P. C.: 37 Cal 259 (1). No overt act towards the alienation of the properties in Schedule 'Chha' is even suggested in the application, such for example as negotiations or offers for sale, and there is no proof that the property is in danger of alienation. These reasons clearly are sound and unanswerable, and such proof is essential before any order can be made under the provisions of O. 39, R. 1.

2. The plaintiff, in respect of the Schedule 'Chha' properties, asks in his plaint only for a declaration of title, without any consequential relief, and without asking for an injunction. It is clear from the pleadings and affidavits that he is out of possession, yet he does not ask for it. His claim is barred under S. 42, Specific Relief Act.

3. The title-deeds of the properties are in the possession of the plaintiff. (This statement is not quite accurate. The plaintiff has possession of the deeds of properties 1-4). In view of this and the pendency of the suit, the plaintiff cannot have any reasonable apprehension of alienation. No person would be willing to purchase property which is the subject of lis pendens. These reasons also are sound. In a suit for declaration an injunction should not be granted where there is no claim for consequential relief or permanent injunction: 1926 Lah. 504 (2). The learned Judge's reasons for refusing attachment were that the affidavit was sworn, not by the plaintiff, but by an employee of the plaintiff, who states in paras. 4 and 6 that the defendants are trying to, and are about to, dispose of their properties with intent to obstruct and delay the execution of the decree, and that his statements are based partly on information and partly on belief, without stat-

1. Padmabati Dasi v. Rasik Lal Dhar, (1911) 37 Cal 259=6 I C 666.
2. Shiromani v. Banta, 1926 Lah 504=36 I C 439.

ing which are based on which and without stating his grounds of belief. Therefore this affidavit also is inadequate and defective, and open to the same objections as the other, and offends against the order and the decision to which I have already referred. The learned advocate for the plaintiff argued that in addition to plaintiff's affidavits, which he admitted were inadequate and defective, there were in the objections filed by the defendants admissions upon which the Judge could be satisfied " otherwise " within the meaning of O. 38, R. 5 (1).

But the Court must be thoroughly satisfied, and there is nothing in these documents to show that the defendants ever had any intention of obstructing or delaying the execution of any decree which might he passed against them, or with such intent were about to dispose of their property. Mere vague allegations are not sufficient: 1922 Bom 276 (3) and see 1921 Bom 69 (4). And the mere fact that a defendant has in the past mortgaged or disposed of his property is not a sufficient ground for levying attachment. There must be a present intention: 1926 Cal 855 (5). Further the Judge held, for the reasons given in his judgment, that the plaintiff had failed to make out a prima facie case. This is essential before either injunction or attachment can be granted. Moreover the Court must be satisfied that interference is necessary to prevent injury which is irreparable, and that the mischief or inconvenience which is likely to arise in consequence of withholding the relief will be greater than that from granting it: 1930 Sind 287 (6) and 17 I C 219 (7) and many other cases.

The question of appeal raises the further question whether the procedure under the Code and the machinery of the High Court are generally appropriate to appeals in such matters as these. It is true that an appeal is given, but in most, if not in every such case, it must be fruitless and should not therefore be admitted except in very exceptional circumstances. Both injunction and attachment are intended to give prompt relief from immediate or impending danger of injury which will be irreparable. These applications were heard and refused by the learned Judge on 17th November 1933. They came before this Court for disposal under O. 41, R. 11, Civil P. C., on 15th February 1934 no less than three months after the alleged danger had arisen. If admitted, these appeals will be heard some two or three years hence. (The Court is now hearing Miscellaneous Appeals of 1931 and 1932). Long before that date, in all probability, the suit itself will have been decreed. Could any procedure be more absurd or more likely to bring the Court and the administration of justice into contempt? In my opinion the Court ought not to admit appeals from such orders, except in cases of serious misdirection in law or fact, when special directions might be given for expedition.

Moreover it must be remembered that both these orders were discretionary, and an appellate Court ought not to interfere with the exercise of a Judge's discretion unless satisfied that it was not judicially exercised, that is to say, that the Judge acted on wrong principles. The mere fact that the Judges of the appellate Court might have taken a different view is not a sufficient ground for interference: 1930 Sind 287 (6), 3 Ch D 330 (8). 10 Ch 206 (9), (1911) 2 K B 543 (10) and 1927 A C 732 (11) and many other cases.

If the Judge rightly appreciates the facts, and applies to those facts the true principles, that is a sound exercise of judicial discretion: White, C. J., in 26 Mad 168 (12). This well-established rule frequently seems to be overlooked or disregarded by appellate Courts in India, or appellate Judges too

3. Senaji Kapur Chand v. Pannaji Devi Chand, 1922 Bom 276=64 I C 530=46 Bom 431.
4. Nowroji Padamji v. Deccan Bank Ltd., 1921 Bom 69=63 I C 958=45 Bom 1256.
5. Manmatha v. Nagendra, 1926 Cal 855=94 I C 880.
6. Daily Gazette Press Ltd. v. Karachi Municipality, 1930 Sind 287=127 I C 690.
7. Vathiar Ramanuja Aiyangar v. Aiyanachariar, (1912) 17 I C 219.
8. Watson v. Rodwell, (1876) 3 Ch D 380=45 L J Ch 744=35 L T 86=24 W R 1009.
9. Sheffield v. Sheffield, (1875) 10 Ch 206=44 L J Ch 304=23 W R 378.
10. Maass v. Gaslight and Coke & Co., (1911) 2 K B 543=80 L J K B 1313=27 T L R 473 =55 S J 566=104 L T 767.
11. Donald Campbell & Co. v. Pollak, (1927) A C 732.
12. Subba v. Haji Badahaw, (1903) 26 Mad 168.

readily come to the conclusion that a discretion has not been exercised judicially. Finally neither injunction nor attachment ought to be lightly granted. It would be a serious thing if persons in possession were restrained from making use of the property merely because a suit had been instituted about it. It is only where it is essential that property should be kept in its existing condition pending suit, that the Court should interfere: 1920 Cal 276 (13). For all these reasons, I am of opinion that these appeals ought to dismissed, but as my learned brother does not agree, the matter must be referred for hearing by a third Judge, under the provisions of Cl. 36 of the Letters Patent.

Buckland, Ag. C.J.—I am not satisfied that the learned Subordinate Judge wrongly exercised his discretion; and I agree with my learned brother Lort Williams, J., that these appeals should be summarily dismissed under O. 41, R. 11, Civil P. C.

V.S. *Appeals dismissed.*

13. Begg Dunlop & Co v. Satish Chandra, 1920 Cal 276=54 I C 862=46 Cal 1001.

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* A. I. R. 1934 Calcutta 698

PATTERSON AND GUHA, JJ.

P. G. Dombrain and *another*—Accused—Petitioners.

v.

Someswar Choudhury— Complainant—Opposite Party.

Criminal Revn. No. 1216 of 1933, Decided on 14th March 1934.

*** Criminal P. C. (1898), Ss. 505 and 507—Application for issue of fresh commission for cross-examination of witnesses is competent.**

Section 256, Criminal P. C., gives an accused person the right to have the witnesses for the prosecution cross-examined *after charge has been framed*, and that right is not in any way affected by the provisions contained in Ch. 40. S. 507 which is one of the sections contained in Ch. 40, provides for the inspection of depositions taken on commission, and it is open to a person accused in a warrant case, to refrain from putting in any interrogatories when the commission is first issued, and to apply at a latter stage, (that is to say after he has inspected the deposition taken on commission and after charge has been framed against him), for re-issue of the commission together with his cross-interrogatories. [P 698 C 2; P 699 C 1]

Suresh Chandra Talukdar and *Holiram Deka*—for Petitioners.

Probodh Chandra Chatterjee—for Opposite Party.

Judgment.—In the case to which this Rule relates a certain witness for the prosecution was examined on commission at the instance of the complainant, but for reasons which it is not necessary to state here, no cross interrogatories were filed on behalf of the accused, and the commission together with the deposition of the witness, was returned to the trying Magistrate without there having been any cross-examination. The trial was then proceeded with and a charge under S. 420, I.P.C., was in due course framed against the accused persons, the present petitioners. The petitioners thereafter applied to the trying Magistrate for the issue of a fresh commission for the cross-examination of the witness in question. The trying Magistrate made a recommendation to the District Magistrate for the issue of the commission prayed for, but the District Magistrate refused to issue a fresh commission on the ground that the petitioners had failed to furnish cross-interrogatories in connexion with the first commission, though they had been given several opportunities of doing so. The present Rule is for the quashing or transfer of the proceedings, or, in the alternative, for directing that the petitioners be given an opportunity of cross-examining the witness in question on commission.

The provisions regarding the issue of a commission for the examination of a witness are contained in Ch. 40, Criminal P. C., and it is contended on behalf of the opposite party that those provisions are self-contained. It is pointed out that Ch. 40 contains no provision for the issue of a supplementary commission for the purposes of cross-examination, or for any other purpose, and it is contended that this being so, the District Magistrate had no power to issue any such supplementary commission as was demanded on behalf of the petitioners. In our opinion this contention cannot be sustained. S. 256, Criminal P. C., gives an accused person the right to have the witnesses for the prosecution cross-examined after charge has been framed, and that right is not, in our opinion, in any way affected by the provisions contained in Ch. 40. S. 507 which is one of the sections contained in Ch. 40 provides for the inspection of depositions taken on commission,

and it is in our opinion open to a person accused in a warrant case, to refrain from putting in any interrogatories when the commission is first issued, and to apply at a later stage, (that is to say after he has inspected the deposition taken on commission and after charge has been framed against him), for re-issue of the commission together with his cross-interrogatories. In the above view of the matter we would make the Rule absolute so far as the prayer for a direction on the District Magistrate to give the petitioners an opportunity of cross-examining the witness in question on commission is concerned. This being our decision of the main question, we do not think it necessary to say anything about the prayer for the quashing of the proceedings or for the transfer of the case to some other District.

V.S. *Rule made absolute.*

A. I. R. 1934 Calcutta 699

COSTELLO AND LORT-WILLIAMS, JJ.

Probodh Kumar Das — Defendant — Appellant.

v.

Gillanders Arbuthnot & Co.—Plaintiffs —Respondents.

Appeal No. 105 of 1933, Decided on 17th May 1934.

Contract—Surety—Creditor failing to perform term of contract—Surety cannot be called upon to pay.

It is not permissible for the creditor to call upon the guarantor to pay any sum under his gurantee, where he fails to carry out the most important term of his contract, in this case, to convey the property to the purchaser.

[P 702 C 2]

Lort-Williams, J.—This is an appeal from a judgment of Buckland, J., arising out of a suit upon a contract of sale of a tea garden. It appears that some time in August 1931 one S. N. Roy approached Messrs. Gillanders Arbuthnot & Co., with an offer to purchase from them the Kaiyacherra Tea Estate as per description given by them. The terms upon which he offered to purchase were contained in a letter dated 19th August 1931. He added, as postscript to his letter that Mr. P. K. Das, the present appellant, was agreeable to stand as guarantor. Subsequent to that letter, there were certain discussions between the parties, and an amended offer was made, and on 30th September 1931 Messrs. Gillanders Arbuthnot & Co., wrote, saying that they could not accept the amended offer immediately, and asked Roy to leave it open till 7th October.

On 8th October, the company wrote, accepting the offer contained in the letter of 19th August, subject to modification which had been arranged verbally, regarding the payment of the purchase money. The contract provided, inter alia, that the property should be sold free from all sorts of charges and encumbrances, and that the purchase price should be Rs. 85,000 of which Rs. 15,000 were to be paid on the date of delivery of possession, Rs. 10,000 before 31st January 1932, and the balance of Rs. 60,000 in three equal instalments spread over three years. A promissory note was to be given for the balance of the purchase price, for Rs. 70,000 with interest thereon, payable on demand, and upon any default in the punctual payment of any of the instalments, the vendors were to be at liberty to enforce payment on the promissory note for the whole amount then outstanding. The amount was to be further secured by way of equitable mortgage by deposit of title deeds or by a legal mortgage. The purchase was to take effect from 10th October 1931, the date of the execution of the document, and possession was to be given on 16th October 1931, when the purchaser would make the first payment of Rs. 15,000. Then follows the condition which has become of some importance in view of what subsequently happened. Cl. 4 of the agreement provides that

"the tea manufactured in the garden till then and in stock in the garden on the date of possession shall also be delivered to me at the time, except such a stock as has previously been sold amounting to as I understand about 25 maunds."

'Till then' obviously meant up to 16th October 1931 when possession was to be given. Cl. 5 provides that Messrs. Gillanders Arbuthnot & Co. would have the property conveyed to the purchaser or his nominee, as soon after he had made payment of the first sum of Rs. 15,000 as Messrs Gillanders' Solicitors could reasonably arrange,

"and the conveyance was to contain the usual form of receipt for the whole of the purchase money, although, in fact, the purchaser would only have paid a sum of Rs. 15,000."

The balance Rs. 70,000 was to carry interest, and together with the interest was to be a first mortgage on the

Kaiyacherra Tea Estate, which the purchaser was to execute. The cost of stamp duty and registration fee relating to the conveyance and mortgage were to be paid by the purchaser in addition to the price of the property. The terms of Mr. Das' guarantee, which was written at the foot of this contract, were as follows:

"I hereby agree to stand guarantor for the due performance by Mr. S. N. Roy, of the undertakings set forth above, and I agree to pay the amount outstanding on account of principal and interest immediately on being called upon by you to do so, if you do not receive payments from Mr. S. N. Roy according to the above letter, and without your first being required to take legal action for the recovery of the amount due from Mr. S. N. Roy."

The initial sum of Rs. 15,000 was paid by the purchaser, and possession was given on or about 16th October 1931. Default was made in payment of part of the instalment of Rs. 10,000 due on 31st January 1932. On 21st October 1931, i. e., five days after taking possession, Roy wrote to Messrs. Gillanders, inter alia, as follows:

"The despatch of an invoice of 179 chests of tea was taken in hand by your late Manager. This has been taken over by myself, as excluding 24 chests herein, they were all packed subsequent to 10th October, the date of my purchase and they all are under the terms of purchase, my property. Again 606 chests were despatched from the garden between 28th September to 7th October, and these teas are on their way to Calcutta, and they also are, under the terms of purchase mine, I, accordingly beg to request you to hand over the chests to the Bhawanipur Banking Corporation Ltd., after duly endorsing the invoices. We also understand that 96 Mds. of Tea are lying unsold with Messrs. Bullock Bros. & Co. Please direct Messrs. Bullock Bros. & Co., to send the sale proceeds of the same to my Bankers Messrs. Bhawanipur Banking Corporation, Ltd."

On 24th October, Messrs. Gillanders wrote as follows:

"We do not agree with your contention regarding the Tea despatched by the receiver and regret therefore that we cannot comply with your requests. The terms of the purchase were that only the Tea remaining unpacked at the Factory on the date of sale should be delivered to you."

Subsequently, various interviews took place between Roy and Messrs. Gillanders with the object of trying to settle this dispute, and on 9th December Mr. Roy wrote a letter marked 'without prejudice,' referring to an interview he had with Messrs. Gillanders on 8th December, and submitting proposals for an amicable settlement of the dispute. He said, either that they should make over to him all Tea of the Kaiyacherra Garden, 12,000 lbs. of which must be given free of charge, and the balance be supplied at its then price. He stated that he made this proposal without prejudice to his legal rights.

Subsequently, Messrs. Gillanders prepared a draft letter for the signature of Roy, and this was signed by him on the 20th January 1932. In this letter he referred to the previous letter and interview, and asked the company if they would sell him 400 Mds. of Kaiyacherra Tea then in Calcutta, at the price of 4 annas per pound packed in garden chests. If they were prepared to sell that quantity of tea on the terms proposed, he would give up all claims in respect of the tea purchased by him under the contract dated 8th October 1931, and would admit that Messrs. Gillanders had performed the contract in full so far as the question of the sale of manufactured tea was concerned. Messrs. Gillanders replied on the same day saying that they were prepared to sell him 400 Mds. of Kaiyacherra Tea at 4 annas per lb., and they confirmed that all disputes under the contract of 8th October 1931 were now settled and that Roy had no further claim against them in respect of tea alleged to have been purchased by him.

The reason for this dispute appears to be, that between the date when Roy first made his offer in August 1931 and the date when possession was given on 16th October 1931, Messrs. Gillanders, through their Receiver or Manager, had sold off a considerable amount of tea from the estate. Roy apparently took up the position that this tea belonged to him. Messrs. Gillanders pointed to the specific terms of the agreement to which I have already referred, which provided that the tea manufactured in the garden up to 16th October, and the stock in the garden on the date of possession was to belong to the purchaser, except such stock as had been already sold prior to the date of purchase.

It seems clear that Roy's contention about the 606 chests despatched between 28th September and 7th October was not justified. On the other hand, it is clear that Messrs. Gillanders' statement in their letter of 24th October that he was only entitled to tea remaining unpacked at the factory on the date of the sale, was also incorrect and not in ac-

cordance with the terms of the contract. Roy's contention, in his letter of 21st October-with regard to 179 chests—was that this was packed tea lying in the garden, but packed subsequent to 10th October. Messrs. Gillanders' letter of 24th October shows, that they were disputing his right to any packed tea lying in the garden which had been packed prior to 16th October, and were contending that he was only entitled to tea which remained unpacked up to that date. Subsequently, Messrs. Orr, Dignam & Co., the Solicitors of Messrs. Gillanders, sent the drafts of the conveyance and mortgage referred to in the agreement for the approval of Roy. This they did for the first time on 23rd December 1931, which was more than two months after delivery of possession. It appears from further correspondence between the parties that the vendors and their solicitors were pressing Roy not only to pay the subsequent instalment of Rs. 10,000, but to return the drafts of the conveyance and mortgage duly approved by him and by Mr. Das. Roy then began making excuses for his failure to pay his first instalment on the due date, and explained his failure to return the draft conveyance and mortgage by saying that the mortgage was an unnecessary expense and that an equitable mortgage by deposit of title deeds would be sufficient. The result was that Messrs. Gillanders wrote to Mr. Das on 1st February 1932 informing him that Roy had paid only Rs. 2,000 out of the second instalment of Rs. 10,000 and that they called upon him as guarantor to pay the balance, and on 18th May Messrs. Orr, Dignam & Co., threatened Mr. Das with proceedings unless he paid in terms of his guarantee a sum of Rs. 68,000, being the balance of the principal due, and also a sum of Rs. 2,965 odd for interest.

On failure of Mr. Das to make any payment, Messrs. Gillanders instituted the present suit, in which they set out the agreement to which I have referred and claimed a sum of Rs. 71,000 odd, the defendant's guarantee. In his written statement, it was contended that the execution of the necessary conveyance, and the taking of the mortgage from the purchaser, were conditions precedent to his guarantee becoming effective; further, that tea had not been delivered to the purchaser according to the terms of the agreement to the extent of 735 maunds of the estimated value of Rs. 15,000 and that, without the consent of the defendant, the plaintiffs had varied and altered the terms and conditions of sale, and entered into fresh terms with the purchaser. The suit coming on for hearing before Buckland, J., the following issues were settled:

(1) Is the surety discharged by reason of the plaintiff not having executed a conveyance and obtained a mortgage of the property? (2) Is the defendant discharged by the arrangement with Roy as to the tea in variation of the of the terms? (3) Did the plaintiff firm represent to the defendant that they were full owners of the property? If so, can they sue on the guarantee? and (4) Did the plaintiff fail to deliver 733 maunds of tea when possession of the property was given to the purchaser? And if so, did such failure discharge the guarantor?

The third issue about representation was not proceeded with. With regard to the issue about the conveyance, the learned Judge came to the conclusion that there was no express stipulation in the contract, that the execution of the conveyance and mortgage should be a condition precedent to the defendant's guarantee becoming effective. With regard to the mortgage, the learned Judge, quite properly, held that S. 141, Contract Act, provides that a surety is entitled only to the benefit of any security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into. Therefore, this mortgage was not a security which came within the provisions of S. 141, and the defendant was not entitled to raise this matter in defence. With regard to the question about non-delivery of tea, the learned Judge said that at first he was disposed to think that there had been a variation, and that it was clear that if there had been a variation the defendant was discharged from his guarantee. But, in the end he came to the conclusion that there was nothing to show that the tea which the parties were disputing about at the end of the the year 1931, was tea within the terms of the contract, and that as the evidence stood, it was consistent with the the view that the parties were disputing about tea which was altogether outside the contract, which Roy claimed as being within the terms, but which Messrs. Gillanders

contended, formed no part of the subject-matter of the contract. That being the position, the learned Judge held that the onus was upon the defendant to establish that the parties were disputing about tea which formed the subject-matter of the contract, and in the absence of any such evidence, he decided that issue against the defendant.

During the hearing of this appeal, it was contended on behalf of the defendant that Messrs. Gillanders were no longer in a position to convey the property, because they had entered into a contract to sell the property to another party and had received payment of the purchase price of Rs. 25,000. In order to clear up this point, affidavits were put in by both sides, and it appears that such is the fact. It was contended on behalf of Messrs. Gillanders that they are still in a position to convey the property to Roy or the defendant, because they have not yet executed any registered document conveying this property to the proposed purchaser. On the issue raised about the conveyance, it was contended on their behalf that because under S. 55, T. P. Act, it is the duty of the buyer to tender to the seller a proper draft conveyance and because Roy failed to do this, therefore Messrs. Gillanders were absolved from any responsibility in the matter either towards Roy or the defendant. S. 55 provides that the conditions therein mentioned shall apply in the absence of a contract to the contrary. In my opinion, the present contract did not come within the provisions of that section. Messrs. Gillanders specifically agreed by Cl. 5 of the contract to convey the property to Roy or his nominee, as soon after he had made payment of the first sum of Rs. 15,000 as their Solicitors could reasonably arrange.

The defendant contended, and I think rightly, that the plaintiffs have failed to perform this term of the contract, and that until they do so, they cannot be heard to contend that he is liable to them upon his guarantee. This was not an insignificant term of the contract, but probably the most important condition which the contract contained, and it was the very basis of the contract. Messrs. Gillanders say that they have done all that they can in the matter and therefore must not be prejudiced because of their failure to convey. In my opinion, this contention is not correct. It may be that they have been unfortunate owing to the way things have turned out. But the answer to the contention is that they ought to have foreseen that the purchaser might not only fail to perform the contract by payment, but might delay matters by purposely omitting to tender a draft conveyance. For such matters they should have provided specifically in the contract. Moreover, in face of the difficulty which they found themselves in, there was nothing to prevent them conveying this property to Roy without waiting for any tender by him of a draft conveyance. If they had done so, it would have prevented the defendant from raising the contention that they had failed to perform the most important part of their contract. This being the position, probably the delay of two months in tendering the draft conveyance to Roy becomes of less importance, though it is questionable whether delay for so long was a proper performance of the contract contained in Cl. 5.

Further, it is clear that the plaintiff company have complicated matters considerably. They have entered into a contract of sale of this very property to another party and have accepted payment therefor. It might be possible by arrangement with this party and by executing various other legal documents, to place both the purchaser and the guarantor in the same position as they would have been, if these transactions had not taken place. Whether that be so or not, such a position was never contemplated by the parties when they entered into the present contract. In my opinion it is not permissible for the plaintiffs to call upon the guarantor to pay any sum under his guarantee in face of the fact that they have failed up to this very moment to carry out the most important term of their contract namely to convey the property to the purchaser within the provisions of Cl. 5.

On the second point about variation, it is clear that in the letter of 21st October 1931 Roy was claiming 179 chests of tea to which I have already referred, and that in their letter of 24th October 1931, Messrs. Gillanders were contending that he had no right to this tea under the contract because it was packed

tea, whereas he was only entitled to tea which was unpacked at the time of delivery of possession. Therefore this tea was part of the subject-matter of the dispute which was subsequently settled in the way which I have already described, that is to say, instead of the tea which Roy claimed in his letter of 21st October 1931 he got something altogether different namely the tea mentioned in the subsequent letters of 27th January 1932. Therefore there has been a variation of the terms of the contract of which the defendant guaranteed due performance by Roy. For both these reasons the plaintiff company must fail in their suit with the result that the decree must be set aside and this appeal must be allowed with costs here and below.

Costello, J.—I agree.

V.S. *Appeal allowed.*

A. I. R. 1934 Calcutta 703

MITTER AND MCNAIR, JJ.

Satulal Bhattacharjee and *others* — Plaintiffs—Appellants.

v.

Asiraddi Sheikh —Defendant—Respondent.

Letters Patent Appeal No. 23 of 1933, Decided on 22nd March 1934, against judgment of Patterson, J., Calcutta, D/-28th July 1933.

(a) Civil P. C. (1908), O. 41, R. 4—Suit for ejectment and khas possession — One of the defendants dying and his two sons brought on record — One of the sons dying during pendency of second appeal but his representative not brought on record — One of the sons can maintain appeal against whole decree — Decree can be reversed or varied as against all defendants or plaintiffs—Civil P. C. (1908), O. 22, R. 3.

A suit was brought by the plaintiffs for a declaration of their title to certain lands and for recovery of khas possession in respect of the same. The first Court granted a declaration of the plaintiff's title to a fractional share in the lands in suit but dismissed the plaintiffs' suit for khas possession. On appeal the lower appellate Court set aside that decision and decreed the plaintiffs' suit in full. Defendant 1 died during the pendency of the appeal in the lower appellate Court and his two sons were substituted as his heirs in the record of the appeal. A second appeal was filed on behalf of both the sons. One of the sons died during the pendency of the second appeal and his heirs were not brought on the record within the time allowed by law.

Held : O. 41, R. 4 enables one of the two heirs of the defendant to maintain the appeal from the whole decree, and it was competent to the appellate Court to reverse or vary the decree in favour of all the plaintiffs or all the defendants as the case may be, although one of the defendants or one of the defendant's heirs did not join in the appeal : 1918 *Mad* 794, *Appr.* [P 704 C 1]

(b) Civil P. C. (1908), S. 100 — Finding of fact of lower Court cannot be interfered with.

A finding of fact arrived at by the lower appellate Court, cannot be interfered with in second appeal. [P 705 C 1]

Kshitish Chandra Chakravarty, *Panchanan Ghosal* and *Durga Charan Roy Chowdhury*—for Appellants.

Mitter, J. — This is an appeal under S. 15, Letters Patent, from a judgment of my learned brother Patterson, J., who modified the decree of the lower appellate Court and restored the decree of the Munsif. Two points have been raised before us in respect of the appeal which has been preferred on behalf of the plaintiffs. It is first contended that by reason of certain events which happened, the appeal before Patterson, J., should have been dismissed on the preliminary ground that as one of the defendant-appellants had died during the pendency of the appel in this Court and his heirs were not brought on the record, and the appeal having abated so far as the said defendant was concerned, the whole appeal had abated. This contention did not prevail with Patterson, J., and he held that this preliminary objection must be overruled, and we are of opinion that the learned Judge was right in his conclusion on this part of the case for reasons to be detailed presently.

The suit out of which this appeal arose, was brought by the plaintiffs now appellants before us, for a declaration of their title to certain lands and for recovery of khas possession in respect of the same. The first Court granted a declaration of the plaintiffs' title to a fractional share in the lands in suit but dismissed the plaintiffs' suit for khas possession. On appeal to the lower appellate Court it set aside that decision and decreed the plaintiffs' suit in full.

It appears that defendant 1 Fedu Sheikh died during the pendency of the appeal in the lower appellate Court and his two sons Asiruddi Sheikh and Mobarak Sheikh were substituted as his heirs in the record of the appeal in the Court below. The appeal to this Court was filed on behalf of both Asiruddi and

Mobarak. Mobarak died during the pendency of the appeal to this Court and his heirs were not brought on the record within the time allowed by law. The result of that was that the appeal abated automatically so far as the appellant Mobarak was concerned. It is stated that the effect of this abatement of the appeal so far as Mobarak was concerned, is that the whole appeal had abated. The preliminary objection is based on this ground and it is said that the appeal to this Court was incompetent and should have been dismissed apart from any question on the merits. Patterson, J., has negatived this objection and has relied on the provisions of O. 41, R. 4, Civil P.C. We are of opinion that this case is governed by the provisions of O. 41, R. 4, which runs as follows :

"Where there are more plaintiffs or more defendants than one in a suit and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and therefore the appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be."

The suit of the present plaintiffs for ejectment was resisted by the two sons of the original defendant 1, on common grounds, and it seems to us that the present rule enables one of the two heirs of the defendant, to maintain the appeal from the whole decree, and it is competent to the appellate Court to reverse or vary the decree in favour of all the plaintiffs or all the defendants as the case may be, although one of the defendants or one of the defendant's heirs did not join in the appeal. It is contended that the rule only provides for a case where the appeal has been preferred by one of the defendants in which case although the other defendants had not joined in the appeal, he is entitled to get the benefit of the judgment. We are of opinion that that would be putting a limited construction to the provisions of R. 4, O. 41.

The view we take, has been taken by Mukerji, J., in an unreported decision of this Court. It was cited before the learned Judge of this Court ; Second Appeal No. 1961 for 1930 (1). This view receives support also of a decision in the case of 40 Mad 846 (2). Sir John Wallis, at p. 868 of the report, observes as follows :

"The twentieth and the twenty-second defendants died after the appeal had been preferred and their representatives have not been brought on the record. It has been argued that as the appeal has abated as regards these appellants the decree of the lower Court cannot be modified as far as their interests are concerned. The grounds of appeal in which the appellants have succeeded are common to all the appellants and we think the terms of O. 41, R. 4, Civil P. C., are wide enough to cover this case, 27 Bom 284 (3), and enable this Court to set aside the decree as regards the whole of the plaintiffs' claim and not merely in respect of the interest of those appellants whose appeals have not abated. Any other conclusion would lead to incongruity in judicial decisions on the same facts: vide 30 Mad 470 (4)".

Reliance however has been placed on a decision of this Court in the case of 1928 Cal 184 (5). The learned Judges Cumming, and Mallik, JJ., delivered separate judgments in that case. It has been pointed out by Patterson, J., that there are various observations which appear to be in conflict with the observations made by him. Mallik, J., has laid down that the true test in a case of this kind, is, whether it can be heard in the absence of the appellant who is dead, whether an appeal can be heard in the absence of one of the appellants, will depend on the nature of the suit and the decree made. The present suit is a suit for ejectment and the defendant in appeal can contend on grounds common to the other defendants that the whole suit should be dismissed. We do not see any reason to hold why the provisions of O. 41, R. 4 should not cover a case of this kind. We are in entire agreement with the case of the Madras High Court in which judgment was delivered by Sir John Wallis.

The second ground relates to the merits of the case. Patterson, J., has agreed with the lower appellate Court so far as the question of plaintiff's title is concerned. He holds that the plaintiffs have established their title to the entire land claimed in the present suit

1. Karimannessa Bibi v. Jusan Mondal Second Appeal 1961 of 1930.

2. Somosundaram Chettiar v. Vaithilinga Mudaliar 1918 Mad 794=41 I C 546=40 Mad 846.
3. Chintaman v. Gangapai (1903) 27 Bom 284 =5 Bom L R 90.
4. Dhuttaloor Subbayya v. P. Subbayya (1907) 30 Mad 470 = 17 M L J 119 = 2 M L T 104 (FB).
5. Naimuddin Biswas v. Maniruddin Laskar 1928 Cal 184=107 I C 726.

but he has disagreed with the lower appellate Court and has held that as the plaintiffs were not in possession within twelve years of the date of the institution of the present suit, the suit was barred by limitation in respect to the claim for khas possession. (His Lordship then discussed the evidence and proceeded). In our opinion therefore it seems to us that the lower appellate Court was right in the view which it has taken that the plaintiffs were in possession of the suit lands, for at least three years next before the present suit, through their tenant Arjun. This again is a finding of fact arrived at by the lower appellate Court, and it is not permissible to this Court to interfere with it in second appeal.

For these reasons, we are of opinion that the judgment of Patterson, J., must be set aside and that of the first appellate Court restored. It is unfortunate that the respondents in this appeal have not appeared before us, but Mr. Roy Chowdhury and Mr. Chakravarty have very fairly placed the case before us. The appellants are entitled to their costs both before us and before Patterson, J.

McNair, J.—I agree.

G.B. *Appeal allowed.*

A. I. R. 1934 Calcutta 705

GUHA AND NASIM ALI, JJ.

Nagendra Chandra Das—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 937 of 1933, Decided on 12th February 1934.

(a) Arms Act (1878), S. 29—Offence under S. 20—No sanction is necessary—Arms Act (1878) S. 20.

No sanction is required for a prosecution under S. 20 : 27 *Cal* 692, *Ref.* [P 705 C 2]

(b) Arms Act (1878), S. 20—Section is not confined to cases of export or import alone.

Section 20 does not apply to cases of export or import of arms only. It also covers cases of mere possession and control. [P 706 C 1]

(c) Arms Act (1878), S. 20—Appellant in joint possession of room in which cartridges found—Cartridges found in suit-case hidden under low cot—Key of suit case found under appellant's bed—Appellant's intention to hide held to be proved.

The appellant and two other persons were in joint occupation of a room in which the ammunitions were found. The unlicensed ammunitions were discovered in a suit-case under a cot. The appellant denied the ownership and knowledge of the suit-case and refused to deliver its key to the police who demanded it from him. The suit-case was broken open, and the live cartridges were found inside the suit-case. During the progress of the search by the police, when the contents of the suit-case were brought out, a key was found underneath the bedding which belonged to the appellant. The key fitted the lock of the suit-case. The suit-case was kept underneath the cot, which was very low:

Held : the joint possession of the room by the appellant, taken along with the possession of the suit-case and its contents, which must be attributed to the appellant alone was clear evidence of the intention of the appellant to conceal from the police officers, the suit case and its contents and the appellant was guilty under S. 20 : 1933 *Cal* 516 and 692, *Appr.* [P 706 C 2]

Santosh K. Pal and *Surendra M. Das*—for Appellant.

Khondkar, Anil Ch. Roy Chowdhury and *Bireswar Chatterjee*—for the Crown.

Judgment.—The appellant was tried by a Special Magistrate at Dacca, appointed under S. 24, Bengal Act 12 of 1932, for the commission of offences under S. 19 (f) and S. 20, Arms Act, and was sentenced to rigorous imprisonment for three years and five years respectively, under the above provisions of law, the sentences so passed running concurrently. The charge against the appellant who was tried along with two other persons was, first, that he had in his possession or under his control twenty live rifle cartridges without license and thereby committed an offence punishable under S. 19 (f), Arms Act, secondly, that he had in his possession or under his control twenty live rifle cartridges without license in such a manner as to indicate an intention that such act may not be known to any public servant (viz., police officer) and thereby committed an offence punishable under S. 20, Arms Act.

It appears that the prosecution was started with the previous sanction of the District Magistrate of Dacca, in the matter of the offence under S. 19 (f), Arms Act, as required by S. 29 of the said Act; there was no sanction required or obtained in the matter of the offence under S. 20 Arms Act. Although it was argued before us that no sanction having been obtained for prosecution under S. 20, Arms Act, the trial and conviction under the said section was bad in law, we can find no authority in support of such contention, regard being had to the provision relating to sanction as contained in S. 29, Arms Act. The authority of decisions of this Court in cases under S. 20, Arms Act, do not in

any way indicate that any sanction was required for a prosecution under S. 20, Arms Act. The decision in the case of 27 Cal. 692 (1) cited before us, does not support the argument advanced in this behalf. A question was raised before us, as to the applicability of S. 20, Arms Act; and it was suggested that the scope of the section was in this case misunderstood, inasmuch as the intention to do an act in the matter of unlicensed possession of fire-arms or ammunitions, must relate to export or import of arms. The contention so raised appears to us to be wholly untenable, on the provisions of the law as they stand, and such an argument does not appar to have been raised in this Court before. We are unable to hold that S. 20, Arms Act, could apply to cases of export or import of arms only, and not to cases of the present description.

On the merits, so far as the case before us is concerned, the facts were within a narrow compass. It was for the prosecution to establish that the appellant had in his possession or under his control, ammunitions, twenty live rifle cartridges, without license; further that such possession or control indicate his intention that his possession or control of the ammunitions may not be known to any police officer. The evidence in the case was placed before us in its entirety, and we have given our careful consideration to the same. The evidence established the fact that the appellant and two other persons who were jointly tried with him, were in possession of a room in which the ammunitions were found. The three persons were in joint occupation, from sometime previous, of the room where the articles were found, at the time of the search made by the police on 23rd August 1933. The search could not be held to be illegal or irregular in any way, and the evidence before us established the fact that the unlicensed ammunitions, of which mention has been made above, were discovered in a suit-case under a cot. The appellant denied the ownership and knowledge of the suit-case, and refused to deliver its key to the police who demanded it from him. The suit-case was broken open and the live cartridges were found inside the suit-case. During the progress of the search by the police, when the contents of the suit-case were brought out, a key was found underneath the bedding which belonged to the appellant. The key fitted the lock of the suit-case. In this connexion, it may be mentioned that the defence theory that the suit-case might have been planted in the room underneath the cot, is wholly unworthy of consideration on the facts and in the circumstances appearing from the materials on the record; on the other hand, the fact that the suit-case was kept underneath the cot, which was very low, clearly indicated the intention of hiding the suit-case containing unlicensed ammunitions, and also the intention on the part of the accused that the presence of the suit-case and its contents may not be known to any body, and that intention continuing till the search party led by police officers, were in the room of which the appellant was in possession, along with two other persons.

The joint possession of the room by the appellant, taken along with the possession of the suit-case and its contents, which must on the evidence before us, be attributed to the appellant alone, established the case for the prosecution, so far as the appellant was concerned. There was clear evidence of the intention to conceal from the police officers, the suit-case and its contents, evidence coming from witnesses, whose testimony we are unable to reject. On the evidence before us, it appears to us to be abundantly clear that it was the deliberate intention of the appellant to do all that was necessary to prevent the fact of his having twenty live cartridges in his possession and control, from coming to the knowledge of the police. The ammunitions forming the subject-matter of the charge were unlicensed, and the appellant must, on the evidence in the case, be held to have committed offences under S. 19 (f) and the first part of S. 20, Arms Act, as mentioned in the charges framed in the case; and in our judgment, he has been rightly convicted under those provisions of the law by the Special Magistrate, who tried the case. It may be mentioned that the view we have taken of this case, based on the evidence before us, is in consonance with the recent decisions of this

1. Ahmed Hossein v. Queen-Empress, (1900) 27 Cal 692=4 C W N 750.

Court in 1933 Cal 692 (2) and 1933 Cal 516 (3) and we are in entire agreement with the propositions of law laid down in those decisions, bearing upon Ss. 19 (f) and 20, Arms Act. The conviction of the appellant is upheld. The sentence passed on the appellant by the Special Magistrate does not, on the materials before us, appear to us to be severe. The appeal is dismissed.

G.B. *Appeal dismissed.*

2. Shacheendra Kar Gupta v. Emperor, 1933 Cal 692=1933 Cr C 1154=146 I C 645=35 Cr L J 125=60 Cal 1432.

3. Jogendramohan Saha v. Emperor, 1933 Cal 516=1933 Cr C 860=144 I C 957=34 Cr L J 879=60 Cal 545.

A. I. R. 1934 Calcutta 707

MITTER AND MCNAIR, JJ.

Manmatha Nath Haldar and *another* —Defendants—Appellants.

v.

Girish Chandra Roy—Plaintiff—Respondent.

Letters Patent Appeal No. 22 of 1933, Decided on 21st March 1934, from judgment of Patterson, Judge, D/- 27th July 1933.

(a) Civil P. C. (1908), O. 41, R. 27 (i) (b)—Additional evidence can be admitted only to remove inherent lacuna or defect—Such evidence can be admitted only when required by Court.

Before a Court can admit an additional evidence it must record its reason for doing so, and it is only when the Court itself requires additional evidence, that is to say, finds it needful in order to pronounce judgment or for any other substantial cause, that such evidence can be admitted. The legitimate occasion for exercise of this discretion is when on examination of the evidence as it stands some inherent lacuna or defect becomes apparent. The defect may be pointed out by a party or a party may move the Court to apply the defect, but the requirement must be of the Court itself. [P 708 C 1]

(b) Bengal Tenancy Act (1885), S. 103-B—Record of Rights—There is presumption as to state of things at publication of Record of Rights but not backwards—Record of Rights—Presumption.

Record of Rights is a presumptive evidence of the state of things at the date the Record of Rights was prepared. One cannot presume backwards from the Record of Rights under S. 103-B and say that the same state of things as disclosed by the Record of Rights existed some years before the record was finally published. [P 708 C 2]

(c) Evidence Act (1872), S. 114—There can be presumption forward but not backward.

The rule of evidence is in favour of presuming the continuity of things shown to exist at a prior date. There is no rule of evidence by which one can presume backwards. [P 708 C 2]

(d) Civil P. C. (1908), S. 100—Interference with concurrent finding of fact amounts to exceeding power under S. 100.

Interfering with the concurrent findings of fact of the Courts below amounts to exceeding jurisdiction under S. 100. [P 708 C 2]

Jogesh Chandra Roy and *Satindra Nath Roy Chowdhury*—for Appellants.

Chandra Sekhar Sen—for Respondent.

Mitter, J.—This is an appeal under S. 15 of the Letters Patent from a judgment of my learned brother Patterson, J., reversing the decisions of the Courts below and decreeing the plaintiff's suit. It appears that the plaintiff who is the respondent before us brought a suit for the ejectment of the defendant from the lands which are comprised within a certain non-transferable occupancy holding. To this suit the original tenant has not been impleaded, the case of the plaintiff being that he, the original tenant, has transferred the entire holding to the defendant who is in possession thereof as trespasser, and the transfer not having been recognised by the plaintiff who is the landlord of the holding in question, the plaintiff is entitled to a decree in ejectment. The substantial defence to the suit is that the entire holding has not been transferred, that the original tenant still continues in possession of the holding and has never refused to pay rent and that there has been no abandonment, and that even quite recently the plaintiff has obtained a decree for rent and has been realizing rent from the original tenant. The transfer is alleged to have taken place in the year 1328 B. S., corresponding to the year 1921. Both the Courts below have come, concurrently, to the conclusion that there has been a transfer only of a part of the holding.

It appears that although the Munsif found that the defendant was a part purchaser of a non-transferable occupancy holding, that finding of the Munsif was not challenged before the Subordinate Judge. Before the Subordinate Judge the question debated was that since the institution of the suit or rather since the disposal of the suit in the first Court, the Record of Rights has been published, and the Record shows that the defendant has been in

possession of the entire holding. An application was made before the hearing of the appeal in the lower Court, for the reception of this finally published Record of Rights as additional evidence in the case and the Court rightly said that the application should be considered after the hearing of the appeal had commenced and after the Court had considered the question as to whether the additional evidence should be taken. But the Court did not pass any formal order admitting this Record of Rights in evidence, although it made reference to the Record of Rights in its judgment.

In the first place, it has now been definitely laid down by the highest authority that before a Court can admit an additional evidence it must record its reason for doing so. In a recent decision in the case of 1931 P. C. 143 (1), Sir George Lowndes in delivering the judgment of their Lordships of the Judicial Committee, pointed out:

" that in a case coming under Cl. (1) (b), R. 27, O. 41 it is only when the Court itself requires additional evidence, that is to say, finds it needful in order to pronounce judgment or for any other substantial cause, that such evidence can be admitted. The legitimate occasion for exercise of this discretion is when on examination of the evidence as it stands some inherent lacuna or defect becomes apparent. The defect may be pointed out by a party or a party may move the Court to supply the defect, but the requirement must be of the Court itself."

It seems to us that though the learned Judge of the lower appellate Court did not receive this as an additional evidence in the case but he referred to the Record of Rights and has considered the weight which has to be attached to it. It is really in favour of the appellant before the lower appellate Court who is the respondent before us. The learned Judge of this Court has really rested his decision and upset the concurrent findings of the Courts below, on the entry in the Record of Rights, as Patterson, J., observes in one place:

" In these circumstances it must, I think, be held that the findings of the Courts below to the effect that only a portion has been transferred are vitiated by the fact that the entry in the Record of Rights has not been taken into consideration, by those Courts, and that if the entry in question be taken into consideration, as in my opinion it ought to be, the only conclusion which it is possible to arrive at, is that the entire holding was transferred to the defendants by the kobala, Ex. 1 and that the defendants are now in possession of the entire holding under the said kobala."

In this connexion it is important to notice that the sult was instituted in March 1929 and the cause of action for the suit, arose on the date of transfer, which was sometime in the year 1921 as also on the date of knowledge of the plaintiff, which was sometime in August 1928. Even assuming that the Record of Right was properly admitted as evidence before the lower appellate Court or could be referred to, its effect would be to raise a presumption of possession of the defendant at the date when it was finally published, which is said to be after the disposal of the suit in the first Court, namely, after 16th December 1929. It has been very strenuously contended by Mr. Sen on behalf of the respondent that it was open to the learned Judge of this Court to draw an inference from the fact of possession, as shown in the Record of Rights, of the holding in suit that the possession must be referable to the deed of sale which was executed in the year 1921. It is difficult to accede to this contention. Record of Rights is a presumptive evidence of the state of things at the date the Record of Rights was prepared. Besides there is nothing in the Record of Rights to show that this possession has any reference to the purchase in the year 1921. There might have been some force in the argument if it could be shown that the entry in the Record of Rights disclosed that possession at the date of its final publication was referable to the particular deed of sale, in other words if the entry had referred to this document. It is difficult to imagine how one can presume backwards from the Record of Rights under S. 103-B, Ben. Ten. Act, and say that the same state of things as disclosed by the Record of Rights existed seven years before the record was finally published.

The rule of evidence is in favour of presuming the continuity of things shown to exist at a prior date. There is no rule of evidence by which one can presume backwards. We are clearly of opinion that the learned Judge of this Court has interfered with the concurrent findings of fact of the Courts below and as such has exceeded his jurisdiction under S. 100, Civil P. C. The result is that the judgment of the learned

1. Parsotim Thakur v. Lal Mohar Thakur, 1931, P C 143=132 I C 721=58 I A 254 =10 Pat 654 (P C).

Judge must be set aside and the second appeal to this Court must be dismissed with costs before us and Patterson, J.

McNair, J.—I agree.

G.B. *Appeal dismissed.*

A. I. R. 1934 Calcutta 709

MITTER AND MCNAIR, JJ.

Ananda Kishore Choudhury and *others* —Plaintiffs—Appellants.

v.

Panchu Kapali and *others*—Proforma Defendants—Respondents.

Letters Patent Appeal No. 10 of 1933, Decided on 21st March 1934, against decree of Bartley, Judge, D/- 3rd August 1932.

Contract Act (1872), Ss. 69 and 70—Decree for costs against co-defendant having common interest and common grounds of defence — Costs paid by one defendant — Others must contribute.

Section 69 applies to suits for contribution, where both the plaintiff and the defendant were liable for the money paid by the plaintiff. Where the plaintiff and the defendant were equally interested in defending the suit brought by a third party and they have a common defence they should equally bear the costs which are decreed against them by a decree of Court, by which they are jointly and severally liable to pay and there is no distinction between a case where execution is proceeded with by attachment and sale of the properties of the plaintiff who sued for contribution and a case where execution had been arrested because the plaintiffs paid off the money.

[P 710 C 2]

Gopendra Nath Das and *Sailendra Mohan Das*—for Appellants.

Jatindra Mohan Chowdhury and *Prokash Chandra Pakrashi*—for Respondents.

Bireshwar Chatterji—for Deputy Registrar.

Mitter, J.—This is an appeal under S. 15, Letters Patent, against a judgment of my learned brother Bartley, J.

It appears that the Maharaja of Tippera sued for khas possession of certain lands impleading as defendants in the suit, two sets of persons, the first set claiming a right as superior landlord or talukdars and the second set, the tenants claiming to hold under them. The suit was decreed with costs against the landlords and certain tenants who had joined in contesting. It appears however that the costs although they were leviable from the landlords and the contesting tenants jointly and severally, were, as a matter of fact, realized from two of the landlords only. These landlords who are the appellants before us, brought a suit for contribution against the other defendants, viz., the other landlords and tenants who had contested with them, the original suit. The Munsiff dismissed the suit as against the tenants, being of opinion that they were not liable to contribute. He however decreed the suit against the landlord defendants. On appeal by the plaintiffs landlords, the learned District Judge reversed the decision of the Munsiff so far as he dismissed the claim of the plaintiff for contribution as against the tenant defendants. The effect of the appellate Court's decree was that the plaintiffs' suit for contribution was decreed against all the defendants. Against this decision an appeal was taken to this Court and heard by Bartley, J., who reversed the decision of the District Judge and and restored that of the Munsiff. Against this judgment the present appeal has been preferred under the Letters Patent.

It is contended on behalf of the appellants that the reasoning on which the learned Judge of this Court has rested his decision, cannot be sustained. The learned Judge of this Court has relied on a decision in the case of 14 W R 70 (1), as an authority for the proposition that a joint decree itself creates no privity or obligation as between co-defendants. He has also relied on two decisions of the Allahabad High Court in support of the proposition that there can be no right to contribution as between different sets of defendants, where opposite or exclusive defences are set up: 19 All 462 (2), and 1918 All. 328 (3). He has further referred to the case of 7 W. R. 384 (4), and has relied on certain observations of Sir Barnes Peacock to the effect that if the defendants were acting as the servants of the plaintiff or under his directions as he was the person who claimed the right and derived the benefit, he was the person who should pay all the damages. Applying the principles laid down in the cases referred to above, the learned Judge has arrived at the conclusion that as the joint decree

1. Kisto Chandra v. Wise, (1870) 14 W R 70.
2. Fakire v. Tasadduq Hossain, (1897) 19 All 462=1897 A W N 107.
3. Nand Lal Singh v. Beni Madho Singh, 1918 All 328=47 I C 980=40 All 672.
4. Sreepati Roy v. Loharam, (1867) 7 W R 384 =B L R Sup Vol 687.

created no privity between the landlords and the tenants who were the co-defendants, and there having been no contract to reimburse the landlords, the suit for contribution, against the tenants, must fail. It is argued on behalf of the appellants that the principles laid down in those cases cannot apply to the facts of the present case. Here the tenants did not set up any opposite or exclusive defence in relation to the defence set up by the landlords under whom they claim the tenancy. It seems to us that the defence which was set up by the tenant defenants was substantially the same as the defence set up by the landlord defendants. The tenants were equally interested in defending the title of their landlords in the suit brought by the Maharaja of Tipperah. It is, further, to be noticed that the decision in the weekly reporter case, which is referred to, was a decision which was given prior to the enactment of the Contract Act of 1872. It seems to us that the matter with relation to contribution must now depend on the two statutory provisions contained in the Contract Act viz., Ss. 69 and 70 of the Act. S. 69 runs as follows:

"A person who is interested in the payment of money which another is bound by law to pay and who, therefore, pays it, is entitled to be reimbursed by the other."

It is true that the decree obtained by the Maharaja was a decree for costs which was payable jointly and severally by the landlord defendants and by the tenant defendants as well but that does not render the provisions of S. 69 inapplicable. It is contended on behalf of the respondents that taking strictly the language of S. 69, the payment made by the landlord defendants, was not a 'payment of money' as contemplated by the section, which the tenant defendants were bound by law to pay, and this argument rested on this reasoning, viz., as there was a joint, and several liability, in other words, as the money might have been realized by the decree-holder Maharaja by execution exclusively against the landlord defendants, the tenant defendants were not bound to pay within the meaning of the section. We are unable to accede to this contention. It is true at one time, the authorities were not clear on the point as is noticed by Sir Frederick Pollock and Sir Dinshaw Mulla, in their commentary on the Contract Act. The learned authors observe as follows:

"whether this section applies to a suit for contribution where both the plaintiff and the defendant were liable for the money paid by the plaintiff, is not clear on the authorities:"

and the earlier trend of decision in some of the cases was that the section did not apply to such a case. But the view taken in the recent cases is that this section applies to suits for contribution, where both the 'plaintiff and the defendant were liable for the money paid by the plaintiff. The learned authors observed that this view was taken in the cases of 1914 Cal. 208 (5) 1914 Cal. 672 (6), 1915 Cal. 310 (7). Even if the matter does not come under S. 69, there can be no doubt, that it comes within the wider language of S. 70. There seems to be no justice or equity in the view taken by the learned Judge of this Court that although the landlord defendants and the tenant defendants were equally interested in defending the suit brought by the Maharaja of Tipperah, they should not equally bear on costs which were decreed against them by a decree of Court, by which they were jointly and severally liable to pay. Mr. Chowdhury who appears for the respondents states that this might have been the case if the Maharaja had proceeded to levy execution by attachment or sale of the properties of the landlord defendants who had sued for contribution. But we do not see 'any distinction between a case where execution was proceeded with by attachment and sale of the properties cf those who had sued for contribution and a case where execution had been arrested because the plaintiffs paid off the money. There can be no doubt, that the tenants got the benefit of the payment which was made by the plaintiffs in the case. We are therefore of opinion, that the decision of the learned Judge of this Court must be set aside and that of the District Judge restored except so far as respondent 2 Rajani Kanta Kapali is concerned as he is said to have died during the pendency of the appeal in

5. Ram Lal v. Khiroda Mohini, 1914 Cal 208 =20 I C 569.
6. Prosunno Kumar v. Jamaluddin, 1914 Cal 672=15 I C 55.
7. Rajani Kanta v. Rama Nath, 1915 Cal 310 =27 I C 56.

this Court, in September 1933, i.e., more than three months from now. This appeal as against him has abated and the decree passed in Second Appeal No. 860 of 1930 by Bartley, J., will stand in favour of the said respondent or his heirs and legal representatives. Subject to this order regarding the deceased respondent 2 Rajani Kanta Kapali, the judgment of the learned Judge of this Court must be set aside and that of the District Judge restored. The appellants are entitled to the costs of this hearing as well as of the hearing before Bartley, J.

McNair, J.—I agree.

G.B. *Appeal allowed.*

A. I. R. 1934 Calcutta 711

BUCKLAND, J.

Jagganath Addy—Plaintiff.

v.

Khetra Pal Bhattacharjie and *another*—Defendants.

Suit No. 339 of 1933, Decided on 5th December 1933.

Surety— Debt contracted by son—Mere willingness of father to help his son does not make father guarantee for his son.

The fact that the father was willing to help his son is not enough to raise an inference that he was prepared to be a guarantee for him nor can it be inferred from the fact that he paid on one occasion certain sum to the creditor to help his son. [P 712 C 1]

Judgment.—The plaintiff sues in this case to recover the sum of Rs. 2,369-6-0 for principal and interest due on two promissory notes dated 16th July 1931 executed by the defendant Khetra Pal Bhattacharjie in his favour. In addition to Khetra Pal Bhattacharjie, he also sues Rai Bahadur Manindra Nath Bhattacharjie, the father of Khetra Pal Bhattacharjie as guarantor. The defendant Khetra Pal Bhattacharjie has not put in any defence or appeared at the hearing. There will be a decree against him for the sum claimed with costs and interest on judgment at six per cent. The defendant Rai Bahadur Monindra Nath Bhattacharjie denies the guarantee and that in substance is the only issue in the case. The plaintiffs' story in reference to the defendant Manindra Nath Bhattacharjie is that on 31st October 1932, Khetra Pal took him to his father who wanted to look at the promissory notes. He looked at them and said "Don't bring a suit against my son. I will pay you your money" and asked the plaintiff to call again on 3rd November. On 3rd November the plaintiff called and according to the plaintiff the Rai Bahadur told his son to accompany the plaintiff to the house of a Small Cause Court pleader, whither they went. Khetra Pal introduced the plaintiff to the pleader and Rs. 40 were paid to the plaintiff who gave a receipt. On 12th November the plaintiff heard about the insolvency of Lakin one of the joint-makers of the promissory notes to whom I have not referred because the suit has not been brought against him. On 18th November the plaintiff went to see the Rai Bahadur and complained that he was not being paid regularly. The Rai Bahadur, according to the plaintiff, reassured him and asked him to call again on 25th November, and on that day the plaintiff went to the Rai Bahadur, who gave him a cheque on the Imperial Bank for Rs. 150 and again told the plaintiff to call on him and not to sue his son for the money.

It appears that shortly thereafter criminal proceedings were instituted against the defendant Khetra Pal. The plaintiff went again and saw the Rai Bahadur about 18th or 19th January. The Rai Bahadur appeared to be very much upset but declined to make any further payment. That is the plaintiff's story. He is supported by the witness Korali Prosad Pathak who appears to have been the go-between in this matter. His evidence is that he accompanied the plaintiff on all four occasions, 31st October, 13th November, 25th November and 18th January. He does not speak to having done anything else in the matter. So far as these occasions are concerned there is no substantial discrepancy between the evidence of this witness and that of the plaintiff. The Rai Bahadur's evidence is that he never saw the plaintiff until 25th November, when he heard a noise going on in his house and found his son and the plaintiff having a quarrel about some payment or other. He says that he found his son was in the wrong and felt that he ought to help him and for this reason he paid Rs. 150. He denies having been in any way responsible for Rs. 40 paid earlier in November. He says that his son did so himself. He says that he saw the plaintiff again

subsequent to 25th November and told him that he was not going to pay anything more, because he was never consulted when the money was lent to his son and he could not afford to do so.

These are the two stories in dispute. It is denied by the Rai Bahadur that he gave any guarantee. Ordinarily a money-lender lending money if he wants a guarantee, asks for a guarantee at the time that he gives the loan, and though that would appear to be the story which is made in the plaint, the story put forward here is that the guarantee was given some four months later than the loan in order to induce the plaintiff to forbear from suing the alleged guarantor's son. This case appears to have come out for the first time when the plaintiff was in the witness-box. There is no letter or other document of any kind referring to any such guarantee. There is no mention of the guarantee in the receipt for Rs. 40. If as is now suggested that the money was paid by the guarantor, one might well have expected that the plaintiff would have recorded it in the receipt. It is a strange coincidence that the witness Pathak accompanied the plaintiff on each of the occasions to which the plaintiff speaks in his evidence. Why did he do so? There is no particular reason why Pathak should have accompanied him on each occasion and no explanation of this has been forthcoming. The defendant's story by no means leads to the inference that because the father was willing to help his son, therefore the father was prepared to be guarantee and nothing of the kind can be inferred from the circumstances that the father paid Rs. 150. Had he been a stranger one might have said that there was more in it than met the eye but having regard to the relations between the two I am quite prepared to accept the Rai Bahadur's story in this respect. I am somewhat suspicious of the plaintiff and his witness and I accept the evidence of the defendant in preference to that of the plaintiff and this witness Pathak. The result is that the suit against the defendant Rai Bahadur Manindra Nath Bhattacharjie will be dismissed with costs.

v.s. *Suit dismissed.*

A. I. R. 1934 Calcutta 712

MALLIK AND PATTERSON, JJ.

Rivers Steam Navigation Co. Ltd.—Defendant—Petitioner.

v.

Hira Lal De and *others*—Plaintiffs—Opposite Parties.

Civil Rule No. 1536 of 1933, Decided on 8th March 1934, from order of 2nd Sub-Judge, Dacca, D/- 29th June 1933.

Civil P. C. (1908), O. 33, Rr. 2 and 5—Suit governed by Fatal Accidents Act—Plaint not complying with S. 3 of that Act—Application to sue in forma pauperis should be rejected under O. 33, R. 5—Fatal Accidents Act (1855), S. 3.

Where a suit is governed by the Fatal Accidents Act but the plaint does not comply with S. 3 of that Act, the plaintffi desiring to sue in forma pauperis cannot be said to have complied with the requirements of O. 33, R. 2, Civil P. C., and his application to sue as a pauper is liable to rejection under O. 33, R. 5.

[P 713 C 1]

Bagram, Fanindra Nath Sanyal and *Rupendra Kumar Mitra* for *Secretary of State*—for Petitioner.

R. B. Pal and *Bhupendra Nath Roy Chowdhury*—for Opposite Parties.

Mallik, J. — This rule is directed against an order by which an application made by one Hiralal De for permission to sue as a pauper was allowed by the second Subordinate Judge of Dacca on 29th June 1933. One Dinabandhu De was travelling in a motor launch, named the "Meghna" on 17th January 1933, when due to the negligent navigation of the Serang of the SS "Mikir" owned by the Rivers Steam Navigation Co. Ltd, there was a collision between the steamer and the motor boat with the result that Dinabandhu De was drowned. On these allegations Dinabandhu's two sons, Hiralal De and Jitesh Chandra De, filed a plaint suing the Rivers Steam Navigation Co. Ltd., for damages under the Fatal Accidents Act (Act 13 of 1855). The plaint however was presented by Hiralal alone and not by Jitesh. The learned Subordinate Judge rejected the application of Jitesh but allowed that of Jitesh's brother Hiralal; and it is against this order allowing Hiralal's application for permission to sue in forma pauperis that the present rule is directed.

This rule, in my opinion, must be made absolute. As I have stated above, the damages that were claimed were

under the Fatal Accidents Act. Under S. 1 of that Act, the suit against the Rivers Steam Navigation Co. Ltd. was for the benefit, not only of Hiralal alone, but also of Hiralal's brother Jitesh, Hiralal's widowed mother and the two daughters of Dinabandhu, all of whom, it appears, were living at the time. S. 3, Fatal Accidents Act, lays down that the full particulars of all the beneficiaries are to be given in the plaint. The plaint filed by Hiralal however did not contain all these particulars. That being so, the plaint filed by Hiralal cannot be said to have complied with all the requirements of the provisions of O. 33, R. 2, Civil P. C., and the plaint not having complied with the requirements of that rule, ought, in my opinion, to have been rejected under O. 33, R. 5 of the Code. The rule therefore as observed at the outset must be made absolute with costs, hearing fee being assessed at one gold mohur, to be divided half and half between the Secretary of State and the Rivers Steam Navigation Co. Ltd. It is to be understood that the observations we have made regarding the applicability of the provisions of the Fatal Accidents Act will not affect the merits of the case at the time of hearing. They have been made for the purpose of considering the question of pauperism only.

Patterson, J.—I agree.

V.S. *Rule made absolute.*

A. I. R. 1934 Calcutta 713

COSTELLO AND LORT-WILLIAMS, JJ.

Shamsuddin Ahmed—Plaintiff—Appellant.

v.

Charu Chandra Biswas and *others*—Defendants—Respondents.

Appeal No. 43 of 1934, Decided on 22nd May 1934, from original Suit No. 726 of 1934, Reported in A. I. R. 1934 Cal. 621.

(a) Appeal—Maintainability—Judge original side—Refusing interim injunction—Appeal lies.

An appeal lies from the refusal of a Judge of the original side of the High Court to grant an interim injunction, but what the Court of appeal has to consider is simply whether or not the Judge who dealt with the matter properly exercised the discretion which he undoubtedly possessed. [P 714 C 1]

(b) Injunction—Interim one, is granted to preserve status quo—Test is whether plaintiff would suffer irreparable damage if no injunction is granted.

The object of an interim injunction is to preserve status quo. Generally it is applied for and granted where there is an apprehension that damage to property of the plaintiff or, at any rate, some definite injury to the plaintiff will or is likely to be caused if a certain order is not made. The right criterion which is applicable to the matter of this character is that the Judge should ask himself the question whether the plaintiff is likely to suffer any damage or any irreparable damage and if he comes to the conclusion that the plaintiff would not suffer any serious damage injunction should rightly be refused. [P 714 C 2]

Hazra—for Appellant.

Banerjee—for Respondents.

Costello, J.—This matter comes before us by way of appeal from an order of Roy, J., made on 3rd May 1934* whereby he refused to grant an interim injunction pending the hearing of the suit. The suit is brought by one Shamsuddin Ahmed, who is described as a ratepayer, voter and councillor of the Calcutta Corporation on behalf of himself and other elected Councillors of the Calcutta Corporation against ten defendants who are the persons nominated as members of the Calcutta Corporation by the Local Government under the provisions of S. 39, Calcutta Municipal Act 1923. An order was made that notice should be given by advertisement that the plaintiff was suing on behalf of himself and other persons in order to give an opportunity to the persons, whom the plaintiff purported to represent, to come into the suit if they so chose. We are informed that a certain number of the other elected members of the Calcutta Corporation have applied to be joined as defendants in the suit. The plaintiff is asking in the suit for several declarations and the reliefs which he is claiming are in these terms: (1) for a declaration that the plaintiff and the other persons on whose behalf the suit has been instituted are the only councillors entitled to attend the meeting of 21st April 1934 and subsequent meetings of the Calcutta Corporation, (2) for a declaration that the plaintiff and the other persons on whose behalf the suit has been instituted along with the aldermen alone constitute the whole Corporation, (3) for a declaration that the appointment of the defendants is illegal and that they are not entitled to take part in the proceedings of the

*See 1934 Cal 621.

Calcutta Corporation, and (4) for an injunction restraining the defendants from attending any meeting of the Calcutta Corporation or from acting any way as Councillors of the said Corporation.

The real point at issue in the suit is indicated in the third of these prayers. But shortly the plaintiff's case amounts to this: that the ten original defendants have not been lawfully nominated by the Government as members of the Corporation and therefore they are not entitled to take part in the proceedings of the Corporation. I need not specify in detail the reasons given by the plaintiff in his plaint for the contention that the defendants are not lawful members of the Corporation and were not members at the time when the suit was instituted. These are matters which will have to be determined in the suit when it comes to trial. That only question before Roy, J., was whether there should be any interlocutory injunction granted to restrain the defendants from functioning as Councillors pending the hearing of the suit. The learned Judge dealt with the matter very fully and carefully and although the proceedings were only interlocutory proceedings, the learned Judge thought fit to give quite a full and reasoned judgment explaining why he decided to refuse the application. In course of that judgment he said:

"I do not think it would be desirable on the hearing of an interlocutory application to express any opinion on the question as to whether the appointment of the defendants is ultra vires or not, or as to whether the suit is maintainable or not. Nor do I think, in the circumstances of this case is it necessary for me to come to a finding at the present moment on the question as to whether the suit or the present application is malafide or not, as I am clearly of opinion that this is not a case in which I should grant an injunction pending hearing of the suit."

Mr. Banerjee cn behalf of the first two defendants took a preliminary objection that no appeal lies from the refusal of a Judge of this Court to grant an interim injunction. I cannot accept that contention. In my opinion, it is right and proper that there should be a right of appeal in a matter of this kind; but what the Court of appeal has to consider is simply whether or not the learned Judge who dealt with the matter properly exercised the discretion which he undoubtedly possessed. It is to be borne in mind at the outset that the object of an interim injunction is to preserve status quo. Generally it is applied for and granted where there is an apprehension that damage to property of the plaintiff or, at any rate, some definite injury to the plaintiff will or is likely to be caused if a certain order is not made. The learned Judge has expressed his opinion, and quite definitely, that this was not a case where any serious injury would fall upon the plaintiff if he is not protected by an order of the Court. In my opinion, the learned Judge has applied the right criterion which is applicable to a matter of this character. He has asked himself the question whether the plaintiff is likely to suffer any damage or any irreparable damage and he came to the conclusion that the plaintiff would not suffer any serious damage.

Mr. Hazra arguing for the plaintiff-appellant before us has in effect conceded that the learned Judge looked at the matter from the right point of view, and sought to argue that the learned Judge's opinion was not correct in the circumstances of the case. But in answer to a number of questions from me, he was totally unable to state or even to suggest in what manner the plaintiff in this particular case is likely to suffer any serious damages or even any damage at all if this interlocutory injunction is not granted. Indeed, it is very difficult on the face of it to see in what manner it can reasonably be said that any right residing in the plaintiff could be infringed by the defendants if they are allowed to function as Councillors of the Calcutta Corporation. Certainly there is no infringement of any right which will cause to the plaintiff permanent and irreparable damage. What is more important, I think, is this that if hereafter it is decided that the plaintiff's contention in the suit is not sustainable, then if an injunction were now granted, the ten defendants would suffer exactly in the similar way as the plaintiff would suffer if the defendants are allowed to continue to function as Councillors of the Corporation. In my opinion, the learned Judge was quite right in coming to the conclusion that no serious damage was being done to the plaintiff and therefore it was not a case

in which an interim injunction should be granted. If one applies the test whether or not it is desirable to preserve the status quo, which is the ordinary test applied where there is any question of damage to parties, then obviously the effect of not granting a temporary injunction in a case of this character is to preserve the status quo till the trial of the suit.

It has been suggested by Mr. Hazra that it is desirable in the interests of all parties that the hearing of the suit should be expedited and to that course the defendants have no objection to offer. We think this is a case where it is desirable that the points raised in the suit should be determined as early as possible and therefore anything that can be done to expedite the final hearing of the suit should be done. In order to expedite the hearing, the right course is that an application should be made on the original side in the ordinary course for directions. This appeal will be dismissed with costs.

Lort-Williams, J.—I agree.

R.K. *Appeal dismissed.*

A. I. R. 1934 Calcutta 715

HENDERSON, J.

Syed Dad Ali—Plaintiff—Appellant.

v.

Jamiruddin Sheikh and *others*—Defendants—Respondents.

Appeals Nos. 2240, 2241 and 2242 of 1931, Decided on 30th May 1934, from appellate decrees of Sub-Judge, Burdwan, D/- 11th February 1931.

Landlord and Tenant — Encroachment by tenant upon land not belonging to his landlord—Tenant cannot keep such land to himself where sued against by owner.

The defendants were in possession under proprietors of adjoining toujis and they had encroached upon the plaintiff's land. It was not quite clear whether those proprietors settled the disputed lands or whether the encroachments were made by the defendants themselves.

Held : that the plaintiff was entitled to a decree of khas possession from the defendants : 1916 *Cal* 596 *Foll.* ; 20 *Cal* 708, *Dist.*

[P 715 C 2]

Atul Chandra Gupta and *Farhat Ali* —for Appellant.

Abdul Ali — for Respondents (only in No. 2242).

Judgment.—These three appeals are by the plaintiff. He and one Shufi Khaleque purchased estate No. 1613 of the Burdwan Collectorate at a sale held for arrears of revenue. This Khaleque later sold his share to the plaintiff. The plaintiff then instituted 22 suits in order to obtain khas possession of various portions of this estate. In the three suits with which the present appeals are concerned the defendants are in possession under proprietors of adjoining toujis and their case was that the lands did not appertain to touji No. 1613. They made a further defence that in any case they were protected from ejectment because they took settlement bona fide. It is now not disputed that the lands belonged to the appellant's estate. The defendants however maintained that their case was covered by the decision in 20 Cal 108 (1). The learned Munsif over-ruled this contention and gave the plaintiff decrees. The defendants appealed and the learned Subordinate Judge differing from the learned Munsif came to the conclusion that the decision referred to applied to the present cases. He therefore dismissed the suits. The plaintiff now appeals to this Court and the question for decision is which of the learned lower Courts decided correctly.

The cases are all cases of encroachment. The defendants are tenants of adjoining proprietors. It is not quite clear whether those proprietors settled the disputed lands or whether the encroachments were made by the defendants themselves. But, in any event, the encroachments would enure to the benefit of the proprietors. On these facts I am clearly of opinion that the decision of the learned Munsif was correct. In delivering the judgment of the Court his Lordship the Chief Justice said this :

"The possession of the land in question for the purpose of cultivating it was acquired a good many years ago by the defendants from the persons who at that time were in actual possession of the zamindari within which it was situated and who were then the only persons who could give possession of the lands of the zamindari to cultivators."

It is thus at once apparent that the facts of the present cases are quite different. The persons in actual possession of the zamindari to which the lands appertain were the defaulting proprietors and it was only by means of encroachment that the present defendants were

1. Benod Lal Pakrashi v. Kalu Pramanik, (1893) 20 Cal 708.

able to get possession. Had the landlords of the defendants been in possession of touji No. 1613 at the time then this decision would have affirmed. The present cases are really similar to the case of 1916 Cal 596 (2).

The only right which the defendants obtained was one by adverse possession. By his purchase at the revenue sale the plaintiff acquired the estate free from these encumbrances. The result is that these appeals must be allowed, the decrees of the lower appellate Court set aside and those of the Munsif restored with costs in all the Courts. The respondent in Appeal No. 2242 of 1931, asks for leave to appeal. This is granted.

V.S. *Appeals allowed.*

2. Tepu Mahammad v. Te'ayel Mahammad, 1916 Cal 596=29 I C 216.

A. I. R. 1934 Calcutta 716

M. C. GHOSE, J.

Moslem Molla and *others* — Defendants—Appellants.

v.

(*Executor to the estate of late*) *Subal Chandra Chandra Roy Narain Chandra* and *others*—Respondents.

Appeal No. 2474 of 1931, Decided on 13th June 1934, from appellate decree of First Court Sub-Judge, Howrah, D/- 27th June 1931.

Landlord and Tenant—Mere absence of pucca structure is not determining factor on question whether tenancy is permanent or not.

Mere absence of pucca structure is not a determining factor on the question whether a tenancy is permanent or not. Nor is it sufficient for an inference of permanency that the tenants have possessed the land for a long period succeeding from father to son on payment of uniform rent: 13 *I C* 606; 1925 *Cal* 309; 1928 *Cal* 597; 1934 *Cal* 288, *Rel on.* [P 717 C 1]

The plaintiffs brought a suit for a declaration that the defendants were not permanent but ticca tenants of a part of the land and trespassers in respect of the other part, that they were attempting to raise a pucca structure on the land which they had no right to do and they prayed for an injunction that the defendants, be restrained from doing so. It was proved that the defendants, their father and grand-father had been residing on the said land and they had been paying rent at a uniform rate. It also appeared from the record and evidence that for 40 years the plaintiffs had notice that the defendants were claiming permanent right and yet they had suffered them to remain on the land for 40 years before instituting this suit.

Held: that the circumstances of this case established the presumption that the defendants had a permanent right: 33 *C W N* 211, *Dist.* [P 717 C 1]

Amarendra Nath Bose and *Syed Farhat Ali*—for Appellants.

Hira Lal Chakrabarti and *Pares Chandra Mitra*—for Respondents.

Judgment.—This is an appeal by the defendants in a suit instituted by the plaintiffs for a declaration that the defendants were not permanent but ticca tenants of a part of the land and trespassers in respect of the other part, that they were attempting to raise a pucca structure on the land which they had no right to do and the plaintiffs prayed for an injunction that the defendants be restrained from doing so. The first Court granted the plaintiffs a decree as prayed for. The Court of appeal below has affirmed that decree.

In this Court it is urged that upon the facts found by the Courts below the defendants should be held to have a permanent right to the land. The defendants produced a patta dated the year 1830 which purports to confer a permanent right on the defendants' predecessor. The trial Court rejected the patta as spurious and the appellate Court accepted that view. In the absence of a patta the Courts below have held that the origin of the tenancy is unknown. It has been proved by the defendants and admitted on the side of the plaintiffs that the defendants their father and grandfather have been residing on the said land and they have been paying rent at a uniform rate of Rs. 4 per annum for about 4 cottahs of land. There are common structures on the land but no permanent structures. The Court of appeal below held that mere long possession at a uniform payment of rent and succession from father to son and son's son, are not sufficient for raising the presumption of permanency in the absence of a pucca structure which unequivocally points to the permanent nature of the tenancy. The Court of appeal below was much influenced by the fact that the structures on the land are common structures such as poor people have and not permanent structures. Various cases have been cited, namely, 13 I. C. 606 (1). 1925 Cal. 309 (2), 1928 Cal. 597

1. Moharnm Chaprashi v. Tela Muddin Khan (1912) 13 I C 606.
2. Abdul Hakim v. Elahi Baksha, 1925 Cal 309=85 I C 103=52 Cal 43.

(3) and 1934 Cal. 288 (4). Upon a consideration of the judgments in these cases it is clear that mere absence of a pucca structure is not determining factor on the question whether a tenancy is permanent or not. Nor is it sufficient for an inference of permanency that the tenants have possessed the land for a long period succeeding from father to son on payment of uniform rent. Those facts are not alone sufficient. The presence of a permanent structure would be a notice to the landlord that the tenant is claiming a permanent right.

The absence of a permanent structure may lead to the inference that the landlord had no notice of such a claim. In this case however there is one circumstance which differentiates it from all the reported cases, namely, in 1888 over 40 years before the present suit the plaintiffs' predecessor instituted a suit for ejectment against the defendants alleging that they were mere ticca tenants and had no permanent rights. The defendants in reply filed a written statement claiming permanent right. The suit was withdrawn by the plaintiffs, since then for 40 years the plaintiffs and their predecessors have had notice that the defendants were claiming a permanent right. In 1918 another suit was instituted to eject the defendant but that suit was also withdrawn. The present suit was instituted in 1929. The occasion for it was that at the end of 1928 the defendants were attempting to build a brick structure on the land. The learned advocate for the respondents relies chiefly on the decision in 1929 Cal. 37 (5). Having carefully gone through the judgment in that case it appears that the present case is differentiated from that case by the fact that for 40 years the landlords had notice that the tenants were claiming permanent right, yet they had suffered them to remain on the land for 40 years before instituting this suit. I am of opinion that the circumstances of this case establish the presumption that the tenants have a permanent right. The appeal is therefore allowed and the plaintiffs' suit dismissed with costs in all the Courts. Leave to appeal under the Letters Patent is allowed.

V.S. *Appeal allowed.*

3. Nibaran Chandra v. Krista Mohan, 1928 Cal 597=112 I C 180=55 Cal 1029.
4. Manmatha Nath v. Pramatha Nath, 1934 Cal 288=150 I C 238=61 Cal 32,
5. Kamal Kumar Dutt v. Nanda Lal Duby, 1929 Cal 37=116 I C 378=56 Cal 738.

A. I. R. 1934 Calcutta 717

GUHA AND NASIM ALI, JJ.

Ram Lal Ghose and *others* — Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 688 of 1933, Decided on 8th January 1934

(a) Criminal P. C. (1898), S. 297—Not to state whether confession was voluntary or not is to commit error of law.

Where the Judge does not state to the jury whether the accused's confession was voluntary or not nor does he state to the jury that it was for them to determine whether it was true or not, he commits an error of law.

[P 718 C 1]

(b) Criminal P. C. (1898), S. 297 — Judge giving direction to jury which amounted to contravention of S. 162—It is misdirection.

A statement by which an impression is conveyed in the charge to the jury that the evidence of the witnesses before the Court to which it referred, found corroboration in the statements made by them before the police amounts to a misdirection to the jury by the Judge, inasmuch as the Judge is acting in contravention of the provisions of law as contained in S. 162. [P 718 C 1]

Camell, Satindra Nath Roy Choudhury and *Byomkesh Bose* — for Appellants.

Anil Chandra Roy Choudhury and *Nirmal Kumar Sen*—for the Crown.

Judgment.—This is an appeal by nine persons who were convicted by the Sessions Judge of Faridpur, and sentenced to various terms of imprisonment: some of them under S. 397 read with S. 395, and others under S. 395, I. P. C. The jury before whom the trial was held were unanimous in their opinion that the appellants were guilty of the offences under the provisions of the law mentioned above. Two of the appellants were convicted under Ss. 397/395, I. P. C., and sentenced to undergo rigorous imprisonment for eight years each; the other seven were convicted under S. 395, I. P. C., and sentenced to six years' rigorous imprisonment each. In support of the case for the prosecution, evidence was given in Court, which consisted mainly of oral evidence. In addition to the oral evidence, there were certain finds, in the shape of ornaments and other things which were removed by the dacoits as their booty,

and there was also a confession by one of the accused persons, Ismail Sheikh, which was subsequenty retracted. In the learned Sessions Judge's charge to the jury his decision on the question whether Ismail Sheikh's confession was voluntary or not, was not stated; nor did the Judge state to the jury that it was for them to determine whether it was true or not. It was left to the jury to determine whether the confession was or was not voluntarily made, or in other words, whether it was admissible: This was an error of law on the part of the learned Sessions Judge and the illegality in the charge in this behalf amounted to a serious misdirection resulting from an omission to give a proper direction according to law, calculated to mislead the jury in arriving at a proper verdict. It appears further that the learned Sessions Judge in placing the evidence of some of the principal witnesses to the occurrence before the jury stated as follows:

"Under the law, no evidence can be given before you by the prosecution as to what these witnesses told the police, but the fact remains that the defence which is entitled to bring to your notice any contradiction between the statements there made and the statements made now, has not placed before you any contradictory statement as regards the account of the occurrence."

The exact import and significance of the Judge's statement to the jury referred to above is not clear to us; but we are of opinion that the impression conveyed by this statement in the charge to the jury was that the evidence of the witnesses before the Court to which it referred, found corroboration in the statements made by them before the police; and in that view of the matter there was, in our judgment, a misdirection to the jury by the Judge, inasmuch as the Judge was acting in contravention of the provisions of law as contained in S. 162, Criminal P. C. On both the heads referred to above, it appears to us to be clear that something wrong was said, or that something was said which would make wrong that which was left to be understood. In our judgment therefore the learned Judge's charge to the jury on those heads was defective in material particulars, and was such as misled the jury in coming to a conclusion on the weight to be attached to Ismail's confession, used as evidence in the case, as also to the evidence of the principal witnesses to the occurrence. We have arrived at the conclusion that the misdirection, or want of proper direction to which reference has been made above, vitiated the learned Judge's charge to the jury; and as we are of opinion that the appellants' case was not considered in proper light by the jury owing to the misdirections referred to above the verdict of the jury must be reversed.

It is not necessary for us to consider the other points raised before us on behalf of the appellants, in support of the appeal, relating to misdirections or non-directions contained in the learned Judge's charge to the jury, besides those mentioned above. It may be stated however that so far as those other points are concerned, they relate to matters of detail in the evidence, and the development of the case for the prosecution in view of what was mentioned in the first information report in the case, and to the way in which these matters were placed before the jury by the Judge. Although open to comment, we are not satisfied that there was such misdirection so far as the other minor points are concerned, or any non-direction which prejudiced the appellants in their trial, or resulted in injustice, so far as the appellants were concerned. Mention may also be made of a point raised before us in support of the appeal that the jury in the case was not properly constituted. This was with reference to a statement contained in the order sheet in the case to the following effect:

"Cards of all the jurors summoned (10) are put in a bag. Cards are drawn out separately by lot from the bag."

It is not clear what the procedure followed by the Judge exactly was, but in view of the fact that no objection was taken before the Sessions Judge on behalf of the accused, on the score of choosing of jurors or to the constitution of the jury, in the manner mentioned in the order sheet, we do not consider that there is any substance in the argument sought to be advanced before us relating to the question of the choosing of jurors and of the constitution of jury, seeing that there was not even a suggestion that there was any failure of justice on account of any irregularity

in the procedure adopted in constituting the jury. In view of the conclusion we have arrived at, relating to the Sessions Judge's charge to the jury on two main heads referred to above, we set aside the verdict of the jury in this case, and with it, the conviction of the appellants and the sentences passed on them by the Sessions Judge. The appellants will be retried for the offences for the commission of which they were charged before the Court of Session. Appellant 9 Jogesh Chandra Das who has been released on bail must surrender; and we decline to grant bail to any of the appellants pending their retrial.

v.s. *Retrial ordered.*

A. I. R. 1934 Calcutta 719

Special Bench

C. C. GHOSE, AG. C. J., COSTELLO AND MALLIK, JJ.

Sarat Chandra Dhupi—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 421 of 1933, Decided on 9th January 1934.

(a) Criminal Trial—Held on evidence that there was ample corroboration of approver's statements

In a case under S. 396, I. P. C., the only question was whether or not the evidence of the approver ought to be accepted. The evidence given by the various witnesses showed quite conclusively that there was corroboration on three significant points: (1) the approver's statement that he was fetched from his own house on the night of occurrence to take part in the dacoity: (2) the evidence to the effect that the accused had purchased an axe which was subsequently found, and (3) the evidence of witness who recognized the accused as being one of the party of dacoits at the time when they were retreating after the occurrence:

Held: that there was ample corroboration in several material particulars and that these three points were in themselves more than sufficient to connect the accused with the crime with which he was charged. [P 720 C 1, 2]

(b) Criminal Trial—Alibi—Failure to prove defence of alibi—Effect of.

Whenever a defence of alibi is set up and that defence utterly breaks down it is a strong inference that it the prisoner was not in fact where he says he was then in all probability he was where the prosecution say he was.

[P 720 C 2]

(c) Criminal Trial — It is not imperative that in every case there should be corroboration of approver's evidence—(*Obiter.*)

Obiter.—It is not imperative that in every case there should be corroboration of the evidence of an approver though no doubt as a matter of precaution it is generally speaking desirable that there should be some sort of corroboration: 1931 *Rang* 235, *Ref.* [P 721 C 1]

Anil Chandra Roy Chowdhury—for the Crown.

Costello, J. — The appellant Sarat Chandra Dhupi, otherwise known as Das, was convicted by a Special Tribunal at Mymensingh for an offence under S. 396, I. P. C., and was sentenced to ten years' rigorous imprisonment. He was originally charged along with several other persons who were subsequently acquitted by the tribunal on the ground that there was no satisfactory and independent evidence to corroborate that given by the approver in the case. The judgment which we have now to consider deals only with the case of Sarat Chandra Dhupi, the present appellant. The only question in this appeal is whether or not the evidence of the approver ought to be accepted. He narrated a circumstantial and detailed story of an occurrence which took place on the night of Sunday, 5th June 1932. Put shortly the story was that he was fetched from the place where he lived by Sarat Chandra Dhupi and taken to a spot where other men to the number of twelve or fourteen were assembled together armed with guns and revolvers for the purpose of committing a dacoity and that later in the same evening the whole party proceeded to the village of Kuniati and there forcibly entered the bari of a man named Khoda Newaz. It appears that at the time when the dacoits approached the bari, there was a man named Harip Akanda who was the father of Khoda Newaz's sister-in-law standing in the outer part of the bari. He was seized and tied up and a number of the dacoits mounted guard over him, while the main body went inside the bari. The majority of the dacoits remained in the courtyard but a party of four or five of them entered the western bhiti hut from which the owner the man Khoda Newaz had already fled. He seems to have been a person of very small courage because he left his wife Durlabjan Bibi in the hut at the mercy of the dacoits. This Durlabjan Bibi subsequently gave evidence in the case. A wooden chest was broken open and various articles and a quantity of money were taken away to the value of about Rs. 1,300.

In the meantime a small boy who was a servant of Harip Akanda had fled into the outer bari. One of the dacoits seems to have noticed him moving away and called attention to him in offensive language. A shot was fired and the boy whose name is Rahim Bux thereupon fell wounded. He died whilst being taken to hospital next day. By the time the dacoits had finished their operations in the bari and were moving off villagers had begun to assemble and a pursuit was started. The dacoits fired shots from time to time in the direction of their pursuers until they reached a place called Rampur Bazar which is situated at the junction of two main roads a mile and a half distant from the actual scene of the dacoity. By that time the villagers had more or less surrounded the dacoits and accordingly the dacoits finding themselves in difficulties fired a volley into the crowd of villagers with the result that five of them were wounded and one of them a man called Rahimuddi was killed. The villagers thereupon retired and the dacoits made good their escape.

The approver was a man named Ambika Charan Bhattacharjee. In effect the evidence which he gave set forth the story of the occurrence as above narrated. He had already made some statements of a confessional nature which when examined appear to tally reasonably well with the evidence he subsequently gave before the Court. The learned Commissioners have discussed at very great length the question of the extent to which the evidence of the approver was corroborated by that given by the other witnesses. Mr. Roy Chowdhury who appears for the Crown has in the absence of any one on behalf of the appellant very properly taken us through all the relevant parts of the evidence. He has pointed out to us such statements in the testimony of the various witnesses as he says tend to corroborate the story told by the approver. It seems to us abundantly clear that there was ample corroboration in several material particulars. The evidence given by the various witnesses shows quite conclusively that there was corroboration on three significant points: (1) the approver's statement that he was fetched from his own house on the night of the occurrence to take part in this dacoity; (2) the evidence to the effect that Sarat Chandra Dhupi or Das as he is generally referred to, had purchased an axe which was subsequently found about half way between the scene of the occurrence and Rampur Bazar. A witness was called who said that he had actually made the axe and sold it to Sarat Chandra. The evidence of the approver was that Sarat Chandra carried an axe and he was one of the party who entered the western bhiti and broke open the chest, and (3) the evidence of Jahuruddin who recognized Sarat Chandra Dhupi as being one of the party of dacoit at the time when they were retreating after the occurrence.

In my opinion these three points are in themselves more than sufficient to connect this appellant with the crime with which he was charged; but over and above all that it is to be noted that the defence set up by this man was one of alibi. At the time when he was arrested he stated that on the night of 5th June 1932, so far from being engaged in a criminal conspiracy and taking part in a dacoity he was peacefully occupied as a guest at a party in the house of a man named Miafar Sheik or Miafur Ali at a place called Balashimal and to give weight and corroboration to what he was saying he explained that he was at a party at which Baul songs were being sung. He also mentioned the names of certain of the other supposed guests at this party. A similar line of defence was set up at the stage of the trial when the accused was examined under S. 364, Criminal P. C. In answer to one of the questions then put to him he said:

> "I told him (i. e., Sub-Inspector Jogesh Chandra Roy who arrested the accused) that on the night of the dacoity I sang Baul songs with Samir Shaikh, Adu Shaikh, Banu Shaikh, and others in the house of Miafar at Balasimal."

Evidence was given to show that that was untrue. Miafur himself gave evidence to the effect that there was no party in his house on the night in question and no one sang any song there and certainly the prisoner himself was never there on that evening. Whenever a defence of alibi is set up and that defence utterly breaks down it is a strong inference that if the prisoner was not in fact where he says he was then in all probability he was where the prosecution say he was. At any rate the line

of defence adopted and his failure to substantiate it is an element which it is right to take into consideration in deciding whether or not the accused is guilty. We are clearly of opinion that there was in this particular case ample and considerable corroboration of the story told by the approver, but at the same time I should like to say that I think in this country the law with regard to corroboration of the testimony of approvers is as stated by Sir Arthur Page in 9 Rang. 404 (1) at p. 430 where he said

"the legislature in enacting these sections (that is to say the relevant sections of the Evidence Act) intended and effected, subject to the limitations therein prescribed that the question whether and under what circumstances the testimony of approvers and the confessions of co-accused should be treated as evidence against the accused in any particular case should be determined according to the good sense and discretion of the tribunal by which the accused is tried."

Later on the learned Chief Justice of Burma said at p. 431:

"We venture to think that many of the Indian decisions are based on fallacious reasoning and lay down the law in a sense that is inconsistent with the express provisions of the Act. The opinion that we have formed and expressed on this subject is in consonance with the observations of the Hon'ble Mr. Stephen 'that the effect of the provision (that is S. 114) is to make it perfectly clear that Courts of justice are to use their own common sense and experince in judging of the effect of particular facts, and that they are to be subject to no technical rules whatever on the subject.'"

In the particular case with which the learned Chief Justice was dealing none of the appellants whose appeals were being considered had been convicted on the evidence of an approver or the confession of a co-accused unsupported by independent and untainted corroboration. If however this is the correct view of the law it follows that it is not imperative that in every case there should be corroboration of the evidence of an approver though no doubt as a matter of precaution it is generally speaking desirable that there should be some sort of corroboration. The question does not arise in the present instance as we are fully satisfied that there was abundant corroboration of the evidence given by the approver and therefore the learned Commissioners were right in coming to the conclusion they did that this man at any rate was one of those who took part in the dacoity.

We have not been addressed on the subject of the sentence, but I would point out that in the course of this dacoity at least two persons were murdered and having regard to the provisions of S. 396, I. P. C., the sentence of ten years' rigorous imprisonment passed on the present appellant is in no way excessive. The appeal will therefore be dismissed.

C. C. Ghose, Ag. C. J.—I agree.

Mallik, J.—I agree.

V.S. *Appeal dismissed.*

1. Aung Hla v. Emperor, 1931 Rang 235=1931 Cr C 875=135 I C 849=9 Rang 404 (S B).

A. I. R. 1934 Calcutta 721

MALLIK AND JACK, JJ.

Makhanlal Basak—Defendant — Appellant.

v.

Bashudharanjan Das Gupta—Plaintiff—Respondent.

Appeal No. 290 of 1932, Decided on 22nd February 1934.

(a) Contract Act (1872), Ss 211 and 231 —Where principal can bring his case under S. 211, S. 231 does not debar him from seeking his remedy under that section.

Section 231 gives the undisclosed principal an option to proceed against the other contracting party; and in case where the former is able to bring his case within the purview of S 211 there is nothing in S. 231 which could be said to debar him from seeking his remedy under S. 211. [P 721 C 1]

(b) Contract Act (1872), Ss. 231 and 211 —Contract for undisclosed principal—Breach by reason of agent's default— Principal can proceed only against other contracting party and not against agent.

Where the refusal of the other contracting party to perform the contract is due to the agent of an undisclosed principal failing to pay the former his dues under his own separate contract with him, the proper section for the undisclosed principal to proceed under is S. 231 and not S. 211, and such principal is entitled to a decree only against the other contracting party and not against his agent. [P 722 C 2]

Saratchandra Basak and *Hemendra Kumar Das*—for Appellant.

Jitendra Kumar Sen Gupta and *Surajitchandra Lahiri*—for Respondent.

Mallik, J.—This appeal arises out of a suit for recovery of Rs. 1,099 as damages. The facts, which gave rise to the present litigation, were these. The plaintiff and defendant 1 are both contractors under the Dacca Municipality and both got contracts for the supply of alum to that Municipality. Defen-

dant 1 went to Calcutta and entered into a contract with defendant 2 for the supply of alum, which defendant 1 had contracted with the Municipality to supply. The plaintiff, on finding out that defendant 2's rate was fair, asked defendant 1 to place an order with defendant 2 on his (plaintiff's) behalf. Defendant 1 however instead of placing the order in the name of the plaintiff, took a contract in his own name, although the plaintiff paid in two instalments a sum of Rs. 500 which had to be paid in advance. Subsequently, when the plaintiff went to Calcutta to take delivery of the goods from defendant 2, defendant 2 refused to recognise him and refused to supply him the goods in question, with the result that the plaintiff had, in order to supply the goods contracted for to the Dacca Municipality, to buy the same from another firm and incurred some loss in consequence thereof. On these facts, the plaintiff sued both defendant 1 and defendant 2, praying that he may be allowed a decree for money representing damages which he had suffered. Both the defendants denied their liability. The Courts below gave a decree against defendant 1 and dismissed the plaintiff's claim against defendant 2. Defendant 1 is the appellant before us.

On behalf of the appellant our attention was drawn to the provisions of S. 231, Contract Act, and it was urged that, as it was a case of undisclosed principal, the plaintiff was entitled to proceed against defendant 2 alone. In answer to this contention, our attention was drawn to S. 211, Contract Act, and it was contended, on behalf of the plaintiff, that, although S. 231 gave to the plaintiff a right to proceed against defendant 2, it gave him an option to do so, and if the plaintiff could bring his case within the purview of S. 211, there was nothing in S. 231, which could be said to debar him from seeking his remedy under S. 211. This argument, so far as it goes, is perfectly sound. But the case, in my judgment, is not a case covered by S. 211. Defendant 1, no doubt, by placing the order with defendant 2 in his own name, had acted against the instruction of his principal, the plaintiff. But the refusal of defendant 2 to supply the goods, which resulted in a loss to the plaintiff, was, as the facts found indicate, not so much for the reason that defendant 2 did not know the plaintiff, as for the reason that defendant 1 had failed to carry out the conditions of his own contract with defendant 2. It appears that defendant 1 had failed to pay for the second and third lots of goods sent to him by defendant 2, on the basis of the first contract entered into by defendant 1. The plaintiff, no doubt, suffered loss on account of defendant 2's refusal to supply the goods to him. But the inability of defendant 1 to pay for the two lots of goods supplied by defendant 2 was much more responsible for the refusal than the fact that the second contract had been entered into in the name of defendant 1, instead of in the name of the plaintiff. I am therefore of opinion that S. 211 was not applicable to the present case and the proper section, under which the plaintiff could proceed, was S. 231 and, under S. 231, he was entitled to a decree against defendant 2 and not against defendant 1.

I would, accordingly, allow the appeal, set aside the decree of the lower appellate Court and send the case back to the Court of appeal below to give a decree to the plaintiff as against defendant 2 subject, of course, to the rights and obligations subsisting between defendant 1 and defendant 2, which will be determined after giving the parties an opportunity to adduce evidence on the point. In the event of the whole claim of the plaintiff being found not to be realisable from defendant 2 owing to the liability of defendant 1 to defendant 2, the balance of the plaintiff's decree will be realised from defendant 1.

The appellant, defendant 1, will be entitled to his costs in this appeal to be realised one half from the plaintiff and the other half from defendant 2.

Jack, J.—I agree. It is necessary to send the case back, inasmuch as the plaintiff's case in the first place was not a case of undisclosed principal, though, as a matter of fact, it was subsequently found to be in fact a case of undisclosed principal. Therefore defendant 2 had no opportunity of shewing what the liabilities and obligations were between him and defendant 1.

V.S. *Appeal allowed.*

A. I. R. 1934 Calcutta 723

MALLIK AND M. C. GHOSE, JJ.

H. a Pleader, In re.

Civil Rule No. 112 of 1934, Decided on 5th March 1934.

Legal Practitioners Act (1879), S. 13— Legal practitioner signing notice served on Subordinate Judge—Notice imputing ill-will and malice and containing also defamatory matter — Accusations held amounted to grossly improper conduct on part of pleader.

A pleader of 30 years' standing signed and served a notice, purporting to be given on behalf of his client under S. 80, Civil P. C., on a Subordinate Judge. In this notice at more than one place the said Subordinate Judge was charged with having misused his powers and also with having wantonly, with intent to harm and disgrace the client, ordered an attachment of his property before judgment. Malice and ill-will was imputed to the Judge in the discharge of his duty. The defence of the pleader was that the notice was drafted by his client and that he without reading, had merely signed it:

Held : that the accusations directed against a judicial officer presiding over a Court and which were almost defamatory in character, amounted to grossly improper conduct on the part of the said pleader, in the discharge of his professional duty. [P 723 C 1, 2]

Held further : that a pleader of such experieince must be held responsible for the contents of the notice. [P 723 C 2]

Charuchandra Biswas and *Sateendranath Mukherji*—for the Pleader.

Sharatchandra Basak and *Roopendrakumar Mitra*—for the Crown.

Mallik, J.—This rule was issued on *H*, a pleader practising in the Court at Sealdah, to show cause why he should not be dismissed or suspended under S. 13, Legal Practitioners Act, on the ground of grossly improper conduct in the discharge of his professional duty by giving notice under S. 80, Civil P. C., upon Babu Kshirodeshwar Banerji, Subordinate Judge at Alipur, a notice which contained highly objectionable words. The notice is dated 12th September 1933 and was received by the Subordinate Judge on the 13th idem. It was signed by *H* and it purported to be given on behalf of his client, Ray Bahadur Jogendrachandra Ghose. At more than one place in the notice, the Subordinate Judge was charged with having misused his powers and he was charged also with having wantonly, with intent to harm and disgrace the Ray Bahadur, ordered an attachment before judgment. There can be no manner of doubt that these accusations, coming from a pleader acting on behalf of his client, directed as they were against a judicial officer presiding over a Court and which were almost defamatory in a character, clearly amounted to grossly improper conduct on the part of *H*. Indeed *H*., in his explanation, practically admitted that that was so. *H*., however in showing cause, has tried to explain his conduct by saying that he had signed the notice without having read the contents thereof. His story was that one Surendra Babu (full name not disclosed) whom he knew to be a gomasta of Ray Bahadur Jogendrachandra Ghose, produced before him a plain sheet of paper without title-head containing some type-written matter and told him that the Ray Bahadur had sent the same to him to be signed by him, and *H*, who was very busy at the time and had no time to go through the contents of the document except one or two lines at the bottom, signed the document and returned it to Surendra Babu. The question is whether this story can be accepted. I am inclied to think that it cannot. I find it extremely difficult to believe that a pleader having any sense of responsibility—and there is nothing to show that *H* had no sense of responsibility in him—should put down his signature on a document containing something about damages without reading the contents thereof—only at the bidding of a gomasta of a client, although the client was in a sort of loco parentis to him. I have therefore no hesitation in holding that the pleader *H* has been guilty of grossly improper conduct in the discharge of his professional duty and has therefore brought himself clearly within the purview of S. 13, Legal Practitioners Act.

Now the question is what punishment should be imposed on him. On the one hand, the language used by him was highly objectionable, while, on the other hand, there is the fact that he has expressed his unqualified apology for what has been done by him and has also given an assurance that he will never do it again and there is also the fact that he is an old man of 65 and has put in thirty years of practice. Taking all the facts and circumstances into consideration, I am of opinion that the ends of justice will be satisfied if we suspend him for

three months and I would, accordingly, suspend him for that period of time from to-morrow.

M. C. Ghose, J. — I agree. The notice under S. 80, Civil P. C., which was served upon the Subordinate Judge, is of highly objectionable character. Malice and ill-will are imputed to the Judge in the discharge of his duty. The petitioner is a pleader of 30 years' standing and he ought to know that a Judge acting officially is not liable to be sued in any civil Court for any act done or ordered to be done by him in the discharge of his official duty—whether or not he acted within the limit of his official powers—provided that he acted in good faith at the time of doing the act or ordering the act, complained of, to be done. The pleader's explanation that he signed this document without reading it cannot be accepted. He is a pleader of experience and must be held responsible for the contents of the document, which he signed.

v.s. *Rule made absolute.*

A. I. R. 1934 Calcutta 724

GUHA AND NASIM ALI, JJ.

Jogendra Nath Banerjee—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 929 of 1933, Decided on 14th February 1934.

Explosive Substances Act (6 of 1908), S. 5—Accused and another person tried jointly—Such person in his examination under S. 342, Criminal P. C., seeking to clear himself at expense of accused—Conviction based on such statement is bad—Evidence Act (1872), S. 30.

If the statement of a person who is being tried jointly with the accused is a statement deprecating his own guilt; and seeks to clear himself at the expense of the accused, the statement cannot be taken into consideration under S. 30, Evidence Act, or any other provision of the law as against the accused. Such a statement is not evidence against the accused jointly tried with him as a co-accused. And therefore a conviction of the accused based mainly on the statement of a co-accused and recorded under S. 342 cannot stand. [P 724 C 2; P 725 C 1]

Hiralal Ganguli, Jitendra Mohan Banerjee and *Sambhunath Banerjee*—for Appellant.

Anil Chandra Roy Choudhury — for the Crown.

Judgment.—The appellant has been convicted and sentenced by the learned Chief Presidency Magistrate,, Calcutta, exercising jurisdiction as a Special Magistrate under S. 24, Bengal Act 12 of 1932, for commission of offences under S. 4 (b) and S. 5, Explosive Substances Act (Act 6 of 1908). The offences charged in this case and in regard to which evidence was placed before the Court was very serious. It appears to be clear that the conviction of the appellant is based mainly upon the statement of a co-accused Taraprasanna Ghatak, who has been acquitted by the learned Magistrate; reference has been made to his statement at different places in the judgment recorded by the Magistrate; and it has been treated as evidence furnishing corroboration of the most material evidence in the case, a note alleged to be in the handwriting of the appellant (Ex. 3 in the case). The learned Magistrate in dealing with Ex. 3 has observed that there was no escape from the fact that Taraprasanna's statement was fully borne out by the fact of the note (Ex. 3) which was proved to be in the appellants' handwriting. The statement of the co-accused Taraprasanna Ghatak referred to above was one under S. 342, Criminal P. C.; and it appears that what he stated before the Court was this:

"My statement to police may be taken as my statement (Ex. A). Adds—Jogen Banerjee is my cousin (Mamato Bhai). He used to visit me regularly at 56/2, Nimtolla Ghat Street and later at 2, Nimtolla Ghat Street. One day he came and told me that he had sent his family to his village home and asked me if I could keep a box for him. I have no family. I agreed. Four or five days later he brought this box (Ex. 1) and left it in my room, in my presence. I asked him what it contained; he said 'homoeopathic books.' About three months later, a boy came with this note (Ex. 3). I think it was Parikshit, but as I had not seen him before, I cannot be sure; the note asked for return of box through bearer; it was from Jogen. I asked if he knew Jogen—he said he did not. I refused to return the box to him. The boy said Jogen was at Beliaghata. I had a suspicion the boy might be a common thief and refused to return the box through him and told him to send Jogen to me himself. I had no work. I used to sell sweets in the Police Court compound."

The statement of the co-accused before the Court, of a person who was being tried jointly with the appellant, was a statement deprecating his own guilt; it was a statement seeking to clear himself at the expense of the appellant; and as such, the statement could not be taken into consideration under S. 30, Evidence Act, or any other provision of the law as against the appellant.

The statement of Taraprasanna Ghatak, as an explanation exculpating himself from his share of the offence charged against him, was not evidence against the appellant jointly tried with him as a co-accused. In our judgment, the conviction of the appellant as it stands must be set aside, based mainly as it is on the statement of a co-accused recorded under S. 342, Criminal P. C.

As indicated above, we give effect to the points raised before us in support of the appeal that the statement of Taraprasanna Ghatak, a co-accused not having been of a confessional nature, was not admissible as against the appellant, and that the appellant was prejudiced by the use of the same in the manner mentioned in the judgment of the learned Magistrate by whom this case was tried. In the events that have happened regard being had to the fact that Taraprasanna Ghatak has been acquitted by the Magistrate, it would be open to the prosecution to examine him as a witness in the case, and give such other evidence for the purpose of establishing the charge under which the appellant was tried, and on which he is to be retried. In sending the case back for a retrial we desire to mention that it would be satisfactory if the accused was made to write out the contents of the note (Ex. 3) in their entirety in the presence of the learned Magistrate holding the trial, and if such writing was sent to a competent handwriting expert for examination and opinion for consideration of the Court. In the result, the conviction of the appellant and the sentence passed on him are set aside, and the case sent back for retrial on fresh evidence in the light of the observations made in this judgment. The appeal is allowed; retrial ordered.

V.S. *Appeal allowed.*

A. I. R. 1934 Calcutta 725

PANCKRIDGE, J.

National Carbon Co. Incorporated, In re.

Decided on 23rd January 1934.

(a) Writ of Prohibition — Calcutta High Court has jurisdiction to issue writ of prohibition.

The High Court has power to issue a writ of prohibition. The language of Cl. 21 of the Charter of 1774 cannot be used to control Cl. 4 of that Charter. [P 728 C 1]

(b) Patents and Designs Act (2 of 1911) S. 17—Controller of Patents is not technically a Court.

The Controller of Patents is not technically a Court or tribunal exercising judicial functions, but so far as he has a duty imposed upon him to hear and determine objections to applications for leave to amend there is a fair analogy between his position and that of a Court. Therefore a writ of prohibition can be issued on him: *King* v. *North-Worcestershire Assessment Committee Ex parte Hadley*, (1920) 2 *K B* 397 and 1930 *Mad* 896, *Ref.* [P 728 C 1]

(c) Patents and Designs Act (2 of 1911), S. 17—Civil Procedure Code does not apply to Controller of Patents.

The Civil Procedure Code is not applicable to proceedings before the Controller of Patents. The principles underlying the Code, in so far as they are principles of natural justice, must of course be observed by him, as they must be observed by all authorities exercising judicial or quasi-judicial functions. [P 729 C 1]

(d) Patents and Designs Act (2 of 1911), S. 17 (9)—Suit for purposes of S. 17 (9) when terminates, stated.

A suit for the purposes of S. 17, sub-S. (9) terminates the moment the Court pronounces its judgment, and cannot thereafter be said to be pending. Appeals pending against decrees in suits for infringement of patents are outside the purview of sub-S. (9): 15 *Cal* 94, *Dist.*; 28 *Cal* 23, *Harris* v. *Quine*, (1869) 4 *Q B* 653, *Ref.*; *Cropper* v. *Smith*, (1884) 28 *Ch D* 148, *Foll.*; *Woolfe* v. *Automatic Picture Gallery, Ltd.*, (1903), 1 *Ch* 18, *Rel. on.* [P 729 C 2; P 730 C 2]

Barwell and *Ormond* — for National Carbon Co.

S. Choudhury and *Sircar* — for Controller of Patents.

Judgment. — The circumstances in which this Rule has been issued upon the National Carbon Company, Incorporated, and upon the Controller of Patents are as follows: The National Carbon Company, Incorporated, carry on business in New York, where they manufacture and export dry cell batteries for flashlights and electric torches. They are the grantees of Indian Patent No. 17148 of 1930. In the specification, which was accepted on 8th December 1930, the invention is described as relating "to dry cells and particularly to "improved means of closing and sealing such cells." I shall hereafter refer to the National Carbon Company, Incorporated, as "the patentees."

The Bright Star Battery Company are incorporated in the United States of America, and they also manufacture and export dry cell batteries for flashlights. They offer their goods for sale in India through Messrs. Brough & Co., a firm carrying on business in Bombay.

In December 1931, the patentees instituted a suit on the original side of this Court against Messrs. Brough & Co., alleging that the batteries manufactured by the Bright Star Company were an infringement of their patent and claiming an injunction and damages. The defendants denied the infringement, and also put in issue the validity of the patent and raised certain objections to the specification and claim. The nature of the defendants' contentions is apparent from the following issues among those formulated in the course of the trial:

Issue 1.—Is the plaintiff company the true and first inventor of the annular metal cover ?

Issue 2.—Is the patent in respect of the same invalid ?

Issue 9.—Is the alleged invention sufficiently ascertained or described in the specification ?

Issue 10.—Does the claim contain a distinct statement of the invention ? Is it ambiguous, misleading and wide ?

On 17th January 1933, when the evidence had been closed, counsel for the patentees, who was then in the course of making his final reply on behalf of his clients, applied for leave to serve short notice for the following day of an application under S. 18, Indian Patents and Designs Act, 1911. Leave was refused by Buckland, J., for reasons given in a judgment delivered by him on that day. The concluding paragraph of the judgment is as follows:

"I refuse leave to serve short notice of motion. This does not of course preclude the plaintiff company from making any application which it may be advised to make upon such notice as the rules require."

The patentees thereupon served the defendants with notice that an application would be made on 23rd January 1933, that the patentees should be allowed to amend the specification in the suit, namely, the specification in Indian Patent No. 17148 of 1930, by correcting and explaining the printed Indian specification in terms of the prayer of the petition. On 23rd January 1933, as appears from the order of that day, counsel for the patentees, when the application was called on stated to the Court that he had no instructions to proceed with the application, which was accordingly dismissed with costs. On 3rd February 1933, Buckland, J., dismissed the suit with costs. The following is an extract from his judgment:

"In my judgment neither the plaintiff company nor its assignor was the true and first inventor of the annular metal cover and the defendant company has not infringed the plaintiff company's patent in the manner set forth in issue 3. I also hold that the inventon is not new nor proper subject-matter for a patent, and that the specification, and in particular the claim are ambiguous and too wide, and that the alleged invention was anticipated by the prior publication in India of the patent granted to Tarver in England in 1917."

On the same day immediately upon judgment being pronounced, the patentees through Messrs. Remfry & Sons, patent and trade mark attorneys, presented an application under S. 17 of the Act to the Controller of Patents for leave to amend the specification of their patent. The application is in the prescribed form, and contains a declaration that no suit for infringement or proceeding before a Court for revocation of the patent in question is pending. The proposed amendmennts are described as being by way of correction, explanation and limitation. A copy of the specification and claim is attached to the application showing the proposed amendments is red ink. They appear to me to be substantially the same as those which formed the subject matter of the application of which notice had been given on 19th January 1933. The application was duly advertised under S. 17, rub-S. (3) of the Act. On 8th March 1933, the patentees filed an appeal against the decree of Buckland, J., dismissing their suit against Messrs. Brough & Co.

On 10th August 1933, the Bright Star Company filed a full statement of opposition to the patentees' application, wherein after calling attention to the pending appeal, they set out the fact that the application for amendment under S. 18 had been refused by the Court on 23rd January 1933. They also give their reasons for submitting that the proposed amendments will enlarge the scope of claim 1, and make it substantially different from the claim as it stood before amendment. They make a similar submission with respect to the other claims. The patentees' reply is dated 12th September 1933. In dealing with the application disposed of on 23rd January 1933, the patentees state:

"It is admitted that during the hearing of the suit an application was made to the Court for applicants to be allowed to amend the specification, but such application was not allowed by the Court and the details of the application were not even considered by the Court, as the

application was refused without any consideration being given to the wording or details of the amendment whatsoever, the Court having refused to even listen to the terms set forth in the application."

When Mr. Clough drew my attention to this paragraph, I expressed my strong disapproval of it, and nothing that Mr. Barwell has said has caused me to modify the opinion I then formed. The language appears to me to deliberately chosen to indicate a lack of respect for the Court, and is moreover calculated, and I feel compelled to add intended, to give a totally inaccurate picture of the incident to which it refers. From what has already been stated and from the record it is perfectly plain that the only reason why the patentees' application was not considered on the merits was that they saw fit to give no instructions to their counsel to proceed with it. This being so, for the patentees to describe the Court as refusing to listen to the terms set forth in the application, is, to my mind, highly reprehensible.

In December 1933, the parties appeared before the Controller who heard arguments both as to jurisdiction and on the merits. Before orders were passed, on 13th December 1933, the Bright Star Company presented a petition to this Court, setting out the facts and contending, first, that, inasmuch as a suit for infringement of the patent was pending, the Controller had no jurisdiction to entertain the patentees' application; secondly, that to entertain the application would be "a violation of the principles of law," as the period for appealing against the order of dismissal of 23rd January had expired and that the matter in issue had already been finally decided by this Court; and, thirdly, that the Controller had no jurisdiction to grant leave, as the amended specification would claim an invention substantially larger than or substantially different from, the invention claimed by the specification. The alternative reliefs sought are a writ of prohibition forbidding the Controller to continue the proceedings, an order of a similar character under S. 45, Specific Relief Act, 1877, and a writ of certiorari requiring the Controller to bring up the record so that the proceedings may be quashed.

After hearing counsel, I directed that a Rule should issue on the patentees and the Controller in terms of the prayer of the petition. This has, accordingly, been done, although the Rule as framed does not mention the writs by name. Exception has been taken to certain alleged formal defects in procedure. It is said that a copy of the petition should have been served with the Rule, and I have been referred to passages in the Yearly Practice, 1934. The objections are entirely technical, and it is not argued that the patentees have been prejudiced in any way. I do not feel called upon to give any weight to them, as this matter is not one like an application to commit for contempt of Court, where the party, whose personal liberty it is sought to affect, is entitled to insist on the strictest observance of the prescribed procedure.

A point of greater importance is raised by the contention that the Court has no power to issue a writ of prohibition. It is agreed that this writ, if the power exists to issue it, can be claimed as of right, and that for this reason various arguments, open to the patentees in opposing the prayer for as much of the relief sought as is merely discretionary, are inapplicable. I am of opinion this power exists. By Cl. 4 of the Charter of the Supreme Court of 1774, it was provided that the Court should have

"such jurisdiction and authority as our justices of our Court of King's Bench have, and may lawfully exercise, within that part of Great Britain called England, by the common law thereof."

Undoubtedly, among the powers of the Court of King's Bench at the date of the Charter was that of issuing writs of prohibition. It is admitted that all the powers of the Supreme Court have been inherited by the High Court, except such as have been specifically taken away by statute. This is recognized in 11 Cal. 275 (1) as regards this Court, as also in 1918 Mad. 1266 (2) as regards the Madras High Court. The latter decision was affirmed by the Judicial Committee in 1919 P. C. 31 (3). It is however suggested that to issue a writ of prohibition was never among the

1. Nundo Lal Bose v. Corporation for the Town of Calcutta, (1885) 11 Cal 275.
2. In re Mrs. Besant, 1918 Mad 1266=37 I C 607=18 Cr L J 239=39 Mad 1164 (SB).
3. Besant v. Advocate-General of Madras, 1919 P C 31=52 I C 209=20 Cr L J 593=46 I A 176=43 Mad 146 (PC).

powers of the Supreme Court, and that Cl. 21 of the Charter has the effect of cutting down and curtailing the powers apparently conferred by Cl. 4. Cl. 21 makes the Courts and Magistrates already existing at the date of the Charter

"subject to the order and control of the said Supreme Court of Judicature at Fort William in Bengal, in such sort, manner, and form, as the inferior Courts and Magistrates of, and in that part of Great Britain called England are, by law, subject to the order and control of our Court of King's Bench."

The clause proceeds:

"To which end the said Supreme Court..... is hereby empowered and authorised, to award and issue a writ or writs of mandamus, certiorari, procedendo, or error, to be prepared in manner before mentioned, and directed to such Courts or Magistrates as the case may require, ..."

It is rightly pointed out that there is no mention of any authority to issue a writ of prohibition, and also that there is no record of such a writ ever having in fact issued from the Supreme Court or the High Court. Nonetheless, I cannot accept the argument. As has been pointed out by learned commentators, including Sir Fitzjames Stephen, the draftsmanship of the Charter is open to criticism, and it may be that there is here an instance of omission through oversight. In any case, I do not think that the language of Cl. 21 can be used to control the language of Cl. 4 in the manner suggested. It would need far more direct language to convince me that it was intended by Cl. 21 to exclude from the powers of the Court of King's Bench conferred on the new Court by Cl. 4, the power to issue a writ of prohibition. Moreover, I have no doubt that the writ can issue on the Controller. He is not technically a Court, or a tribunal exercising judicial functions in the legal acceptation of the term, but that does not make it untrue to say that, so far as he has a duty imposed upon him to hear and determine objections to applications for leave to amend, there is a fair analogy between his position and the position of a Court. The principle has been many times affirmed that when a person or body of persons, is clothed with power to determine questions, and decide issues affecting the rights of the private citizen or the public, the King's Bench Division will interfere by prohibition or certiorari to prevent the illegal exercise of such power. It is unnecessary to multiply cases. I need only refer to the judgments of Lord Hewart, C. J., in 2 K. B. 397 (4) and of Venkatasubba Rao, J., in 1930 Mad. 896 (5).

Since I have held that this Court has power to issue a writ of prohibition if the case is a fit one for its exercise, I need not consider whether the circumstances of this particular case would make it right for me to refuse the discretionary reliefs asked for, namely, a writ of certiorari, and an order under S. 45, Specific Relief Act. With regard to the latter order the patentees rely on S. 17, sub-S. (6), Patents and Designs Act, which provides for an appeal to the Governor-General in Council against the decision of the Controller. It is argued that this fact prevents proviso (d), S. 45, Specific Relief Act, from being fulfilled, since the appeal is a specific and adequate legal remedy open to the applicant. It is also argued that the conduct of the Bright Star Battery Company in taking part in the proceedings before the Controller, until the stage when it only remains for him to promulgate his decision, disentitles them to relief. As I have already observed it is not necessary in the circumstances to consider the weight that ought to be given to these contentions.

By far the most important point urged in support of the Rule is that which is concerned with S. 17, sub-S. (9), Patents and Designs Act, which makes the whole section inapplicable, when and so long as any suit for infringement or proceeding before a Court for the revocation of a patent is pending, and it will, I think, be convenient if I postpone consideration of it until I have disposed of the other objections to the Controller's jurisdiction. It is said that the Controller ought not to entertain the patentees' application, because the amendments, which he is asked to sanction, are in substance the same as those which formed the subject matter of the application to the Court. which was dismissed on 23rd January.

4. King v North Worcestershire Assessment Committee Ex parte Hadley, (1929) 2 K B 297=98 L J K B 605=141 L T 557 = 93 J P 199=45 T L R 525=27 L G R 458.
5. Penugonda Venkataratnam v. Secy. of State, 1930 Mad 896 = 128 I C 851 = 53 Mad 979.

It is admitted that as the dismissal was due to the patentees' failure to appear in support of the application, and as there was no decision on the merits, the matter cannot be regarded as res judicata ; but the principle embodied in O. 23, R. 1, Civil P. C., is invoked. It is said that in effect the patentees withdrew their application to the Court without either asking for, or obtaining, leave to make the same application at a future date.

I think the answer to this is that the Code of Civil Procedure is not applicable to proceedings before the Controller. The principles underlying the Code, in so far as they are principles of natural justice, must of course be observed by him, as they must be observed by all authorities exercising judicial or quasi-judicial functions. How far, if at all, according to those principles the patentees have prejudiced their rights by their conduct in respect of the proposed application to the Court is for the Controller to decide.

Next, it is argued that the amendments sought would so clearly make the specification claim an invention larger than and substantially different from that claimed in the unamended specification, that the Controller is bound to decide adversely to the patentees. The answer again is that the scheme of S. 17 of the Act, shows that this question is one of those that the legislature intended that the Controller should decide, subject to the right of appeal as provided by sub-S. (6). It is quite impossible for the Court to investigate the matter, and then by anticipation prohibit the Controller from proceeding, on the assumption that his decision, when given, will be erroneous. To do so, would, in my opinion, be a usurpation on the part of the Court of the jurisdiction which the law has given to the Controller.

Finally, we come to the question whether sub-S. (9) has in the circumstances the effect of depriving the Controller of all jurisdiction under S. 17. I do not think it can be plausibly argued that on 3rd February, when the application was presented to the Controller any suit for infringement was pending. Judgment dismissing the patentees' suit against Messrs. Brough & Co., had already been pronounced. The fact that the formal decree does not appear to have been signed by the Master or a Judge before 13th February, or to have been filed before 21st March, does not, in my opinion, affect the matter. Such steps may be regarded as machinery for formally recording the result of the suit, or as necessary preliminaries for execution. In other words, in my opinion, the suit, for the purposes of sub-S. (9), terminated the moment the Court pronounced its judicial decision, and could not thereafter be said to be pending.

What however is the position from the date of the filing of the appeal ? Counsel has argued that, for the purposes of the sub-section, " suit " must include appeal and he points out, with considerable force, that, whatever were the reasons that induced the legislature to deprive the Controller of jurisdiction during the pendency of a suit, those reasons must apply, with equal force, during the pendency of an appeal. In this connexion, he has referred to the Transfer of Property Act, 1882, S. 52, as unamended, and my attention has been drawn to the observations of C. M. Ghose, J., in 15 Cal 94 (6). It is true that, at p. 99, the learned Judge speaks of the proceedings of the appellate Court as being " but a continuation of the proceedings in the suit," but the question he was considering was quite different from the one before me, since what he had to decide was whether the appellate decree was a decree " made therein " within the meaning of the section. 28 Cal 23 (7) is rather more favourable to counsel's contentions, since there the alienation was effected before the filing of what is described as the " inevitable " appeal. I cannot say I find 4 Q B 653 (8) particularly helpful. That decision is merely to the effect that the contract between an attorney and his client covers the conduct of possible appellate proceedings, as well as the conduct of the original suit, although the attorney is entitled, if he sees fit, to decline to act after the determination of the suit in the lower Court. If however he does act, limitation does not begin to run with respect

6. Gobind Chunder Roy v. Guru Churn Kurmokar, (1887) 15 Cal 94.
7. Dinonath Ghose v. Shama Bibi, (1900) 28 Cal 23=4 C W N 740.
8. Harris v. Quine, (1869) 4 Q B 653=10 B & S 644=38 L J Q B 331=20 L T 947=17 W R 967.

to his claim for remuneration, until he has completed his work with regard to the appeal. The case is certainly no authority for holding that, in a statute, the word " suit " must be construed as including appeal.

What however finally prevents me from accepting Mr. Clough's very able argument as to the construction of sub-S. (9) is the decision of Chitty, J., in 28 Ch D 148 (9). There the Comptroller-General refused to proceed with an application to amend, presented to him under the Patents, Designs, and Trade Marks Act, 1883, S. 18, considering that the leave of the Court under S. 19 of that Act, was necessary, because, since the presentation of the application, an appeal had been lodged in the House of Lords against the decision of the Court of Appeal affirming in part the judgment of the High Court. Chitty, J., held that " action for infringement " in S. 18, sub-S. (10) of the Act, meant action before judgment, and that, in the circumstances, there was no action for infringement pending. I appreciate the fact that the provisions of the English statute differ from those of the Patents and Designs Act, 1911. In particular, under the English statute, there was no power given to the Court similar to that conferred by S. 18 of the Act, to allow a patentee to amend his specification. Instead of this power, the English Court, under S. 19 of the Patents, Designs and Trade Marks Act, 1883, had the power, in an action for infringement of a patent, to give the patentee liberty to apply to the Controller for leave to amend his specification.

Owing to this difference, some of the arguments, which influenced, Chitty, J., are inapplicable in this case. However I cannot lose sight of the fact that the Act was passed 27 years after the decision in 28 Ch D 148 (9) and the legislature saw fit to employ language, in essentials the same as the language, which had on that occasion been judicially interpreted. Moreover, since the Patents and Designs Act, 1919 (9 and 10 Geo. 5, C. 80) the law in England has been the same as in India in this respect, for under S. 22 of that Act, the Court has power to allow amendments. I have however been unable to find any suggestion in the standard work " Terrell on Patents," Edn. 7, published in 1927, that, since the Act of 1919, 28 Ch D 148 (9) is no longer good law.

In the circumstances, I feel constrained to come to the conclusion that it was the intention of the legislature to exclude pending appeals against decrees in suits for infringement from the purview of S. 17, sub-S. (9) of the Act. I may add that quite apart from the opinion I have formed as to the construction, I should have considerable doubt whether the filing of an appeal deprives the Controller of jurisdiction to deal with an application already presented under S. 17, sub-S. (1) of that Act.

I notice that in 1 Ch 18 (10) the Court of appeal upheld the decision of Kekewich, J., that the jurisdiction of the Comptroller to deal with an application for leave to amend, made under S. 18 of the Patents, Designs and Trade Marks Act, 1883, was not suspended by the subsequent presentation of a petition for revocation. I am inclined to think that, even if Mr. Clough's contention be adopted, the filing of the appeal on 8th March does not affect the power of the Controller to deal with the application made to him on 3rd February. It is not however necessary to decide this question. For the reasons I have given, I hold that the application fails and must be dismissed with costs.

V.S. *Rule discharged.*

9. Cropper v. Smith, (1884) 28 Ch D 148=54 L J Ch 287=33 W R 338=52 L T 94.

10. Woolfe v. Automatic Picture Gallery, Ltd. (1903) 1 Ch 18=72 LJ Ch 34=87 L T 549.

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GUHA AND MCNAIR, JJ.

Superintendent and *Remembrancer of Legal Affairs, Bengal*—Appellant.

v.

H. E. Watson—Respondent.

Govt. Appeals Nos. 1 and 2 of 1934, Decided on 4th July 1934.

(a) Factories Act (1911), Ss. 43 (c), and 35 --Manager being absent not responsible for working of factory—He cannot be proceeded against for infringement of law committed in his absence.

Where the person was absent from the duties as manager as contemplated by law, at the time when there was the alleged infringement of the law, he could not be proceeded against for such offences as were alleged to have been committed under the Factories Act, for he was not the manager responsible for the working of the factory.

[P 732 C 2]

(b) Factories Act (1911), Ss. 41 (a), and 28—Bona fide representation by manager regarding alleged infringement of S. 28—Such manager cannot be punished under S. 41 (a).

The law, in general, affords protection in the matter of prosecution for commission of offences, to persons acting in good faith. Thus where there was the representation of the manager to the Inspector of Factories by his letter showing the bona fides on the part of the manager of the factory, in the matter of the alleged infringement of the law as contained in S. 28 read with S. 41 (a). [P 732 C 2]

Held : that the accused person was not the person on whom penalty could be imposed under the Factories Act. [P 733 C 1]

(c) Factories Act (1911), S. 2—All persons not coming strictly within exception mentioned in S. 29 are persons employed in factory.

All persons not strictly coming within the exceptions contemplated by S. 29, and persons in regard to whom there is no 'opinion' of the Inspector of Factories, entitling the manager to claim that he was not a person employed in the factory are to be deemed as persons employed in the factory. [P 733 C 1,2]

(d) Factories Act (1911), Ss. 2 and 29—Question whether particular worker comes within S. 2 and in whose case exception could be claimed under S. 29 has to be settled by Inspector of Factories.

The Factories Act does not affect only the manual workers. As the provisions of the Act now stand, the question whether a particular worker who comes strictly within the definition clauses of S. 2, which are of a very wide application, and in whose case an exception could be claimed under S. 29, has to be settled by the Inspector of Factories, who is the constituted authority under the law, as it now stands, to express the opinion whether that person held a position of supervision or management, or is employed in a confidential capacity, as mentioned in S. 29 of the Act, and R. 59 framed under the Act; the opinion of the Inspector being dependent on the facts and circumstances of the case before him. [P 733 C 2]

(e) Factories Act (1911), S. 35—Provisions of S. 35 are mandatory.

The provision of the law as found in S. 35 is mandatory in its nature; the expression 'shall be kept', taken along with the proviso to that section relating to an order in writing by the Inspector, makes the position clear that in the absence of such an order, one register in form G must be kept, of all persons employed in a factory, of the hours of their work, and of the nature of their respective employment. [P 734 C 1]

D. N. Bhattacharjee, and *Anil Chandra Roy Choudhury*—for Appellant.

S. C. Taluqdar—for Respondent.

Guha, J.—These are two appeals by the Government of Bengal; and they are directed against an order of acquittal passed by the learned Chief Presidency Magistrate, Calcutta, on 16th December 1933, in regard to two separate charges, following upon complaints made against Mr. H. E. Watson, as Director, Statesman Printing Press, by the Chief Inspector of Factories, Bengal, on 9th November 1933. The complaints made were : (i) under S. 41 (a) read with S. 28, and (ii) under S. 43 (c) read with S. 35, Indian Factories Act.

The case for the prosecution was that the Inspector of Factories inspected the factory : the Statesman Printing Press, on 15th and 19th October 1933, and found that one printer, five proof readers, and seven compositors in the advertisement section were employed on different dates beyond the time limit of eleven hours per day, as prescribed by S. 28, Indian Factories Act. It was further alleged that the register of persons employed as prescribed by S. 35 of the Act, was not correctly maintained, regard being had to the facts that no entries were made in the register after 17th October, that specified hours of work of the persons employed were not entered in the register, and that different shifts in which the workers were employed were not shown.

In the written statement filed in Court by Mr. Watson, it was stated that during the dates between which the offences were alleged to have been committed, he was not in India, and he had given over charge to Mr. Hemmin, the Director of the Statesman Ltd., that no charge could lie against him in respect of matters which took place in his absence, and without his knowledge. It was further mentioned in the written statement that the accused person was not the occupier of the premises. It was therefore pleaded in defence that no penalty could be inflicted under the Indian Factories Act, on the accused, placed on his trial. So far as the charge under S. 28 read with S. 41 (a) was concerned, it was stated on the side of the defence that the thirteen persons referred to in the petition of complaint were not manual labourers; that they were persons who used their educational qualifications, were experts, and were engaged in work of supervision or confidential work.

It was further mentioned that the persons working in the advertisement department : the printer, the readers and copyholders mentioned in the petition of complaint, were all outside the scope of S. 28, Indian Factories Act.

With reference to complaint made under S. 43 (c) read with S. 35 of the Act, it was pleaded in defence that the employment register taken along with the time sheets which contained all the necessary details, completely satisfied the requirements of the law. It was specifically stated in the written statement that the present system of maintaining registers had been approved by Mr. Adams, the then Chief Inspector of Factories, in whose opinion the keeping of the employment register and using the same in conjunction with the time sheet, was sufficient compliance of the provisions of the Indian Factories Act, and that this system has been in vogue, without any objection by the authorities concerned, for the past ten years. It may be noticed in this connexion that evidence in support of the case aforesaid, stated in the written statement, was sought to be given before the Magistrate, but such evidence was not recorded ; the Magistrate did not state his reason why the evidence was not allowed to be given. It is necessary to notice that after the inspection of the factory on 15th and 19th October 1933, the attention of the Director of the Statesman Printing Press was drawn by the Inspector to the irregularities noticed by the Inspector. It was done by a letter from the Inspector of Factories to the Director, dated 24th October; the Director it appears sent a reply to the Inspector on 26th October in these terms :

"We are in receipt of your letter No. 6356, dated 24th October, and thank you for calling our attention to irregularities, which will be immediately put right. With regard to S. 22: the names in red were given a holiday for their Sunday work, but we find that it was not within three days of the Sunday, and we will take care that this is observed in future. With reference to the notice that you should receive in this matter escaped our attention, but a notice will be sent to you weekly every Monday in future. Your remarks under S. 35 have been attended to. With reference to S. 28: many of the names mentioned are merely supervisors and therefore we understood that they did not come strictly under the Hour Rule. We should like to inquire whether Readers, who sit in office away from the works, should not come under the same category as Clerks as we have always regarded them as such ? We are changing the employment register so as to separate the supervisors from the ordinary workmen, which will make the work of your Inspector easier. We shall be glad to know if this matter is now adjusted to your satisfaction."

There was admittedly no reply given to this letter of 26th October which discloses absolute bona fides and good faith on the part of the management of the factory concerned. The complaints on the other hand starting the present prosecution were filed before the Magistrate on 9th November 1933. On the facts and in the circumstances of the case before us, the main features of which have been outlined above, two questions stand out very prominently for consideration, and they call for a decision before the provisions of the Factories Act as contained in Ss. 2, 28, 29 and 35, and the Rules framed under the Act, referred to in the course of the argument before us, come in for consideration, in connexion with the case for the prosecution.

First, could the penalties prescribed by the Factories Act be imposed on Mr. Watson against whom complaints were lodged, and who was charged with violation of law. The person accused of offences under the Factories Act, was absent from the duties as manager, as contemplated by law, at the time when there was the alleged infringement of the law. It is a fact that the absence of the manager of the factory was not notified to the authorities by the occupier, as required by law (S. 33 (2), Factories Act), for which non-compliance with the provisions of the law, the occupier could be held liable. According to S. 33 (3) of the Act, the occupier was to be deemed as manager for the purposes of the Act, and he was jointly and severally responsible for any violation of the law. On the facts as they stand, Mr. Watson was not the person against whom complaints could be lodged or the person who could be charged with any of the offences or the infringement of the law complained of, and on whom penalty could be imposed under the law for infringement of the law, at a time when he was not the manager responsible for the working of the factory.

Secondly, the law, in general, affords protection in the matter of prosecution for commission of offences, to persons acting in good faith. Good faith so far as commission of acts for which penalties may be imposed under the law, must, no doubt, involve due care and attention (S. 52, Penal Code). The question for consideration therefore in the

case before us is: did the infringement of the law by the manager of the factory —assuming that there was infringement of the law—involve want of good faith on the part of the manager. There was the definite case before the Magistrate, as stated by the accused person, and which he wanted to establish by evidence; there was further the representation of the manager to the Inspector of Factories by the letter of 26th October 1933, to which reference has been made already, showing the bona fides on the part of the manager of the factory, in the matter of the alleged infringement of the law as contained in S. 28 read with S. 41 (a), Factories Act. On the materials before us, the conclusion is irresistible that the accused person (Mr. Watson) was not the person on whom penalty could be imposed under the Factories Act, for the reasons stated above in regard to any of the infringements of the law, mentioned in the petition of complaint before the Magistrate.

Our decision on the two questions mentioned above concludes the appeals before us; but in view of the arguments advanced in support of the appeals, and on behalf of the respondent, it is desirable to indicate briefly, the result of our interpretation of the different provisions of the Factories Act under two different heads is concerned. At the outset, it may be presumed that the enactment regulating the employment of workers, and their work in a 'factory,' as defined in the Factories Act, has to be construed in favour of the employee, and strictly against the employer. The question whether the thirteen persons mentioned in the petition of complaint, were within the category of persons employed in the factory within the meaning of S. 2 (2), Factories Act, was discussed before us at length. The significance of the word 'employed,' the meaning of term 'factory' and of the expression 'manufacturing process' as mentioned in S. 2 (4) of the Act, have to be considered in conjunction with R. 59, relating to the exceptions contemplated by S. 29 of the Act. It would appear that all persons not strictly coming within the exceptions, and persons in regard to whom there is no "opinion" of the Inspector of Factories, entitling the Manager to claim that he was not a person employed in the factory, as contemplated by S. 28, Factories Act, are to be deemed as persons employed in the factory. In the case before us, there was however a claim by the Manager in good faith, in view of the difficulty felt in interpreting the different provisions of the Factories Act, that the persons mentioned in the petition of complaint were not persons to whom S. 28 could be held to be applicable. The Manager's view in this behalf was placed before the authorities for consideration, and no opinion was expressed by the authorities themselves. The only reply that was vouchsafed by them was the launching of the prosecution by a complaint before the Criminal Court, which has resulted in an acquittal of the person against whom the complaint was lodged, on the interpretation of the provisions of the law applicable to the case. It could not therefore be said that there was absence of good faith on the part of the Manager of the factory. It may be mentioned in this connexion that the view forcibly presented before us, and which was accepted by the Magistrate in the Court below, that the Factories Act affected only the manual workers does not appear to be sound. As the provisions of the Act now stand, the question whether a particular worker who comes strictly within the definition clauses of S. 2, which are of a very wide application, and in whose case an exception could be claimed under S. 29, has to be settled by the Inspector of Factories, who is the constituted authority under the law, as it now stands, to express the opinion whether that person held a position of supervision or management, or is employed in a confidential capacity as mentioned in S. 29 of the Act, and R. 59 framed under the Act, the opinion of the Inspector being dependent on the facts and circumstances of the case before him.

As to interpretation of S. 35, Factories Act : on a strict interpretation of that provision of the law, it cannot be said that the employment register need not be complete in itself, and that it could be supplemented by the time sheet, as was contended for on the side of the defence, a contention which was accepted by the trial Court. The provision of the law as it stands is mandatory in its nature; and although the use of the word "shall" in some cases does not

definitely indicate the intention of the legislature, the expression "shall be kept," taken along with the proviso to S. 35 relating to an order in writing by the Inspector, makes the position clear that in the absence of such an order, one register in Form G must be kept, of all persons employed in a factory, of the hours of their work, and of the nature of their respective employment, as mentioned in S. 35. In the case before us, there were of course reasons given, why there was no strict compliance with the particular provision of the law; and the letter of 26th October 1933, addressed to the Inspector of Factories made it clear that the irregularities of S. 35, had been attended to by the Director of the Factory. There was therefore no absence of good faith on the part of the management of the factory, so far as strict compliance of the provision of the law as contained in S. 35, Factories Act, was concerned.

The result of the conclusions as mentioned above is that the order of acquittal passed by the Chief Presidency Magistrate in the two cases before us, should not be interfered with. The order is affirmed for reasons other than those assigned by the Magistrate in his judgment. The appeals are accordingly dismissed. I desire to add that I have had the privilege and opportunity of considering the judgment going to be delivered by my learned brother, and I entirely agree with the view taken by him of the cases before us.

McNair, J.—I agree with the judgment that has been delivered by my learned brother and with the reasons which he has given for dismissing the appeals. I wish to add that in my opinion these proceedings should never have been brought. The learned Chief Presidency Magistrate in his judgment states :

> "The object of the Act is to protect human beings from being subjected to unduly long hours of bodily strain or manual labour."

That undoubtedly is one of the objects of the Act. It also provides that employees should work in healthy and sanitary conditions so far as the manufacturing process will allow and that precautions should be taken for their safety and for the prevention of accidents. In order to obtain the information necessary to ensure that its objects are carried out, the Local Government are empowered to appoint inspectors, to call for returns, and to see that the prescribed registers are duly kept. This is part of the machinery which enables the authorities to maintain effective supervision, and it is undoubtedly important that there should be substantial compliance with these provisions of the Act.

At the same time it should not be forgotten that the Act is sanctioning interference with the ordinary rights of the citizen and that the inquisitorial powers which are given should be used with tact and circumspection—a law which is enacted for the benefit of the employee should not be used merely for the purpose of harassing the employer. It is difficult to believe that these principles were present in the minds of the authorities who were responsible for this prosecution. What are the facts? An Inspector came to the Statesman offices at 9-30 a. m. on a Sunday morning in the middle of the puja holidays and was unable to see the employment register. He inspected the premises again four days later on 19th October, a gezetted holiday, and was shown the register. On both occasions he was shown the time sheets. One of the irregularities of which the Inspector complained was that the data required had not been included in the register prescribed by the Act. As I have said on each of his visits he was shown the time sheets and it was explained to him that these time sheets were intended to supplement the employment register as the forms of register provided in the Act were unsuitable to the conditions of employment in a newspaper office where 14 shifts were sometimes worked.

The method adopted, he was told, had been submitted to and sanctioned by, a former Chief Inspector of Factories and had been used by the 'Statesman' without protest from any Inspector for the last 10 years. A second complaint was that the register on the 19th was not up-to-date. This no doubt was a technical infringement but the explanation given was that the register had been written upto the 17th and that the 18th and 19th were gazetted holidays. The third complaint was that certain employees in the advertisement section came within the provisions of the Act

and had worked longer than the prescribed hours. With regard to some of these employees, the authorities themselves are doubtful whether they should or should not be included. Agreeing as I do with my learned brother that no prosecution will lie against Mr. Watson, who was on leave at the date of the alleged infringements, I do not consider it necessary to deal at length with the points that have been raised, but from the above outline it will appear that the complaints related to two technical breaches of the machinery provided for enforcing the Act; and to an alleged offence in employing beyond the maximum working hours certain persons to some of whom it is admittedly doubtful whether the provisions of the Act apply. On 24th October 1933 the Inspector wrote to the 'Statesman Printing Press' setting out the alleged infractions of the Act. The 'Statesman' immediately replied saying that the irregularities complained of had been put right and giving reasons for their contention that some of the employees mentioned were not subject to the provisions of the Act. The letter is eminently reasonable and shows a genuine desire to meet any complaint and to rectify any irregularities. This letter was not even acknowledged and these proceedings were initiated against Mr. Watson on 9th November. The complaints were rejected by the learned Chief Presidency Magistrate and the Government has appealed to this Court and has instructed the learned Deputy Legal Remembrancer to 'press every charge and to admit nothing.' With regard to the first charge the authorities do not deny that the form of register (coupled with the time sheets) which has been supplied by the 'Statesman' has been sanctioned and accepted for the past 10 years. In this Court it is argued that although that fact is not denied, it is not admitted, and that even if it was sanctioned, the authorities are not bound thereby as the sanction was not in writing. It is difficult to understand this attitude on the part of those responsible for the prosecution and it is in marked contrast to the scrupulous fairness and disregard of mere technicality which in my experience has invariably been shown by the Deputy Legal Remembrancer when appearing for the prosecution in a criminal charge. At a late stage in the hearing we were informed that the authorities looked upon this as a test case and that if a conviction resulted no fine would be exacted. I find it hard to accept this explanation in view of the trivial character of two of the charges and seeing that so far as I am aware no such explanation had ever previously been made either to the Court or to the accused.

There is another small incident which has some bearing on this point. I was supplied by the prosecution with a copy of the rules framed under the Act which contained many marginal notes, presumably by some member of the department. I suggested that a clean copy might be supplied and I was informed that both the Act and the Rules framed under it were out of print and could not be obtained even by a factory which is governed by its provisions. The Government, we were told, are unwilling to incur the expense of reprinting the Act since they intend to introduce a new Act at an early date. In the circumstances it is difficult to understand why the Government should incur the expense of fighting a test case upto the appellate Court. Surely any ambiguity which is contained in the present Act and which the Government considers of primary importance could be rectified through the legislature. I agree that the appeals should be dismissed and I consider for the reasons which I have stated that this is a prosecution which should never have been launched.

V.S. *Appeals dismissed.*

A. I. R. 1934 Calcutta 735

NASIM ALI AND KHUNDKAR, JJ.

Surendra Narain Saha and *others*—Judgment-debtor—Appellants.

v.

Kanai Lal Dugar and *another*—Decree-holders—Respondents.

Appeals Nos. 26 and 27 of 1934, Decided on 15th June 1934, from original orders of sub-Judge, Mymensingh, D/- 30th November 1933.

(a) Decree—Compromise decree—Decree is capable of being executed where it declares rights of parties and directs certain acts to be done.

By a compromise the plaintiff became a mortgagee by conditional sale in respect of the properties mortgaged, and the decree was passed in these terms: "It is ordered and decreed that the suit be decreed in terms of the petition of

compromise filed on behalf of both parties, that the parties be bound by the terms of the compromise and they do get their respective remedies in accordance therewith and that the petition of compromise which has been filed do form part of the decree".

Held : that the decree not only declared the rights of the parties under the solenama but directed certain acts to be done and was capable of being executed : 1926 *Cal* 975 and 1925 *Mad* 279 *Ref.* [P 736 C 1, 2]

(b) Decree—Decree in mortgage suit ordering that decretal amount should be paid in instalments—Such decree is not preliminary decree under O. 21, R, 34—Civil P. C, (1908), O. 21, R. 34.

A compromise decree in a mortgage suit, in which the decretal amount is payable by instalments, is not a preliminary decree as contemplated by O. 21, R. 34, Civil P. C.

[P 736 C 2]

Naresh Chandra Sen Gupta and *Jogesh Chandra Sinha*—for Appellants.

Nirmal Chandra Chakrabarty — for Respondents.

Judgment. — These appeals are by the judgment-debtors in an execution proceeding. The decree under execution is a compromise decree passed in a mortgage suit. The objection of the judgment-debtors was that the decree was incapable of execution. The learned Judge overruled that objection. Hence the present appeals by the judgment-debtors. The first point urged by the learned advocate for the appellants is that the decree is incapable of execution, inasmuch as it simply declared that by the compromise the plaintiff would be thereafter a mortgagee by conditional sale in respect of the properties mortgaged.

In other words, the contention is that the decree must be construed to be a decree declaring or creating rights which are unenforcible in execution and can be enforced only by a suit. The material portion of the decree in the present case is as follows:

"It is ordered and decreed that the suit be decreed in terms of the Refanama (petition of compromise) filed on behalf of both parties, that the parties be bound by the terms of the compromise and they do get their respective remedies in accordance therewith and that the petition of compromise which has been filed do form part of the decree."

From the terms of the decree it is clear that the decree not only declared the rights of the parties under the Solenama but directed certain acts to be done.

"Ordinarily the Indian Courts pass judgments which are to be enforced in execution and even when they create new relation involving fresh rights and obligations they provide for working out the rights in execution. Rarely do they create a new obligation without providing for its execution and indicating a suit as the only method of enforcing it: see 1925 Mad 279. (1)"

The terms of the compromise and the decree embodying those terms not only declared or created new rights or obligations but also provided for the working out of these rights in execution. The words in the Solenama,

"in default the defendants executing the conveyance or putting the plaintiff in possession, the plaintiff will have a right to have it done by the Court"

are sufficiently wide and general to cover an application for execution of the decree itself to the competent Court: see 1926 Cal 975 (2). There is therefore no force in this contention. The next point urged in support of the appeals is that the decree is only a preliminary decree and therefore cannot be executed unless it is made final. It is urged that as the decretal amount is payable by instalments, the decree must be considered as a preliminary decree. It is now well settled on authorities that a compromise decree in a mortgage suit, in which the decretal amount is payable by instalments, is not a preliminary decree as contemplated by O. 21, R. 34, Civil P. C. As regards the directions in the decree for the execution of the conveyance, it cannot be considered as a preliminary decree. That such a decree is executable is clear from O. 21, R. 34, Civil P. C.: 1926 Cal 975 (2). There can be no doubt that the direction about delivery of possession is not a preliminary decree. In fact the nature of the suit, the terms of the compromise and the decree based thereon would go to show that the decree put an end to the entire controversy between the parties in the suit and nothing remained to be done by the Court in the suit. This contention must therefore be overruled.

The last point urged by the learned Advocate for the appellants is that the execution of the decree is barred by limitation. The evidence in the case however shows that the six consecutive instalments were regularly paid. The

1. Ramaswami v. M. P. M. Muthayya Chetty, 1925 Mad 279=85 I C 991=48 Mad 482.
2. Aswini Kumar v. Ram Gopal 1926 Cal 975=95 I C 179.

default was in the payment of the last two instalments and this admittedly took place within three years from the date of the application for execution. There is therefore no force in this contention too. All the points urged in support of the appeals therefore fail.

As regards the Cross-objection we are of opinion that the decree-holder is not entitled to get any further interest inasmuch as there is no provision of such interest in the compromise and the facts and circumstances of the case do not justify the claim of the decree-holder in this respect. The appeals and the cross-objections are therefore both dismissed, but there will be no order as to costs in either of them. The learned advocate for the appellants however prayed before us for extending the time for paying off the balance. In view of the facts and circumstances of this case we direct the judgment-debtors to pay the balance due to the decree-holders as found by the Subordinate Judge within two months from this date. In default they are directed to execute a kabala in favour of the decree-holders for the mortgaged properties excluding the land mentioned in Sch. (3) and present it for registration and place the decree-holders also in possession of the property so conveyed after removing the huts described in Sch (3). In default the kabala may be executed by the executing Court on their behalf in respect of the said properties and we further order that the decree-holders do get possession of the said properties through the said executing Court. The order of the learned Subordinate Judge is confirmed subject to the above modification made by us.

V.S. *Order accordingly.*

A. I. R. 1934 Calcutta 737

PANCKRIDGE, J.

Kashiram Budhia—Applicant.

v.

Chajuram Budhia—Respondents.

Suit No. 1471 of 1929, and Ex. No. 1 of 1930, Decided on 9th February 1934.

(a) Practice—Special Referee appointed in pursuance of settlement between parties—Neither Ch. 14 R. 1 nor Ch. 22, R. 3 applies to proceedings before Special Referee—Calcutta High Court Rules and Orders (original side), Ch. 14, R. 1 and Ch. 22, R. 3.

The parties to a family partition suit agreed to terms of settlement. In pursuance of those terms, an order was made that *A* should be appointed Special Referee to take the accounts and should be also appointed commissioner of partition.

Held : that neither R. 1, Ch. 14 of the Rules and Orders of the High Court (Original Side) dealing with proceedings at the hearing of suits, nor R. 3, Ch. 22, dealing solely with the procedure upon commissions to take evidence, issued under O. 26, Rr. 1 and 4, Civil P. C., was applicable to the proceedings before *A*. [P 738 C 1]

(b) Civil P. C. (1908), O. 18, Rr. 5, and 6—Rr. 5 and 6 apply to Special Referee appointed by original side of High Court.

Where a commissioner of partition and Special Referee is appointed by the original side of the High Court, the provisions of O. 18, Rr. 5 and 6 apply although O. 49, R. 3 makes those provisions inapplicable to the proceedings conducted by the Court itself. Therefore the deposition of a witness should be read over and explained to him after it is completed and, if necessary, translated into a language which he understands. [P 739 C 1]

B. C. Ghose and *H. K. Mitra*—for Applicant.

S. N. Banerjee and *S. R. Das* — for Respondents.

Judgment.—This application is made in a family partition suit which was instituted in 1929. The parties agreed to terms of settlement on 13th February 1930. In pursuance of those terms, an order was made on 28th July 1930, that Mr. J. M. Ghose, Barrister-at-law, should be appointed Special Referee to take the accounts and should also be appointed Commissioner of Partition. The order proceeded to give the commissioner liberty to examine witnesses upon oath or solemn affirmation, and to take depositions in writing and return the same with the commission. The order further directed the Special Referee to report whether or not there were any fluid assets belonging to the joint estate in the hands of the defendant which ought to be invested. The Special Referee entered upon the reference both as to accounts generally, and as to the fluid assets specified in the order. I understand that the evidence with regard to the fluid assets is now complete, but the reference, so far as it concerns the accounts generally, has not been concluded, and at the moment there is a witness of the defendant named Surajmull Kesriwal, who is still under examination.

It appears that, while the reference has been proceeding, Surajmull has been prosecuted before the Presidency Magistrate under S. 162, read with S. 120-B

I. P. C., that is to say, of conspiracy to give illegal gratification to a public servant. He was convicted by the Chief Presidency Magistrate, and he appealed against his conviction and sentence. This Court in its criminal appellate jurisdiction set aside the conviction and sentence and acquitted Surajmull. I have had an opportunity of perusing the judgment of the Court, from which it appears that the learned Judges dealt with the case on the merits, but, at the same time, they expressed the opinion that certain important evidence, which was relied on by the prosecution, was of doubtful admissibility. This evidence consisted of statements made by Surajmull in his deposition before the Special Referee. The learned Judges were inclined to hold that, inasmuch as the depositions had not been read over and explained to the witnesses, they were not admissible under S. 80, Evidence Act. They were further inclined to the view, for which there is considerable authority, that S. 91, Evidence Act, was a bar to the witness's statement being proved aliunde as, for example, by the Special Referee or by one of the officers assisting him in the reference. The observations of the learned Judges have had the effect of causing the plaintiff to take out this summons, asking for various directions, and the matter has also been raised by a special report of the Special Referee made at the instance of the plaintiff.

The plaintiff asks for certain directions upon the shorthand writers who have been by consent employed to record the evidence. There is no difficulty as regards this, and the Special Referee is prepared to direct the shorthand writers, if he has not already done so, to sign and initial the depositions in the way which the plaintiff suggests. The plaintiff also asks that the whole of the evidence given in what is called the "fluid assets" reference and in the main reference should be read over and explained to the witnesses by a sworn interpreter, who, in his turn, should certify that he has correctly interpreted the evidence.

A point of practice has to be decided as to the procedure that Mr. J. M. Ghose ought to adopt in recording the evidence. Mr. Ghose himself takes the view that it is not necessary for the evidence to be read over to the witnesses, and he bases this view on Ch. 14, R. 1 of the Rules and Orders. I do not agree with Mr. Ghose in this respect, for Ch. 14, deals with proceedings at the hearing of suits, and R. 1 begins "upon the hearing of any suit or matter in Court or before a Judge." The rule is therefore clearly not applicable to proceedings before a Special Referee.

With regard to civil Courts generally, the provisions of the law as to the taking of depositions are to be found in O. 18, Rr. 5 and 6, Civil P. C. At first sight, it would appear that these rules have no application to the present case because O. 49, R. 3, provides that they shall not apply to any Chartered High Court in the exercise of its ordinary or extraordinary original jurisdiction. It has been suggested that the procedure, which the Special Referee should follow is the procedure which is laid down in Ch. 22 Rules and Orders, or more particularly the procedure specified in R. 3 of that chapter, which, in many respects, resembles the procedure laid down by O. 18, Rr. 5 and 6 of the Code. I am of opinion that Ch. 22 deals solely with the procedure upon commissions to take evidence, issued by virtue of the powers conferred on civil Courts by O. 26, Rr. 1 and 4, Civil Procedure Code. None of these rules are directly applicable to the case in question, because R. 1 deals with the examination of a witness, within the local limits of the jurisdiction, who is exempted from attending Court or who is from sickness or infirmity unable to attend it and R. 4 deals with persons who are resident beyond the local limits, or who are about to leave them or whose official duties prevent them from giving evidence without detriment to the public service. None of these conditions apply to the present case.

It is suggested on behalf of the defendants that a Special Referee is a person whose existence is not recognized by the law, and who is therefore not bound to follow any particular procedure, although the evidence given before him, and the conclusions at which he arrives on that evidence may be binding as between the parties. I consider that that is putting the matter too high, at any rate with regard to the present case, because Mr. J. M. Ghose has been

appointed not only Special Referee but Commissioner of Partition and he has been directly authorized by the order of his appointment to examine witnesses upon oath or solemn affirmation and to take their depositions in writing. That appears to me to contemplate the evidence being taken in accordance with the provisions of the law, whatever the provisions applicable in this particular case may be. As to this question, I think the answer is to be found in the concluding provisions of O. 26, R. 9 deals with commissions for local examination. R. 11 deals with commissions to examine accounts, and R. 13 deals with commissions to make partitions. R. 17 provides that the provisions of the Code relating to the summoning, attendance and examination of witnesses shall apply to persons required to give evidence under O. 26.

In my opinion the effect of that is to make the provisions of O. 18, Rr. 5 and 6 apply to proceedings conducted by Commissioners of Partition appointed by the Original Side of the High Court, although, as I have pointed out, O. 49, R. 3 makes those provisions inapplicable to proceedings conducted by the Court itself. The consequence therefore is that I direct that, with regard to all witnesses who have been called and whose examination had not been concluded, and with regard to all witnesses who may hereafter be called at the reference, Mr. J. M. Ghose should see that the provisions of Rr. 5 and 6, O. 18, are carried out, that is to say, that the depositions should be read over and explained to the respective witnesses when each witness' evidence is completed, and that, when necessary, they should be translated into a language which the witness understands. I do not think it necessary to give any directions with regard to the depositions which have already been completed. Both parties have succeeded in part and failed in part because the plaintiff at one time asked that at the close of each day the witness' deposition should be read over to him and he should be required to acknowledge its correctness. This procedure is not recognized by any of the rules which it has been suggested apply to the proceedings before Mr. Ghose. On the other hand, I have rejected the defendant's contention that the commissioner is at liberty to disregard Rr. 5 and 6 of O. 18. In these circumstances I direct that each party bear his own costs.

V.S. *Application allowed in part.*

A. I. R. 1934 Calcutta 739

NASIM ALI AND KHUNDKAR, JJ.

Raj and *another*—Plaintiffs—Appellants.

v.

Ayesha Khatun and *others*—Defendants—Respondents.

Appeal No. 1820 of 1931, Decided on 10th July 1934, from appellate decree of Sub-Judge, Noakhali, D/- 22nd November 1930.

Bengal Tenancy Act (1885) as amended in 1929), S. 49-F—S. 49-F applies to all those that were under-raiyats when that section came into force.

Where a suit for ejectment brought by the landlord against an under-raiyat was still pending when the new Bengal Tenancy Act, 1929, came into forced, and where it was found that the under-raiyati was not validly terminated by the notice:

Held; that S. 49-F applied to the case and the heirs of the under-raiyat where entitled to continue the suit. [P 740 C 1]

Bankim Chandra Banerjee—for Appellants.

Bijan Kumar Mukherji—for Respondents.

Judgment.—The only point for determination in this appeal is whether the learned Judge was right in holding that the heirs of the original under-raiyat who had acquired a right of occupancy by custom were entitled to continue the appeal after the death of the original under-raiyat. It appears that the suit for ejecting the original under-raiyat, that is the predecessor-in-interest of the respondents was instituted on 11th February 1928 on the ground that the under-raiyati was determined by service of notice under S. 49, Bengal Tenancy Act. The plea of the original under-raiyat who was the defendant in the suit was that he had acquired a right of occupancy by custom and consequently he was not liable to be ejected by service of notice under S. 49. While this suit was pending before the trial Court the new Bengal Tenancy Act came into operation on 21st February 1929. By virtue of S. 49-F of the new Act the under-raiyati became heritable and consequently his heirs after his death would be entitled to possess the property as under-raiyats. The posi-

tion would have been entirely different if at the date of the institution of the suit the under-raiyati was terminated and the original under-raiyat was a trespasser on the land. In view of the finding of the lower appellate Court which has not been challenged before us, viz., that at the time of the institution of the suit and at the date when the new Act came into operation the under-raiyati was not validiy terminated and the original under-raiyat continued to be an under-raiyat as contemplated by S. 49-F, in respect of the land in suit, the under raiyati became heritable by the operation of that section and consequently after his death his heirs inherited the holding and were entitled to continue the appeal. We are accordingly of opinion that the learned Judge's decision on this point in correct. The appeal is accordingly dismissed with costs.

v.s. *Appeal dismissed.*

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* A. I. R. 1934 Calcutta 740

NASIM ALI AND KHUNDKAR, JJ.

Abdul Jabbar Talukdar —Defendant —Petitioner.

v.

Sanu Bibi—Plaintiff—Opposite Party.

Civil Rule No. 847 of 1934, Decided on 19th July 1934, from order of 2nd Court Sub-Judge, Pabna, D/- 21st May 1934.

*** Civil P. C. (1908), O. 33, R. 5 (c)—Mortgage subsequent to application under O. 33 not for cash but executed under pressure for previous loans does not come within R. 5 (e).**

The agreement referred to in R. 5, Cl. (e), O. 33, which authorizes the Court to reject an application for permission to sue as a pauper is one which is champertous. If a person enters into a champerty or maintenance agreement for the prosecution of litigation, he is not entitled to prosecute the suit in forma pauperis. But the mortgage bond, though executed three weeks after the presentation of the petition not for any money paid in cash but given under pressure for previous loans, does not come within the provisions of R. 5 (e): 18 *Bom* 464 and 1917 *All* 186, *Rel on.* [P 740 C 2]

Bansori Lal Sircar—for Petitioner.

Surajit Chandra Lahiry—for Opposite Party.

Order.—This Rule is directed against an order of the 2nd Court of the Subordinate Judge of Pabna dated 21st May 1934 allowing the application of the opposite party Sanu Bibi to sue in forma pauperis. The learned Subordinate Judge on a consideration of the evidence has come to the conclusion that she is a pauper. The learned Judge has also found that a mortgage bond which was executed by the lady three weeks after the presentation of the petition was not for any money paid to her in cash but the mortgage was given under pressure for previous loans of her husband. In this view of the matter the learned Subordinate Judge has allowed her application.

The only point which is urged in support of the rule is that the mortgage executed by the lady is an agreement which she entered with reference to the subject matter of the proposed suit under which the mortgagee has obtained an interest in such subject-matter. In our judgment, the agreement referred to in R. 5, Cl. (e), O. 33, Civil P. C., and which authorizes the Court to reject an application fcr permission to sue as a pauper is one which is champertous. If a person enters into champerty or maintenance agreement for the prosecution of the litigation, he is not entitled to prosecute the suit in forma pauperis. See the case of 18 Bom. 464 (1) and the case of 1917 All. 186 (2). It is however argued by the learned advocate for the petitioner that if this view of R. 5, Cl. (e), O. 33 be taken the statutory charge of Government created by R. 10, O. 33 on the subject-matter of the suit would be defeated. But in view of the fact that the mortgage in this case was executed under circumstances already mentioned after the presentation of the application for leave to sue as a pauper and also in view of the fact that the court-fees form a Crown debt and in ordinary circumstances the Crown would be entitled to precedence in payment of the debt over all other creditors, we are not in a position to say that the learned Judge was not justified in allowing the opposite party to prosecute the suit in forma pauperis. The rule is accordingly discharged, but we however make no order for costs in this rule.

R.K. *Rule discharged.*

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1. Bai Chandbaba v. Kuver Saheb Bapu Saheb, (1894) 18 Bom 464.
2. Mansa Puri v. Harbhagabat Puri, 1917 All 186=37 I C 172.

A. I. R. 1934 Calcutta 741

NASIM ALI AND KHUNDKAR, JJ.

Badar Rahim — Defendant — Petitioner.

v.

Badhshah Meah—Plaintiff—Opposite Party.

Civil Rule No. 105 of 1934, Decided on 19th July 1934, from order of Dist. Judge, Chittagong, D/- 9th November 1933.

(a) Religious Endowments Act (1863), S. 14—Trustee or manager need not be appointed under Act.

The words used in S. 14, namely, "appointed under this Act" refer only to the committee and not to the trustee, manager or superintendent. The trustee or manager who can be sued under the Act therefore need not necessarily be a trustee or manager appointed under the Act: 5 *Beng L R* 55, *App.* and *Rel on.* [P 741 C 2]

(b) Religious Endowments Act (1863), S. 14—Act applies to endowments of public character though coming into existence after 1863.

The words "trustee, manager or superintendent of any mosque, temple or religious establishments" in S. 14 mean a trustee, manager or superintendent of a mosque, temple or religious institution to which the provisions of Regulation 19 of 1810 would have been applicable if they were in force now i. e. to religious endowments of a public character which came into existence not only before 1863 but also afterwards: *Case law discussed*; 2 *Mad* 197 and 22 *Mad* 223, *Expl.* [P 742 C 2; P 743 C 2]

A. K. Roy and *Chandra Sekhar Sen*—for Petitioner.

A. K. Fazul and *Imam Hossain Choudhury*—fer Opposite Party.

Order.— This is an application in revision by one Badar Rahim of Chittagong, the muttawali of a certain wakf, which was created in the year 1907, against the order of the District Judge of Chittagong dated 9th November 1933, granting permission to the opposite parties to sue the petitioner under S. 18, Religious Endowments Act (Act 20 of 1863). The only point urged in support of the application is that the wakf having been created after the year 1863 the provisions of Act 20 of 1863 are not applicable to this wakf. Under S. 18 of the Act no suit under that Act can be entertained without the permission of the Court to institute such a suit. The opposite parties applied to the Court for leave to sue the petitioner under S. 14 of the Act which runs as follows:

"Any person or persons interested in any mosque, temple or religious establishment, or in the performance of the worship or of the service thereof, or the trusts relating thereto, may, without joining as plaintiff or any of the other persons interested therein, sue before the civil Court the trustee, manager or superintendent of such mosque, temple or religious establishment or the member of any committee appointed under this Act, for any misfeasance, breach of trust or neglect of duty, committed by such trustee, manager, superintendent or member of such committee, in respect of the trusts vested in or confided to them respectively."

If S. 14 does not apply to the wakf in question, leave cannot be granted under S. 18 of the Act. It is not disputed in this case that the wakf in question, is a religious endowment and the petitioner is the trustee or manager or superintendent of the said endowment. It is also not disputed that the opposite parties are the persons interested in the said endowment. The only point for determination therefore is whether the petitioner is a trustee or manager of a religious establishment of such a character as is mentioned in S. 14 of the Act. The words used in S. 14 namely, "appointed under this Act," refer only to the committee and not to the trustee, manager or superintendent. See the observations of Norman, J., in the case of. 5 B. L. R. 55 App. (1). The trustee or manager who can be sued under the Act therefore need not necessarily be a trustee or manager appointed under the Act. The section speaks of the trustee or manager of any mosque, temple or religious establishment. Now what is the meaning of the words "any mosque, temple or religious endowment?" Do they mean mosques, temples or religious endowments to which only the provisions of the Act apply or do they include also mosques, temples or religious establishments to which the provisions of the Act do not apply at all. In the case of 23 W. R. 453 (2), it was held that the Religious Endowments Act applies only to endowments for public purposes. That case went up to the Privy Council, and although their Lordships disposed of the appeal on another point they observed that they saw no reason for disagreeing with that part of the judgment of the High Court where it was held that the endowment was not of such a public character as would sustain a suit under Act 20 of 1863. See

1. Ganesh Singh v. Ramgopal Singh, (1870) 5 Beng L R 55 App.
2. Delrus Banoo Begum v. Asgur Ali Khan, (1875) 23 W R 453=15 Beng L R 167.

3 Cal. 324 (3). This view was also taken in 19 Cal 275 (4) and 1932 Pat 177 (5). In the case of 2 Mad 197 (6), though it was observed by the learned Judges that S. 14 is general in its application, it is not clear from the judgment in that case that the religious institution involved in that case was not of a public character. In our judgment the religious institution contemplated in S. 14 must be a religious institution of a public character. The next question is whether the religious institutions referred to in S. 14 are those endowments only which are mentioned in the preamble of the Act; in other words whether the preamble can be legitimately consulted to fix the meaning of the words in the enacting part.

"The preamble of a statute has been said to be a good means of finding out its meaning, and, as it were, a key to the understanding of it; and, as it usually states, or professes to state, the general object and intention of the legislature in passing the enactment, it may legitimately be consulted to solve any ambiguity, or to fix the meaning of words which may have more than one, or to keep the effect of the Act within its real scope, whenever the enacting part is in any of these respects open to doubt: Maxwell on Interpretation of Statute, Edn. 7, pp. 37 and 38. But the preamble cannot either restrict or extend the enacting part, when the language and the object and scope of the Act are not open to doubt. It is unusual to find that the enacting part is not exactly co-extensive with the preamble. In many Acts of Parliament, although a particular mischief is recited, the legislative provisions extend beyond it. The preamble is often no more than a recital of some of the inconveniences, and does not exclude any others for which a remedy is given by the statute. The evil recited is but the motive for legislation; the remedy may both consistently and wisely be extended beyond the cure of that evil, and if on a review of the whole Act a wider intention than that expressed in the preamble appears to be the real one, effect is to be given to it notwithstanding the less extensive import of the preamble. And generally although in cases where the meaning of the words used in a statute is absolutely clear, the Court has no right to go beyond them; when the words are capable of one meaning, and at the same time of a more extended meaning, the Court will look to the object and policy of the Act to see what meaning they ought to have:"

Maxwell on the interpretation of Statutes, Edn. 7, pp. 39-40. In the case of 7 Cal 767 (7) it was held that the Act is applicable to all classes of endowments to which Regulation 19 of 1810 was applicable. In the case of 8 Cal. 32 (8), Prinsep, J., on a consideration of the preamble and the enacting portions of Act 20 of 1863 has come to the conclusion that the trustee, manager or superintendent to whom provisions of the Act are applicable is a trustee, manager or superintendent of a mosque, temple or other religious establishment to which the provisions of Regulation 19 of 1810 were applicable. The learned Judge was of opinion that the same construction should be put upon Ss. 13 and 14 of the Act. In the course of the argument the learned Advocate-General who appeared for the petitioner did not point out anything which would lead us to differ from the construction which was put upon the preamble and the sections of the Act in that case. Act 20 of 1863 was passed with the object of relieving the Board of Revenue and the local agents from the duties imposed on them by Regulation 19 of 1810. The whole scheme of the Act would go to show that the legislature was simply replacing the Regulation 19 of 1810. We are therefore of opinion that S. 14 of the Act was really contemplating such endowments as were contemplated in the Regulation. This view of S. 14 has been accepted by the Patna High Court in 1932 Pat. 177 (5).

The actual decision in 2 Mad. 197 (6) is not really against this view, inasmuch as it appears to us that Regn. 7 of 1817 of the Madras Code was applicable to the endowment in question in that case. In the case of 22 Mad 223 (9) it was no doubt observed by Shephard, J., that S. 14, Religious Endowments Act, was not intended to be restricted to such institutions as came within the purview of the Regulation; but no reasons are given for that observation by the learned Judge. In the case of 19 All. 104 (10), and in the case

3. Asgar Ali Khan v. Derlus Banoo Begum, (1877) 3 Cal 324 (P C).
4. Protap Chandra v. Brojo Nath, (1892) 19 Cal 275.
5. Ram Prosad Gupta v. Ramkishun Prasad, 1932 Pat 177=138 I C 331=11 Pat 594.
6. Fakrudin Sahib v. Ackeni Sahib, (1878) 2 Mad 197.
7. Dhurrum Singh v. Kissen Singh, (1881) 7 Cal 767=9 C L R 410.
8. Jan Ali v. Ram Nath, (1882) 8 Cal 32=9 C L R 433.
9. Sivayya v. Rami Reddi, (1899) 22 Mad 223.
10. Muhammad Sirajulhuq v. Imamuddin, (1896) 19 All 104=(1896) A W N 189.

of 1930 All. 577 (11) the endowment in question would have attracted the provisions of the regulation. Therefore in our judgment the Act would apply only to such endowments as are referred to in the preamble, that is to those endowments to which Regn. 19 was applicable.

The next point for consideration is what are the religious institutions to which Regn. 19 was applicable. There cannot be any question that the regulation was applicable to endowments which were in existence at the date of the regulation and to which the regulation was actually applied. It is now well settled that the regulation was applicable to endowments which came into existence after it came into force: see 22 Mad. 223 (9). In the case of 34 Mad. 375 (12) the provisions of Regn. 7 of 1817 as well as the preamble of that regulation which are similar to Regn. 19 of 1810 were examined by the Madras High Court and it was held that the enacting portion of the statute was sufficiently clear to cover future endowments. The words "have been granted" in Ss. 1 and 5, "granted" in S. 2 "made" and "were granted" in S. 3 and "is vested" in S. 6 do not in our opinion justify the interpretation that the regulation was applicable only to endowments which had already come into existence before the passing of the regulation. In the case of 34 Mad 375 (12) the learned Judge observed as follows:

> "These words were used as applicable at the time when the Board of Revenue would be called upon to take action. Happier language might perhaps have been used to denote the intended meaning, regarding which we entertain no doubt, but we have to construe an old statute, and it is clear to us that it would not be reasonable to place on it the restricted interpretation suggested for the appellant."

It is also well established that in order to bring a suit under the Religious Endowments Act; it is not necessary to show that the regulation was actually applied to the endowment in question: see 5 Beng. L. R, 55 App. (1); 7 Cal. 767 (7); 34 Cal. 587 (13); 18 All. 227 (14); 17 Mad. 95 (15); 26 Mad. 166 (16) and 1932 Pat. 177 (5). In order to attract the operation of S. 14 of the Act all that is necessary is to show that the endowments is one to which Regn. 19 could have been applied, if it were still in force. It was not disputed before us that the endowment in question in the present case is of a public character and is of such a nature that the regulation could have been applied to this endowment if it were now in force.

It is however contended on behalf of the petitioner that the Act contemplated only those endowments which were in existence at the time when the Act came into operation and to which the regulation could have been applied. But if the regulation could have been applied to religious endowments which were created after the regulation and if the Act also applies to endowments which could have been brought under the operation of the regulation if it were in force now, it is difficult to resist the conclusion that the Act applies to endowment which came into existence after 1863. The point under discussion was considered by the Allahabad High Court, in 18 All. 227 (14); 1930 All. 577 (11) by the Madras High Court in the case of 22 Mad. 223 (9) and by the Patna High Court in the case of 1925 Pat. 544 (17). In the last mentioned case Mullick, J., of the Patna High Court observed as follows:

> "It is said that this S. 14 cannot apply because the Act has no application to trusts established after 1863. It is said that the authorities which hold that S. 14 of the Act is general and that it applies to endowments created both before and after 1863 were obiter dicta, but it is clear that this contention cannot be accepted : see 7 Cal. 767 (7); 2 Mad. 197 (6); 18 All. 227 (14) and 22 Mad. 223 (I). By Regn. 19 of 1810 all public endowments in this Province were declared to be under the control and superintendence of the Board of Revenue which was entitled to take charge of their properties and to administer the same although it sometimes did not do so. In respect of some of the endowments the Local Government had the power to nominate or confirm the Manager or Superintendent. In others the Local Government did not appoint but had powers of supervision. Act 20 of 1863 made rules for the management of both these classes. Regn. 19, if not repealed, would have been applicable to endowments created after 1863 also, and it is reasonable to

11. Syed Husain v. Syed Hamid, 1930 All 577 =124 I C 710.
12. Venkatachala Pillai v. Taluk Board, Saidapet, (1911) 34 Mad 375=10 I C 301.
13. Mahomed Athar v. Ramjan Khan, (1907) 34 Cal 587.
14. Sheoratan Kunwari v. Ram Pargash, (1896) 18 All 227=(1896) A W N 37.
15. Muthu v. Gangathara, (1894) 17 Mad 95.
16. Seetaramanuja v. Nanduri Seetapati, (1903) 26 Mad 166.
17. Diljan Ali v. Aktari Begum, 1925 Pat 544= 88 I C 1035=4 Pat 741.

suppose therefore that Act 20 of 1863, which repealed it, was intended to have the same scope and that while some parts of it provided for endowments over which the Local Government were then exercising control, S. 14 was intended to have wider scope and to apply to endowments coming into existence in the future."

We entirely agree with the view which has been taken in that case. Our conclusion therefore is that the words "trustee, manager or superintendent of any mosque, temple or religious establishments" in S. 14, Religious Endowments Act, mean a trustee, manager or superintendent of a mosque, temple or religious institution to which the provisions of Regn. 19 of 1810 would have applicable if they were in force now, and that the provisions of Regn. 19 if they were in force now would have been attracted to religious endowment of a public character which came into existence not only before 1863 but also afterwards. The learned Judge was therefore right in holding that the petitioner can be sued under S. 14, Religious Endowments Act. The rule is accordingly discharged but there will be no order for costs.

R.K. *Rule discharged.*

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* A. I. R. 1934 Calcutta 744

GUHA AND BARTLEY, JJ.

Sarup Ali and *another*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 259 of 1934, Decided on 20th July 1934.

*** Criminal Trial — Identification—Jury trial—Prosecution witnesses identifying accused in diffused light from electric torches —Jury allowed to have experiment in absence of accused—Verdict held not proper and was set aside.**

In a trial with aid of jurors, the evidence of identification was that two witnesses, to whom the accused were known for a long time, recognized the accused not with focussed beams falling on their faces but only with diffused light from electric torches in their hands. The Judge while charging the jury as to the evidence on identification allowed them to have an experiment with such torches.

Held: that there was a great irregularity involved in the Judge's allowing the jury to make an experiment in the absence of the accused, by reason of which the jury ultimately brought in their verdict, a verdict which the jurors were not apparently in a position to deliver before the experiment mentioned in the Judge's charge to the jury was allowed to be made. The verdict of the jury must, in the circumstances, be considered to be not a proper verdict and should be set aside. [P 745 C 1,2]

Imam Hossain Chaudhury—for Appellants.

Debendranarayan Bhattacharji — for the Crown.

Judgment. — The appellants were tried before the learned Assistant Sessions Judge of Tippera, and a jury on the charge of having committed an offence under S. 395, I. P. C. On the unanimous verdict of the jury, they were convicted and sentenced by the Judge to rigorous imprisonment for six years each.

The only question that required consideration in the case before us was whether the verdict of the jury could be taken to be a proper verdict, in view of an apparent irregularity in the procedure allowed to be adopted by the Judge in the matter of the jurors coming to their conclusion on the most material question in the case: the question of identification or recognition of the appellants as members of the party of dacoits who participated in a dacoity in the house of one Warish Bepari. On the question of recognition of the dacoits, the Judge charged the jury in the following manner: in which statement by the Judge reference was made to the method allowed to be adopted by them, in the matter of forming their conclusion:

"You are required next to answer another and perhaps more important question in this case, whether the accused persons before you were some of the raiders who committed the dacoity or robbery. P. W. 1, Warish and P. W. 2, Sonabhan have told you they recognized the accused Pokan and the accused Sarup Ali as having entered their ghar and taken away their money. In testing their testimony you will first consider whether they had sufficient opportunity for recognizing the raiders who had entered their ghar. P. W. 1, Warish told you the size of his ghar to be 15 x 8 cubits and that it had turja walls (woven split bamboo) and C. I. roof, with a door on the west side and another on the south side, being the east bhiti ghar of his bari. He had further told you he was sitting on his bed which was about 3 cubits to the east from the western door of his ghar and that he found the two accused persons on his west side though inside the ghar and that each of them had an electric torch in hand which was flashed and directed in different directions by them. You will consider at what close quarter the miscreants were from the complainant P. W. 1 and his wife who was standing behind him; if you believe them and particularly at the time when one of them had bent down to throw the katha and the other to take the jali. P. W. 2, Sonaban tells you she recognized the miscreants when the focussed beams of light from the torches were directed

towards her husband. You cannot certainly expect that the miscreants would be directing the beams towards their own faces for making themselves easily recognized and P. W. 1 and P. W. 2 also do not say they had recognized with the focussed beams falling on the faces of the culprits. But they have told you the accused persons were known to them for a long time before the occurrence. Hence the question before you is whether with the diffused light in the ghar obtained from the two electric torches was sufficient for clear recognition of two known faces, if of course you believe there were such electric torches flashed in the ghar and the accused persons were known to P. W. 1 and P. W. 2. The learned Public Prosecutor told you, with such light it would be very easy to recognize the known faces of the accused who were at such close quarters, while on the other hand the learned pleader for the defence told you it was next to impossible to so recognize. Under the circumstances you were quite right when you told me yesterday you would like to make an experiment yourselves on this matter as you had no previous experience on such lights. But I had directed you that you must find out a ghar with tarja walls of the size of 15 x 8 cubits or near about it and use only two ordinary electric torches of medium size for the purpose, being careful that no outside light enters the ghar. I had further told you that the recognition was not to be made with the focussed beams of light but with only the diffused light in the ghar. I have been told by you, you had made such an experiment in accordance with the above directions. I shall therefore ask you not to be guided by the opinion or experience of either pleader but by the past knowledge and experience you have on this mattter. You must not forget you are the sole judges of fact. If from your own experience and knowledge you are not satisfied that the recognition was possible or easy, you should have no hesitation in acquitting the accused persons. But if you have no reasonable doubt as to the possibility of recognition, you will say there was an opportunity for recognition."

The point raised before us in support of the appeal was that the Judge should not have allowed the jurors to make an experiment referred to above, and should have on the other hand given a direction to the effect that on consideration of the evidence in the case, if there was any reasonable doubt in regard to the fact of recognition, the accused were entitled to the benefit of the same. In our judgment the contention thus raised has to be given effect to inasmuch as we cannot but hold that there was a great irregularity involved in the Judge's allowing the jury to make an experiment in the absence of the accused, by reason of which the jury ultimately brought in their verdict, a verdict which the jurors were not apparently in a position to deliver before the experiment mentioned in the Judge's charge to the jury was allowed to be made.

The verdict of the jury must, in the circumstances referred to above, be considered to be not a proper verdict against the appellants before us. The verdict of the jury has acoordingly to be set aside. The result of the verdict of the jury against the appellants being set aside does not necessarily end in their acquittal, inasmuch as on the materials before us we are not in a position to hold that there was no case to go to the jury. The verdict of the jury, and with it the conviction of the appellants and the sentences passed on them by the Assistant Sessions Judge, on 25th January 1934, are set aside; and a retrial of the appellants before the Court of Session and jury is directed, on the charge for which they were previously tried. It would be open to the Court of Sessions to consider whether the appellants should not be allowed bail, pending their retrial as directed before us, on the application being made before that Court.

R.K. *Retrial ordered.*

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* A. I. R. 1934 Calcutta 745

NASIM ALI AND KHUNDKAR, JJ.

Kedar Mull Agarwalla and *another*—Plaintiffs—Petitioners.

v.

Wazifunnessa and *another*—Defendants—Opposite Parties.

Civil Rule No. 1273 of 1933, Decided on 18th July 1934, from order of Sub-Judge, Darjeeling, D/- 8th June 1933.

*** (a) Civil P. C. (1908), O. 9, R. 13—Substituted service does not preclude defendants from subsequently showing that there was at all no service.**

Even though the substituted service may be considered as personal service on the defendants under the provisions of O. 5, R. 20 and Cl. (2), this does not preclude the defendants from afterwards showing that in fact there had been no service on him at all and that the order for substituted service was procured on misrepresentation of facts. [P 746 C 2]

*** (b) Civil P. C. (1908), O. 5, R. 20—Defendants served under O. 5, R. 20 on representation that they resided at particular place where really they never resided—Service is not due service.**

When the order for substituted service is made on the representation that the defendants had been residing at a particular place where as a matter of fact the defendants never resided for sometime past and it was on such representation that the Court was induced to hold that the substituted service was properly effected, the

service effected upon the defendants under O. 5, R. 20 is not due service. [P 747 C 1]

Pugh, Prokash Chandra Pakrasi and *Himangshu Chandra Choudhury* — for Petitioners.

Bijan Kumar Mukherji—for Opposite Parties.

Order.—This rule is directed against an order of the Subordinate Judge of Darjeeling, dated 8th June 1933, allowing an application of the opposite parties 1 and 2 for setting aside an ex parte decree passed against them under O. 9, R. 13, Civil P. C.

The rule was issued on only one ground, namely, that the Subordinate Judge wrongly assumed jurisdiction to go into further enquiries as to the date of knowledge of the passing of the ex-parte decree, in view of the fact that the substituted service was due service according to law under Art. 164, Limitation Act, and the period of limitation commenced to run from the date of the service. It appears from the order sheet of the learned Subordinate Judge in the suit that on 8th September 1931 the Court recorded the following order :

"Summons not properly served. Plaintiffs' advocate asks for summons under O. 5, R. 20. Issue summons accordingly. Fix 20th September 1931."

On 20th September 1931, the following order was recorded :

"Defendants are absent. Summons have been served on them under O. 5, R. 20. Two witnesses have been examined on behalf of the plaintiff. Affidavit has also been filed recording service of notice on defendants. Suit is decreed ex parte."

Under O. 5, R. 20, Civil P. C., substituted service by order of the Court shall be as effectual as if it had been made on the defendants personally. It was contended by the learned counsel on behalf of the petitioners that the learned Subordinate Judge was wrong in holding that the substituted service was not due service within the meaning of Article 164, Limitation Act. In support of this contention reliance was placed upon a decision of the Madras High Court in 1928 Mad 815 (1). But in 1931 All 727 (2) it has been laid down by the Allahabad High Court that even though the Court records an order to the effect that substituted service has been effected the proceedings at that stage being ex parte, it would be open to the defendant when he appears later to show that the order was not a proper order and that the method employed was not calculated to effect the purpose of informing the defendant of the institution of the suit. Again in the case of 55 Mad 223 (3) at p. 226, Reilly, J., observed as follows :

"There are several methods of service provided. The first and the best method of service is personal service on the defendant himself ; and in the class of personal service we may include service on the defendant's agent or the manager of his business or a male member of his family residing with him. All that comes within the class of personal service because it may reasonably be inferred and it is inferable under the rules, that, if a summons is served upon a defendant's agent or the manager of his business or a male member of his family living with him, it comes to the defendant's knowledge. Obviously the best method of service is upon the defendant himself. But, even if the summons is returned to the Court as having been served on the defendant himself, and he does not appear at the trial of the suit, he is not necessarily concluded. We cannot in all cases say that because the return is that the summons has been served personally, it has been duly served and so he cannot get an ex parte decree against him set aside. It is open to a defendant in such circumstances to show that the summons in the suit was not really served upon him, but upon somebody else, or that what was served upon him was not the summons in the suit, or that it did not give the correct date or some other essential information about the suit, or that it was not accompanied by a copy of the plaint in the suit concerned, so that although in a sense he was personally served, he was not provided with the knowledge of the claim against him which is the object of the service."

It is clear therefore that even though the substituted service may be considered as personal service on the defendants under the provisions of O. 5, R. 20 and Cl. (2), Civil P. C., this cannot preclude the defendants from afterwards showing that in fact there had been no service on him at all and that the order for substituted service was procured on misrepresentation of facts. O. 5, R. 20 and Cl. (2) laid down that for the purpose of passing a decree at that stage the Court can take the substituted service as service upon the defendant personally and nothing more. It cannot be said that simply because an order is obtained behind the back of the defendants to the effect that service was effected under O. 5, R. 20 of the Code that would preclude the defendant from afterwards

1. Shariba Beeby v. Abdul Salam, 1928 Mad 815=110 I C 490=51 Mad 860.
2. Ram Bharosa v. Ganga Singh, 1931 All 727 =136 I C 609=54 All 154.
3. Gyanammal v. Abdul Hussain Sahib, 1931 Mad 813=134 I C 1202=55 Mad 223.

showing that the order for substituted service was not all proper and that if real facts had been placed before the Court at the time when the order was obtained, the Court would not have ordered substituted service. We are therefore of opinion that the learned Judge was justified in entering into the merits of the application in spite of the order dated 29th September 1931 to the effect that the substituted service was effected on the defendants under O. 5, R. 20, Cl. (2), Civil P. C.

This being the only ground on which the rule was issued the rule should be discharged. The learned counsel appearing for the petitioner however placed the facts of the case before us in order to show that there has been a failure of justice in this case. It is therefore desirable that we should say a few words on the merits of the case.

It is admitted now that these ladies had never resided at Naxalbari. On the representation of the plaintiff, Naxalbari was taken as the last place of residence of these defendants by the Court when the order for substituted service was made. It was represented to the Court (it is now conceded that that was a misrepresentation) that the defendants had been residing at that place for sometime past at Naxalbari and it was on such representation that the Court was induced to hold that the substituted service was properly effected. The learned Judge was therefore perfectly justified in holding that the service effected in this case upon the defendants was not due service.

It was next contended by the learned counsel for the petitioner that the application was barred by limitation, inasmuch as these defendants were aware of this decree long before 30 days from the date of the filing of the application under O. 9, R. 13, Civil P. C. The learned counsel placed before us certain statements of these two ladies and wanted to show that on their own evidence it could not be held that they did not know of the proceedings earlier than 30th November 1932. The learned Judge has however considered these statements of the ladies and after taking into consideration the entire evidence in the case and the circumstances and probabilities has come to the definite conclusion that these two ladies first came to know of the decree on or about 30th November 1932. On the evidence in the case and also in view of the fact that these ladies are illiterate pardanashin ladies, the learned Judge came to the conclusion that they came to know of the decree from Basiruddin on or about 30th November 1932.

We are therefore of opinion that there had been no failure of justice in this case. We therefore discharge the rule with costs—hearing fee is assessed at three gold mohurs.

R.K. *Rule discharged.*

A. I. R. 1934 Calcutta 747

M. C. GHOSE, J.

Tofazzal Ahmed Chowdhury and *others* —Petitioners.

v.

Masalat Khan Chaudhury and *others* —Opposite Parties.

Civil Rule No. 1579 of 1933, Decided on 9th May 1934, from order of Munsif's Court, North Raozan, in M. J. C. No. 113 of 1933.

Bengal Tenancy Act (1885), Ss. 50 and 18 —Rent fixed partly in cash and partly in kind—Same not to be altered on any account—Tenancy is at fixed rent and transfer fee would be Re. 1 only.

The term "rent" is not equivalent to "money rent." Where the rent of a holding is fixed in perpetuity at a certain sum in cash and certain amount of paddy and the same is not to be altered on any account, the tenancy is for a rent fixed in perpetuity and the transfer fee would be Re. 1 only: 1923 *Cal* 74 *Appr* and 37 *Cal* 626, *Diss from.* [P 748 C 2]

Narendra Kumar Das — for Petitioners.

Chandra Sekar Sen — for Opposite Parties.

Order.—In this case a Rule was issued calling upon the opposite party to show cause why the order of the Munsif, North Raozan, complained of in the petition should not be set aside or why such other or further order should not be made as to this Court may seem fit and proper. The petitioner's case is that Ram Sundar De and others held certain lands under the petitioners and their co-sharers and that the said tenants sold their holding to the opposite party describing the same as a mokarari holding and served a notice on the petitioners with landlord's fee of Re. 1 only and the petitioners made an application under S. 26-J, Ben. Ten. Act, claiming that the holding was a raiyati

holding and that they were entitled to transfer fee and compensation under S. 26 (J). The Munsif on hearing the evidence of the parties came to the conclusion that the holding was mukarari, held at a fixed rent and rejected the petitioners' application.

In this Court it has been urged by the learned Advocate on behalf of the petitioners that the solenama Ex. A upon which thø Munsif has based his judgment does not really mean that the rent was fixed for ever and secondly that the solenama is of no effect inasmuch as it was not registered under the provisions of the Registration Act. The solenama in question was dated 30th June 1868. It appears that the landlords instituted a suit for assessment of rent under the Act of 1859 against the tenants and this document represents the compromise of that suit. Stating the claim made by the plaintiff both parties agreed on the compromise that the defendants would hold the land at a money rent of Rs. 9-8-0 and paddy rent of 40 aris of paddy per annum and that this rent will not be altered on any account. It is urged by Mr. Das that inasmuch as the rent consisted of money plus paddy it cannot be considered to be rent fixed in perpetuity. In support of his proposition he has quoted the case of 37 Cal. 626 (1). In that case it was held that where the terms of a document show that the rent is to be partly in money and partly in kind the rent cannot be regarded fixed in amount, but that the landlord is entitled to get the price of the paddy at the date of the suit. It is urged on the other side that the decision of the case of 37 Cal. 626 (1) was dissented from in four subsequent cases in 1916, 1917 and 1919, namely in the case of 1917 Cal. 827 (2); 1917 Cal. 26 (3); 1920 Cal. 875 (4) and 1920 Cal. 614 (5). But the case on which the respondent lay the greatest stress is that of 1923 Cal. 74 (6).

In that case it was held that the presumption under S. 50 is applicable to a tenure holder or a raiyat holding at a rent partly in cash or partly in kind or entirely in kind. In the case of 1923 Cal. 74 (6) the former case was referred to but inasmuch as no grounds were stated for the former judgment it was dissented from on the ground that the word rent under S. 3 (5) now 3 (13), Ben. Ten. Act, means whatever is lawfully payable in money or kind by a tenant to the landlord on account of the use and occupation of the land held by the tenants. Rent therefore may consist entirely of money or entirely of produce of some kind or partly of money or partly of produce. The term rent is not equivalent to money rent. S. 50 provides the condition under which it is to be held that the rent payable by a tenant is fixed in perpetuity. There also the term used is rent and not money rent. I am of opinion that the decision of 1923 Cal. 74 (6) is the decision which this Court ought to follow. In this case the rent was fixed in perpetuity at the sum of Rs. 9-8-0, in cash and 40 aris of paddy. Under S. 18 the rent being fixed in perpetuity the transfer fee would be Re. 1 only.

It is however urged that the solenama upon which the tenants base their case is not admissible in evidence inasmuch as it was a document which required registration and was not registered. The document is of the year 1868. At that time the Registration Act of 1866 was in force. Under S. 17, Cl. 4 leases of immovable property for any term exceeding one year required to be registered. It is urged that in this case the document in question did not create a lease which had already been granted. All that was done in this case was that the landlord asked for assessment of rent and the tenants agreed to the assessment of rent and the rent was fixed by means of the compromise. It is urged that as the document does not amount to a lease but to an agreement only to a fixation of the rent it does not come under S. 17, Cl. 4 of Act 20 of 1866. Further it is urged that even if the document required registration in 1868 the fact that the parties have acted upon that lease from 1868 until the present time has in effect cured the defect due to non-registration. In sup-

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1. Baneswar Mukherjee v. Umesh Chandra (1910) 37 Cal 626=7 I C 875.
2. Nilmadhab Mahapatra v. Keshablal Mahapatra 1917 Cal 827=40 I C 819.
3. Basiruddin Chaudhury v. Afsarunnessa Bibi 1917 Cal 26=40 I C 833.
4. Gurudas Sen v. Govinda Chandra 1920 Cal 875=54 I C 914.
5. Ashutosh Mukherjee v. Haran Chandra 1920 Cal 614=53 I C 382=47 Cal 133 (SB).
6. Dina Nath Pal v. Sati Prosad Garga 1923 Cal 74=72 I C 663.

port of this proposition the case of 1914 P C 27 (7) is quoted. In the result this Rule is discharged with costs; hearing fee is assessed at two gold mohurs.

R.K. *Rule discharged.*

7. Mohamed Musa v. Aghore Kumar Ganguli 1914 P C 27=28 I C 930=42 I A 1=42 Cal 801 (PC).

A. I. R. 1934 Calcutta 749

M. C. GHOSE, J.

Secy. of State—Petitioner.

v.

Sukh Chand Saw and *others*—Opposite Parties.

Civil Rules No. 1607 and 1608 of 1933, Decided on 15th May 1934, from order of Senior Munsif, Second Court, Contai, in J. M. S. Nos. 6 and 7 of 1933.

Bengal Tenancy Act (1885), S. 26-F (5)—Pre-emption cannot be ordered conditional on payment for improvements.

Section 26-F (5) leaves no discretion to the Court to make an order of pre-emption conditional on the payment of the value of the improvements. The value of improvements, if any must be sought for in a separate proceeding. [P 749 C 2]

Basak and *Rupendra K. Mitra*—for Petitioner.

Gopendra Nath Das—for Opposite Parties.

Order.—These two Rules were issued calling upon the opposite party to show cause why the order, complained of, should not be modified as prayed for in the petitions. The matter arises out of the fact that the opposite party purchased portions of two raiyati holdings at Rs. 90 and Rs. 35 and the Secretary of State who is the landlord in due course filed applications for pre-emption under S. 26-F, Bengal Tenancy Act. The learned Munsiff has allowed the applications for pre-emption on payment of the amounts as required by S. 26-F. But in addition to the payments required by S. 26-F the Munsiff has also directed the landlord the Secretary of State, to pay the amount of Rs. 16 to the purchaser on account of certain improvements which he had effected on the land and this payment was directed to be made before the pre-emption is allowed under S. 26-F. It is urged by the learned Government Pleader that the Court below had no jurisdiction to direct the payment of the sum of Rs. 16 alleged to have been paid by the opposite party for the improvements. It is clear that S. 26-F does not mention any payment to be made on account of improvements and the argument of the learned Government Pleader appears prima facie to be correct. On behalf of the opposite party it is urged that the sale was effected on 4th July 1931. But the application for pre-emption was not made until 6th January 1933 nearly eighteen months after the sale. As to this the learned Government Pleader's observation is that the application was made within two months of the receipt of the notice and no ground of limitation was taken by the opposite party.

In the next place it is urged on behalf of the opposite party that under S. 26-F (7) when a transferee is divested of his right, title and interest he shall for the purposes of Cls. (a) (c) and (d), S. 156, be deemed to be a raiyat ejected from his holding by proceedings for his ejectment commencing on the date on which the landlord applied to the Court under Sub-S. (1) for pre-emption and under S. 82 (2), when the Court makes an order for ejectment of a raiyat it shall determine the amount of compensation (if any) due under this section to the raiyat for improvements and shall make an order of ejectment conditional on the payment of that amount to the raiyat. On behalf of the petitioner it is urged that under S. 26-F, Cl. (5) if the deposits required under the previous clauses of S. 26-F are made the Court shall make an order allowing the application and this clear provision cannot in law be said to be governed by the provisions of S. 26-F (7) and S. 82 of the Act. In my opinion, this argument is correct. S. 26-F (5) clearly leaves no discretion to the Court to make an order of pre-emption conditional on the payment of the value of the improvements. The value of improvements if any, must be sought for in a separate proceeding. In the result the Rules are made absolute with costs: hearing fee, one gold mohur for both the Rules.

R.K. *Rules made absolute.*

A. I. R. 1934 Calcutta 750

PATTERSON, J.

Mahmed Eusuf—Defendant—Appellant.

v.

Umed Ali Mian and *another* — Plaintiff—Respondents.

Appeal No. 1460 of 1931, Decided on 29th January 1934, against appellate decree of 1st Court Sub-Judge, Hooghly, D/- 17th February 1931.

(a) Specific Relief Act (1877), S. 31 — Kobala—Rectification of—Intention of parties—Kobala cannot be rectified when it correctly expresses intention of parties.

Where a kobala differed from a bainanama on which it was based in regard to the area and dimensions of a pice of land but it was found that the alterations in the area and the boundaries had been made with the knowledge and consent of both parties ;

Held : that the kobala could not be rectified as it correctly expressed the intention of the parties. [P 751 C 2]

(b) Practice — Scope of suit — Points not raised in plaint are outside the scope of suit.

Where a suit related to the rectification of the northern boundary only and never raised the question as to whether the plaintiff had got possession of land intended to be conveyed and the Court proceeded to discuss the questions about the correctness of southern boundary and about possession :

Held : that both these questions were outside the scope of the suit as the only point for decision was in regard to the agreement between the parties. [P 751 C 2]

Bijan Kumar Mukerji — for Appellant.

Rupendra Kumar Mitter and *Farhat Ali*—for Respondents.

Judgment.—This appeal arises out of a suit for rectification of a kobala or in the alternative for refund of proportionate consideration together with damages. The kobala in question differs from the bainama on which it purports to be based, both in respect of the total area of land conveyed and in respect of the northern boundary of that land. The learned Munsif who tried the suit held that there had been no mistake or fraud in the matter of the conveyance, and that the northern boundary had been changed with the knowledge of both parties. The learned Munsif further found that there was some deficiency in the area of the land actually conveyed but that having regard to the terms of the kabuliyat and the manner in which the plaint was framed, the plaintiff was not entitled to any refund or damages, and he accordingly dismissed the suit.

The learned Subordinate Judge who heard the appeal agreed with the learned Munsif in holding that there had been no mistake or fraud, and that the alteration in the area and in the boundaries had been acquiesced in by the plaintiff in order to make the conveyance conform to the defendant's title deed. On these findings the learned Subordinate Judge ought, in my opinion, to have dismissed the appeal preferred by the plaintiff for, as the learned Munsif rightly observed, the plaintiff had no case for rectification once it had been held that the northern boundary and the area had been changed with the knowledge and consent of both the parties. The learned Subordinate Judge however instead of dismissing the appeal for the reasons indicated above, proceeded to consider whether there ought not to be some rectification of the kobala in respect of the southern boundary, though no foundation for such rectification had been laid in the plaint. In this the learned Subordinate Judge was, in my opinion, clearly wrong, for the suit as framed, related only to the rectification of the northern boundary. The learned Subordinate Judge next proceeded to consider whether the plaintiff had actually got possession of the whole of the area intended to be conveyed. That question was in my opinion entirely outside the scope of the suit, the question for decision being whether the kobala was a correct expression of the intention of the parties and of the agreement entered into between them, and not whether the plaintiff had or had not actually got possession in pursuance of that agreement.

On a consideration of the first point indicated above, the learned Sobordinate Judge, holding that there had been a distinct understanding between the parties that any deficiency in the land conveyed by the kobala, as compared with the land specified in the agreement for sale, should be made up by the defendant, directed the defendant to execute a separate conveyance in respect of a strip of land to the south of the kobala land, and on a consideration of the second point, the learned Subordinate Judge further ordered the defendant to pay the plaintiff a certain sum as compensation for the deficit area. Both these matters were, in my opinion, quite outside the scope of the suit, and the orders

made by the learned Subordinate Judge in respect of these matters must therefore be set aside. The result is that the appeal is allowed with costs throughout and the judgment and decree of the lower appellate Court are set aside and those of the trial Court are restored.

W.S. *Appeal allowed.*

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* A. I. R. 1934 Calcutta 751

MUKERJI AND S. K. GHOSE, JJ.

Bir Bikram Kishore Manikya Bahadur—Decree-holder—Appellant.

v.

Raj Kumar Pal and *another*—Judgment-debtors—Respondents.

Appeal No. 271 of 1933, Decided on 4th July 1934, from appellate order of Sub-Judge, First Court, Tippera, D/- 25th February 1933.

*** Civil P. C. (1908), O. 21, R. 95—Possession by demolition of structures cannot be granted under R. 95.**

The acts necessary to be done by the officer who is entrusted with the duty of executing a writ for delivery of possession issued under R. 95 must vary according to the circumstances of each particular case, the only test of sufficiency of such acts being that they should put the purchaser in effective and complete possession against the judgment-debtor or his representatives or persons claiming under a title created by him subsequent to the attachment of the property. If the judgment-debtor or any of such persons refuses to vacate he has to be removed because otherwise the delivery falls short of the test. But nowhere can the Court order the demolition of a pucca structure which is on the land covered by a decree or by a purchase made in execution of a decree in order to make the possession delivered effective and complete as actual or khas possession: 1933 *Cal* 469, *Expl.* and 18 *W R* 527, *Ref.* [P 751 C 2]

Ramesh Chandra Sen and *Nripendra Chandra Das*—for Appellant.

Amarendra Mohan Mitra—for Respondents.

Judgment. — The appellant as decree holder has purchased a taluk in execution of a rent decree and has applied for delivery of possession under O. 21, R. 95 of the Code by demolition of pucca structures. The Munsif held that the prayer for delivery of possession of the land by breaking down the building on it cannot be entertained and "delivery of possession of the land only should be given." The Subordinate Judge on appeal affirmed the said order of the Munsif.

In our opinion the prayer of the appellant for delivery of possession by demoliton of the pucca structures cannot be allowed. O. 21, R. 95 of the Code entitles the purchaser to be put in possession of the purchased properties—the lands in this case—"and, if need be by removing any person who refuses to vacate the same." The acts necessary to be done by the officer who is entrusted with the duty of executing a writ for delivery of possession issued under this Rule must vary according to the circumstances of each particular case, the only test of sufficiency of such acts being that they should put the purchaser in effective and complete possession as against the judgment-debtor or his representatives or persons claiming under a title created by him subsequent to the attachment of the property. If the judgment-debtor or any such persons refuses to vacate he has to be removed, because otherwise the delivery falls short of the test. O. 21, R. 35, sub-Rr. (1) and (3) relate to the same kind of possession, namely actual or khas possession which the holder of a decree is entitled to, as a purchaser is entitled to get under O. 21, R. 95. Sub-R. (1), R. 35, is worded similarly as R. 95; and sub-R. (3), R. 35 lays down a special procedure in respect of a building or enclosure. But nowhere is it said in the law that the demolition of a pucca structure which is on the land covered by a decree or by a purchase made in execution of a decree is necessary in order to make the possession delivered effective and complete as actual or khas possession. The prayer for demolition of the structures therefore has been rightly refused.

The appellant has drawn our attention to certain observations of Rankin, C. J., in the case of 1933 Cal. 469 (1), as suggesting that the auction-purchaser is entitled to have the property without the property being burdened with the huts, which were the structures in that case. The learned Judge before whom the case was cited was inclined to think that in that case the huts were probably erected after the attachment of the property purchased. Whether this is correct or not we cannot say; but in any case the observations were not pronounced as a decision on any contention to that effect. The

1. Government of Bengal v. Alimaddin, 1933 Cal 469=1933 Cr C 749=144 I C 817=34 Cr L J 826.

view we take of the question finds support in the decision of this Court in the case of 18 W R 527 (2), in which the question was directly raised and decided, in the case of some buildings which were not covered by the decree which was sought to be executed by the decree-holder concerned. Also in the judgment of this Court in M. A. 475 of 1926, not reported, it has been observed:

"If there is any structure of the defendants judgment-debtors the plaintiffs in taking khas possession of the lands would get khas possession of the structures also, if not previously removed by the judgment-debtors and then the plaintiffs may remove them or keep them up as they choose," etc.

The possession which the Court will give will not, in our opinion be concerned with any act of demolition. Any further action which the appellant will take will be his own act and must be such as the law will allow. The appeal is dismissed, with costs 2 gold mohurs.

V.S. *Appeal dismissed.*

2. Radha Gobinda Saha v. Brijendra Coomar Roy, (1872) 18 W R 527.

A. I. R. 1934 Calcutta 752

MALLIK AND M. C. GHOSE, JJ.

Mohammad Zahadur Rahim—Defendant 1—Appellant.

v.

Satyendra Narayan Mookhopadhya and *others*—Respondents.

Appeal No. 356 of 1932, Decided on 8th March 1934, from appellate decree of Sub-Judge, Addl. Court, Burdwan, D/- 11th July 1931.

(a) Practice - Appeal — Appeal dismissed against some respondents can proceed against others.

An appeal dismissed against some of the respondents against whom the appellant did not want to proceed and who were defendants along with the appellants in the original suit, can proceed in the absence of these respondents. [P 752 C 2]

(b) Tort—Actionable wrong — Holding of rival mela on one's own land is actionable only when illegal means are employed —Act not unlawful in itself, is not rendered unlawful merely because motive of act is bad.

An act which is not unlawful in itself does not become unlawful merely because it interferes with other people's business or merely because the motive of the act is bad. The holding of a rival mela by defendant on his own land is not unlawful merely because it interferes with the plaintiff's mela or merely because the defendant in holding his mela had a bad motive for his act. But such an act is an actionable wrong if he exercises his righ of using his land by the employment of illegal means. The grant of an absolute injunction restraining defendant from enjoying his own land is therefore wholly illegal: *Sorrell* v. *Smith* (1925), *A C* 700, *Rel on.* [P 753 C 2]

A. C. Gupta and *Farhat Ali* — for Appellants.

Brojolal Sastri, Santosh Kumar Bose and *Parimal Mukherjee* — for Respondents.

Mallik, J.—The plaintiff-respondent is a patnidar of village Dadhia while defendant 1 is a patnidar of village Ayarpur which is contiguous to Dadhia. A mela is held on some land in Dadhia on the 3rd, 4th and 5th day after Sripanchimi every year. According to the plaintiff, defendant 1, along with the other defendants, has been trying to set up a rival mela on his land in Ayarpur on the three identical days by setting shopkeepers there by the use of force, violence, intimidation and threat for some time past. On these allegations the plaintiff instituted the suit that has given rise to the present appeal for a declaration of his right to hold a mela on his land in Dadhia, for damages as compensation for the loss caused to him by the defendants' disturbance and interference with the plaintiff's right, and also for a permanent injunction restraining the defendants from holding a rival mela or setting up shops on their land in Ayarpur at the time of the Dadhia mela. The plaintiff's claim was resisted by the defendants on various grounds. These grounds were overruled by the Court of first instance and the trial Judge gave a decree to the plaintiff declaring the plaintiff's right to hold a mela on his land in Dadhia, giving him damages for Rs. 100 and granting the permanent injunction as prayed for. This decision was affirmed on appeal. Defendant 1 is the appellant before us.

A preliminary objection was raised that the appeal is incompetent inasmuch as the heirs of respondent 7 who was dead had not been substituted and the appellant did not want to proceed against respondents 8 and 9, and the appeal has been dismissed as against these three respondents. I do not think that there is any substance in this preliminary objection. The appeal may have been dismissed as against these three respondents who with the appellant had been made defendants in the suit, but it cannot be contended that

the present appeal cannot proceed in the absence of those respondents.

Mr Gupta for the appellant had no exception to take to that part of the decree of the lower appellate Court by which the plaintiff had obtained a declaration of his title and also damages. But he strenuously attacked the part by which an absolute permanent injunction had been granted. His contention was that the grant of absolute injunction in the present case whereby the defendant-appellant has been restrained from enjoying his own land is wholly illegal. This contention, in my opinion, is well founded and must therefore prevail. It is an unassailable proposition of law that an act which is not unlawful in itself does not become unlawful merely because it interferes with other people's business or merely because the motive of the act is bad : see 1925 A. C. P. 700 (1) at pp. 718, 719, 728 and 734. The appellant is the owner of village Ayarpur and as such owner he has every right to hold a mela on his land in Ayarpur on any day he likes just in the same way as the plaintiff has a right to hold a mela on his land in Dadhia. The defendant's action in holding such a mela would not be unlawful merely because it may interfere with the plaintiff's mela or merely because the defendant in holding his mela had a bad motive for his act. But such an act on his part would be an actionable wrong if he would exercise his right of using his land by the employment of illegal means by setting shopkeepers by the use of force or violence or intimidation or threat. In the present case the lower appellate Court has found in a way that the defendant did use intimidation and threat in making the shopkeepers to come to his land. This was certainly an actionable wrong and there would have been nothing illegal in granting an injunction that would restrain the defendant from doing it.

But the injunction that has been made in the present case restrained the defendant not only from using his land and exercising his rights by illegal means but restrained him also from exercising those rights even in a lawful manner. The effect of the injunction given in the case has been to make an invasion on the defendant's legitimate rights to use his own property rights which he is perfectly justified in exercising so long as he does not exercise them in an illegal way.

Mr. Sashtri contended that in order to make the injunction effective it was necessary to give it in an absolute form, his contention being that it would not be possible to distinguish the exercise of the defendant's rights to use his land by employing illegal means from an exercise of those rights by means that are not unlawful. This contention, I need hardly say, is not worthy of any serious consideration. There can be no difficulty in saying whether a man when he exercises his rights exercises them by illegal means or in a way in which there is nothing unlawful. The decree of the lower appellate Court cannot therefore in my opinion be maintained in its entirety. I would accordingly maintain it so far as it relates to the declaration of the plaintiff's right and also to damages. But I would set aside the order of injunction that has been made and grant in its place an injunction restraining the defendant from holding a mela on his land in Ayarpur by the employment of illegal means by use of force or violence or intimidation or threat. I would make no order as to costs in this appeal.

M. C. Ghose, J. — The decree given by the trial Court was to this effect: The plaintiff's right to hold the mela in their Dadhia mela ground peaceably and without interruption by the defendants is established. The defendants against whom the suit is decreed are restrained permanently from holding a rival mela in their village Ayarpur or in any land close to the Dadhia mela of the plaintiffs or setting up any shop in any such land on the Saptami Ashtami and Nabami days following the Saraswati puja. The plaintiffs will also get Rs. 100 from these defendants by way of damages. I agree with my learned brother that the first and the third portions of the decree are correct and should stand, but the second portion, whereby the defendants are restrained permanently from holding a lawful mela in their own village, is not in accordance with law. The defendants may be lawfully restrained from illegally

1. Sorrell v. Smith, (1925) A C 700 = 94 L J Ch 347=69 S J 641 = 41 T L R 529=133 L T 370.

preventing people from attending the plaintiffs' mela. But they should not be restrained from holding a mela or shops in their own land in a peaceful manner. I therefore agree with my learned brother that the wording of the injunction should be altered in the manner indicated by him.

R.K. *Decree modified.*

A. I. R. 1934 Calcutta 754

NASIM ALI AND KHUNDKAR, JJ.

Surendra Nath De and *another*—Plaintiffs—Petitioners.

v.

Monohar De and *another*—Defendants—Opposite Parties.

Civil Rule No. 606 of 1934, Decided on 30th July 1934, from decision of Second Court Munsif, Burdwan, in S. C. C. Suit No. 10/2686 of 1933.

(a) Partnership Act (1932), S. 69—Applicability of.

Section 69 applies to suits for enforcement of claims accrued before the commencement of the Act, if such suits are started after S. 69 begins to operate. [P 754 C 2]

(b) Partnership Act (1932), Ss. 69 and 74—S. 74 arrests operation of S. 69 in respect of pending litigations.

Section 69, being enactment which deals with procedure only may be considered as retrospective in its operation and may be held to apply prima facie to all actions pending as well as future. Therefore the pending litigations in respect of rights already accrued are saved from the operation of S. 69 under S. 74 (b). But S. 74 (b) does not save litigations started after the 1st day of October 1933. [P 754 C 2]

Bijan Kumar Mukherjee and *Pankaj Kumar Mukherjee*—for Petitioners.

Radhabenode Pal and *Jatish Chandra Banerjee*—for Opposite Parties.

Judgment.—This Rule is directed against the judgment and decree of the Second Court of the Munsif of Burdwan vested with the powers of a Small Cause Court Judge in a suit brought by the petitioner against the opposite party No. 1 for recovery of a certain sum of money. The learned Munsif has dismissed the suit on the ground that S. 69, Cl. (2), Partnership Act of 1932 is a bar against the present suit. It is not disputed before us that the petitioner and the opposite party (2) constituted a firm as contemplated by S. 4, Partnership Act, and that the said firm has not been registered as required by the Act. It is not also disputed that this suit was instituted after S. 69 of the Act came into operation. The only point for determination therefore is whether S. 69 (2) of the Act is a bar to the maintainability of the present suit. S. 69 (2) runs thus :

"No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm."

Evidently under this section firms which do not choose to be registered under the provisions of the Act have been put under disability as regards their right to sue, the object of the legislature being to put pressure upon the unregistered firms to come on the Register under the provisions of the new Act. Prima facie such an enactment would be unjust, if no opportunities were given to them to register as for no fault of theirs, they would be deprived of the right to enforce a claim which accrued to them before the Act came into operation. In order to obviate this hardship the legislature suspended the operation of S. 69 for a year in order to give unregistered firms a reasonable chance to register before the section begins to operate against them. (S. 1, Cl. (3) of the Act). The suspension of the operation for a year is therefore to be taken

"as an intimation that the legislature has provided that as the period of time within which proceedings respecting antecedent damages or injuries might be taken before the proper Tribunal," See 21 L J M C 193 (1)

In other words, if proceedings for enforcement of claims are not taken within one year. S. 69 would begin to operate as against them. It is therefore clear that S. 69 would apply to suits for enforcement of claims accrued before the commencement of the Act, if such suits are started after S. 69 begins to operate. Again S. 69, being an enactment which deals with proceedure only, i. e. the mode in which a right of action already existing shall be asserted, may be considered as retrospective in its operation and may be held to apply prima facie to all acticns pending as well as future : see 3 Q B 160 (2) at 163 (Blackburn, J.). The legislature therefore wanted to save expressly the pending litigations in respect of rights already accrued from the operation of S. 69 by enacting S. 74,

1. R. v. Leeds and Bradford Railway Co. (1852) 21 L J M C 193.
2. Krimbray v. Draper (1867) 3 Q B 160 =9 B & S 80=37 L J Q B 80= 16 W R 539 =17 L T 540.

Cl. (b). Dr. Mukherjee however contends that the language of the section in its ordinary meaning and grammatical construction goes to indicate that the intention of the legislature was to save all litigations pending as well as future. In other words he would read the words "before the commencement of the Act" in S. 74 (b) as referring to "the right or liability," etc. But the words "before the commencement of the Act" may be taken also as referring to the legal proceedings or remedy in respect thereof. If the allocation of the words is in itself precise and unambigous no difficulty arises. But if the terms are ambiguous then the intention of the legislature must be sought for in the statute as a whole. As already pointed out the other section in the Act would go to indicate that the intention of the legislature was to bring S. 69 into operation against the firms, if they do not register themselves or if they do not take proceedings respecting antecedent matters within a year from the date of the commencement of the Act. S. 74, Cl. (b) therefore does not save litigations started after the 1st day of October 1933. The Munsif was therefore right in dismissing the suit. The Rule is accordingly discharged, but we make no order as to costs in this Rule.

G.A. *Rule discharged.*

A. I. R. 1934 Calcutta 755

M. C. GHOSE AND MCNAIR, JJ.

Mahendra Chandra and *another* — Defendants—Appellants.

v.

Labanya Kumar Roy and *others*—Respondents.

Appeal No. 671 of 1932, Decided on 20th April 1934, from decree of Sub-Judge, Third Additional Court, Sylhet, D/- 14th September 1931.

Contract Act (1872), S. 251—Promissory note executed by one partner—Money borrowed used for firm—All partners are liable.

Where a promissory note is drawn by one partner but the money is borrowed for the firm and used for the firm, all the partners are liable for the debt: 1914 *P C* 132, *Rel on.*

[P 756 C 1]

Hemendra Kumar Das — for Appellants.

Benoyendra Nath Palit—for Respondents.

Judgment.—This is an appeal by defendants 2 and 3 in a money suit. Plaintiff's case was that defendant 1 was a managing partner of a joint family business of which his brother defendant 3 and his cousin, defendant 2, were partners and that as the managing partner of the business defendant 1 borrowed a sum of Rs. 700 from the plaintiffs and applied the money to the use of the business. Certain payments were made from time to time. Ultimately defendant 1 executed a fresh promissory note for Rs. 890. Defendant 1 did not contest the suit. Defendants 2 and 3 contended that there was no joint family business and that no money was borrowed from the plaintiffs for any such business by defendant 1. The trial Court accepted the defence, decreed the suit ex parte against defendant 1 and dismissed it with costs against defendants 2 and 3. In appeal the learned Subordinate Judge found that there was a joint family business of the three defendants, that defendant 1 who was a partner of that business borrowed the money for the firm and the money was actually entered in the books of the firm on the very day that it was borrowed and that it was for use of the firm. Defendant 1 however alone executed the promissory note. The question is whether on these facts the learned Subordinate Judge was correct to hold that defendants 2 and 3 are liable for the money. S. 251, Contract Act, reads as follows:

"Each partner who does any act necessary for, or usually done in, carrying on the business of such a partner as that of which he is a member binds his co-partner to the same extent as if he were their agent duly appointed for that purpose."

A partner of a business may draw Bills of Exchange and sign promissory notes on account of the partnership. In the case of 1914 P. C. 132 (1) decided by their Lordships of the Judicial Committee, there were two merchants of Mauritus who agreed to do business in partnership in sugar. The purchases were commenced by Bills of Exchange drawn partly by one partner Karim and partly by the other partner Rashid on a merchant of Bombay. Afterwards Karim paid up the amount for which he had drawn the Bills of Exchange. But Rashid having become an insolvent did

1. Karmali Abdulla v. Karimji Jiwanji, 1914 P C 132=26 I C 915=42 I A 48=39 Bom 261 (P C).

not pay up his share. Thereupon the merchant sued Karim and their Lordships held that Karim was liable to pay the balance of the debt although the Bills of Exchange had been drawn by his partner Rashid. It is therefore clear that though the promissory note was drawn by one partner, as the money was borrowed for the firm and used for the firm all the partners are liable for the debt. This suit was based not on the promissory note but on the consideration for which the promissory note was given. In the result the appeal fails and is dismissed with costs.

G.A. *Appeal dismissed.*

A. I. R. 1934 Calcutta 756

GUHA AND BARTLEY, JJ.

Kher Singh — Complainant — Petitioner.

v.

Hari Punjabi and *another*—Accused —Opposite Parties.

Criminal Revn. No. 482 of 1934, Decided on 26th July 1934.

Criminal Trial—Inherent powers—After trial is over Judge has no power to pass order regarding custody of minor girl.

Where the Sesssions Judge accepted the majority verdict of not guilty given by the jurors in respect of offences alleged to have been committed by the accused on a minor girl and purporting to act under his inherent powers passed an order that she should be kept in Refuge or Home till the legality of her marriage either with the complainant or the accused was established in civil Court:

Held : that there was no justifucation for such a direction after the trial was over.

[P 757 C 2]

N. K. Basu and *Sukumar De*—for Appellant.

D. N. Bhattacharjee and *Anil Ch. Ray Chaudhury*—for the Crown.

Judgment.—The order complained of in this case must be set aside on the ground that the learned Additional Sessions Judge had no jurisdiction to make an order of that description. We entirely disagree with the view expressed by the Judge in the order mentioned above, namely that the tentative nature of a verdict by a jury before whom the trial was held, does not take away the jurisdiction of the Court to pass an order relating to the custody of a minor. According to the Judge, the power to make such an order was inherent in all Courts which tried cases in which minors were concerned, although it is not clearly defined in the Criminal Procedure Code; and the Code, according to the Judge, regulates procedure up to the conclusion of a trial, and not beyond it ; and any order passed in regard to the custody of a minor is based on the inherent power above-mentioned. In the case before us after having accepted the majority verdict of the jurors, the Judge recorded this order in the exercise of his inherent jurisdiction, relating to the custody of the girl, with reference to whom offences under Ss. 366, 376, 372, 373, 344 and 366-A, I. P. C., were alleged to have been committed by two persons placed on their trial before the Court of Session :

"The jury returned a divided verdict. Three of them held both the accused not guilty by giving them the benefit of doubt. Two of them held them guilty on all the sections. It is desirable that the girl should be kept in some Refuge or Home till the legality of her marriage either with Kher Singh or Pakhar Singh is established in a civil Court. The acquittal of this accused is not conclusive on this point specially as the majority of the jury merely give the accused the benefit of doubt. She is big with child and will probably be delivered of a child in a month or two. It is necessary that she should be kept in an atmosphere which is free from the scramblings of rival claimants. Write to the "Abala Asram." "The Refuge" and "The Nari Kalyan Asram" asking them if they are prepared to keep the girl in their custody free of cost till the civil suit, which either party has expressed a desire to file, is disposed of. Kher Singh is directed to produce the girl on 19th May 1934 in this Court for final orders for the disposal of this girl."

Kher Singh, mentioned in the order was the complainant in the case tried by the judge and a jury. The order complained of in the application on which this Rule was granted, related to the above direction given by the Judge in the matter of production of the girl on 19th May 1934, before the Court, for final orders for the disposal of the girl. As indicated above, we do not find any justification either in law or in practice founded upon inherent powers of Courts for such a direction after the trial was over; and the order made by the Judge appears to us to be wholly without jurisdiction. The Rule is made absolute. The order complained of is set aside.

V.S. *Order set aside.*

A. I. R. 1934 Calcutta 757

GUHA AND NASIM ALI, JJ.

Hossain Ali Mir—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 770 of 1933, Decided on 5th February 1934.

(a) Criminal Trial—Jury – Misdirection—Mere expression of opinion by Judge on question of fact is not misdirection.

Mere expression of opinion by the Judge on question of fact does not amount to misdirection to the jury if the expression of opinion is not of such a nature as to leave nothing to the jury for their consideration. [P 757 C 1, 2]

(b) Criminal Trial—Jury –Misdirection.

Where the charge mentions the fact that certain witnessess were not examined by the prosecution, the charge is not improper. [P 758 C 1]

(c) Criminal Trial—Charge to jury—Stray passages picked up to show misdirection—But charge as whole causing no prejudice or injustice to accused—Charge is not improper.

Where stray passages from the Judge's charge to the jury are selected in order to show that there is misdirection; but if the charge taken as a whole and examined in the light of the evidence shows that no prejudice or injustice is caused to the accused it is not improper. [P 758 C 1]

S. C. Talukdar and *Jatis Chandra Guha*—for Appellant.

Khundkar and *Monindra Nath Mukerji*—for the Crown.

Judgment.—The appellant was tried by the Assistant Sessions Judge (1st Court), Dacca, and a jury for the commission of offences mentioned in Ss. 458 and 148, I. P. C., and on the unanimous verdict of the jury has been convicted and sentenced to rigorous imprisonment for five years and two years respectively, under the above provisions of the law, the sentences so passed running concurrently. The case for the appellant has been argued before us by Mr. Jatis Chandra Guha, Advocate, with care and ability, and various points were raised in support of the appeal relating to the learned Sessions Judge's misdirection to the jury in matters of law and fact. The material portions of the evidence on the record bearing upon those points were also placed before us for our consideration.

It was, in the first place, argued generally that the Judge has expressed his own views on the evidence in the case too strongly. It appears that there are expressions of opinion by the Judge at places, on matters of evidence; but we are not satisfied that expression of opinion was of such a nature as to leave nothing to the jury for their consideration, so far as matters of evidence were concerned. The jury, it would appear, were distinctly told by the Judge that they were not bound to accept his opinion on questions of fact which they were to decide independently of his opinion. Exception was taken to the Judge's reference to the arguments in the case as part of the charge. It must however be noticed that the Judge asked the jurors to consider the arguments after having summarized the material portions of the evidence before the jury. Argument was advanced before us that the law applicable to the case was not properly explained. With regard to the provisions contained in S. 458, I. P. C., the argument cannot be said to be well founded in view of what was exactly said by the Judge in his charge to the jury. The attention of the jury was pointedly drawn to the position that it was necessary to arrive at the conclusion whether the appellant had a knife in his hand, and whether he committed housebreaking by night, having made preparation for causing hurt or for assaulting Abdul Gani Khundkar or his wife. On the statements referred to above, taking them along with the other part of the charge explaining the law to the jury, there was no misdirection in law contained in the charge to the jury. No misdirection could be pointed out with reference to the Judge's explanation of the law so far as the provisions of S. 148 were concerned.

A point was made of the Judge having placed before the jury a part of the evidence in the case which had a bearing upon the cause of death of Abdul Gani Khundkar. The medical evidence, on this point was referred to in detail as also other evidence. The charge against the accused placed before the Court for trial was not for commission of a murder; and the Judge after placing the material portion of the evidence relating to the death of Abdul Gani Khundkar stated as follows: From the circumstances noted above it is for you to consider whether it is not probable that the death of Gani Khundkar was due to shock of the attack with such a small knife injury on him when he was in such weak state of vitality with such a diseased body. So far as reference to

the death of the man Abdul Gani Khundkar and to the cause of death are concerned we are not in a position to hold that there was any misdirection to the jury by the Judge or that reference to the evidence in the case bearing upon the cause of his death amounted to misdirection.

The omission to examine some witnesses by the prosecution was dealt with by the Judge in his charge to the jury. The non-examination of the chaukidar was expressly referred to, and it was stated to the jury that it was for them to consider whether they would think his absence as a witness for the prosecution was material. There was, in our judgment, nothing improper in the charge relating to the question of non-examination of the chaukidar or any other witnesses on the side of the prosecution, regard being had to the facts and circumstances referred to by the Judge in this connexion. The differences between the first information report and the evidence in the case were expressly noted by the Judge in his charge to the jury, and these differences were not sought to be explained away by the Judge as has been suggested before us.

It must be said that care has been taken by the learned advocate for the appellant in selecting passages from the Judge's charge to the jury against which criticisms might be levelled on the score of the direction or non-direction; but we are not at all satisfied on the charge to the jury, taken as a whole, and on examination of the same in the light of the evidence placed before us, that there was any such misdirection or non-direction contained in the Judge's charge to the jury which could lead to any prejudice or injustice, so far as the appellant was concerned. The conviction of the appellant and the sentences passed on him must be upheld, and we direct accordingly. The appeal is dismissed.

R.K. *Appeal dismissed.*

A. I. R. 1934 Calcutta 758

JACK AND KHUNDKAR, JJ.

Leath Elies Joseph Solomon — Petitioner.

v.

H. C. Stork—Opposite Party.

Civil Rules Nos. 1525 of 1933 and 100 of 1934, Decided on 28th May 1934.

(a) Land Acquisition Act (1894), S. 18—Collector refusing to make reference—High Court can revise his order.

The act of the Collector in refusing to make a reference under S. 18 is a judicial act. Though therefore technically S. 115, Civil P. C. or S. 107, Government of India Act, may not be applicable it cannot be said that 'there is no remedy against the wrongful rejection of an application for reference. And as no relief can be obtained outside the jurisdiction of the chartered High Courts, the Collector's order will be revised by the High Court: 12 *C W N* 241; 13 *I C* 470, *Rel on*; *Case law Ref.* [P 759 C 2]

(b) Land Acquisition Act (1894), S. 11—Award is made when it is drawn up and signed.

An award under S. 11 is said to be 'made' only when it is drawn up and signed by the Collector, and not when it is settled what the award is going to be. [P 760 C 1]

(c) Land Acquisition Act (1894), S. 18 (2)—Receiver appointed to accept award—His presence at signing award is representation of claimants—Hence claimant must apply within limitation of six weeks.

Where a Receiver of an estate is appointed by a Court to accept the award on behalf of the claimants his appearance before the Collector at the time of signing the award and acceptance of the award is representation of the claimants within S. 18 (2). And therefore if a claimant desires to have a reference made he must do so within the period of six weeks from the date of the award. [P 760 C 1, 2]

(d) Land Acquisition Act (1894), S. 18—Receiver's appointment does not take away claimant's right of reference.

Where a Receiver was appointed to accept on behalf of the claimants, an award, but subject to the condition that appointment was without prejudice to the claimants:

Held: that not only by virtue of that condition the right of the claimants to make a reference against the award was retained, but even under the general law relating to Receivers, they were entitled to that right. [P 761 C 1]

J. C. Hazra, *S. Roy*, *Surendra Madhab Mallik* and *Probodh Krishna Shome*—for Petitioners.

Sarat Chandra Basak and *Rupendra Coomar Mitter*—for Opposite Party.

Judgment.—This Rule has been issued to the learned 1st Land Acquisition Collector in connexion with his order dated 1st September 1933 rejecting the petitioner's application requiring a reference to the Collector under S. 18, Land Acquisition Act, for decision of her objection to the amount of an award made by the Land Acquisition Collector under the provisions of S. 11 of the Act. The application was rejected on the ground that it was not within the time allowed by law. A preliminary point was raised that this Court has no jurisdiction in revision

either under S. 115, Civil P. C., or under S. 107, Government of India Act. The High Court has no powers of revision unless the case is decided by a Court Subordinate to the High Court, viz. subject to the appellate jurisdiction of the High Court. It is true that a decision of the Collector as to the amount of an award may indirectly come before the High Court in its appellate jurisdiction where a reference has been made to the civil Court under S. 18, Land Acquisition Act, and it is argued that on this ground the orders of the Collector are subject to revision just as the orders of the Rent Controller under the Calcutta Rent Act have been held to be subject to the revision of the High Court in the cases of 1922 Cal. 427 (1) and 1923 Cal. 169 (2). The fact remains however that the Collector cannot be said to be a Court within the meaning of S. 115, Civil P. C., or of S. 107, Government of India Act. There is abundant authority for this view. Reference may be made to the cases of 38 Cal. 230 (3); 32 Cal. 605 (4); 30 Cal. 36 (5); 1924 Mad. 442 (6); 1923 Bom. 290 (7) and 1934 Rang. 118 (8). The petitioner on the other hand relies on the cases of this Court in which it has been held that this Court is entitled to revise an order of the Land Acquisition Collector refusing to refer a case to the civil Court under S. 18 of the Act, viz. 12 C W N 241 (9) and 13 I C 470 (10). These decisions have not been overruled and the petitioner supports them by reference to the decisions in 1917 Pat. 176 (11); 1916 Lah. 37 (12), 16 O. C. 374 (13) and to the cases under the Rent Act, 1922 Cal. 427 (1) and 1923 Cal. 169 (2).

There can be no question that the act of the Collector in refusing to make a reference under S. 18, Land Acquisition Act is a judicial act. The petition for a reference corresponds to the plaint in a suit. It initiates judicial proceedings in the Land Acquisition Court which by virtue of S. 54, Land Acquisition Act, is a Court subordinate to the High Court and the petition for reference is practically a part of those proceedings. Though therefore technically S. 115, Civil P. C., may not be applicable it was hardly the intention of the legislature that there should be no remedy against the wrongful rejection of an application for reference. It may be noted in this connexion that no relief under S. 45, Specific Relief Act, could be obtained outside the jurisdiction of the Chartered High Courts. In these circumstances and in view of the previous rulings of this Court, 12 C. W. N. 241 (9) and 13 I. C. 470 (10), we will not decide against the petitioner on the preliminary point.

As regards the merits: the question of limitation turns upon the point whether the applicant was present or represented before the Collector when the award was made. If she was present her application was barred by time for the award was made in March 1933, whereas under S. 18, Cl. 2 (a), the application must be made within six weeks. If on the other hand she was not present or represented the application may be made within six weeks of the receipt of notice from the Collector under S. 12 (2) or within six months from the date of the Collector's award, whichever period shall first expire. As in this case the applicant received no notice under S. 12 (2), she would have time up to six months and was within time on 31st August. In dismissing her application the learned Land Acquisition Collector says that she was present

1. H. D. Chatterji v. L. B. Tribedi, 1922 Cal 427=68 I C 274=49 Cal 528.
2. Allen Bros & Co. v. Bando & Co., 1923 Cal 169=70 I C 371=49 Cal 931.
3. British India Steam Navigation Co. v. Secretary of State, (1911) 38 Cal 230=8 I C 107.
4. Ezra v. Secretary of State, (1905) 32 Cal 605=32 I A 93 (P C).
5. Ezra v. Secretary of State, (1903) 30 Cal 36=7 C W N 249.
6. Abdul Sattar Sahib v. Special Deputy Collector, Vizagapatam, 1924 Mad 442=84 I C 616=47 Mad 357.
7. Balkrishna Daji v. Collector, Bombay Subarban, 1923 Bom 290=73 I C 354=47 Bom 699.
8. Mayet v. Land Acquisition Collector, Myingyau, 1934 Rang 118=150 I C 1049 =12 Rang 275.
9. Administrator-General of Bengal v. Land Acquisition Collector, 24-Parganas, (1908) 12 C W N 241.
10. Krishna Das v. Land Acquisition Collector Pabna, (1912) 13 I C 470.
11. Saraswati Pattack v. Land Acquisition Deputy Collector, Champaran, 1917 Pat 176=39 I C 650=2 P L J 204.
12. Secretary of State v. Jiwan Buksh, 1916 Lah 37=36 I C 213=67 P R 1916.
13. Hari Das Pal v. Municipal Board, Lucknow, (1913) 22 I C 652=16 O C 374.

when the award was made because she was there throughout the discussions which culminated in the award; she knew fully the terms proposed in fact the delay in making out the award as finally proposed and accepted by the other parties was entirely due to her unwillingness to join the otherwise general agreement. This is not quite accurate since another party was also objecting to the proposed terms. In showing cause under the rule the learned Land Acquisition Collector says that the fact that the petitioner was not present on 30th March does not alter the position. She was present when it was finally determined that the award would be for Rs. 4,10,000. He considers that the award is "made" when it is settled what the award is to be; after that it takes several days to draw up the actual award so determined—a long and complicated document requiring great care and intricate calculation in this case and adds:

"in practice it would be absurd as well and a great inconvenience to the parties, if they were again recalled when the Collector only signs his name to an award already determined merely in order to clarify an imaginary intention of S. 18 (2) (a)."

The learned Collector appears to have overlooked the terms of S. 11 of the Act, directing that an award shall be made "under his hand" and contain particulars of apportionment amongst those interested as well as the total compensation. It follows that the award cannot be said to be made until it is so drawn up and signed. In the present case this took place on 30th March and the affidavits show that the petitioner was not herself present on that date. The learned Land Acquisition Collector was therefore not entitled to reject her application as barred under S. 18 (2) (a) by six weeks limitation on the ground that she was so present. However his order can be supported on the ground that though she was not present she was represented and so comes within the terms of S. 18 (2) (a), for under the orders of this Court she was represented by a receiver of the estate a portion of which is the property in question. Under the direction of this Court the receiver was to accept the award on behalf of the claimants and there is no doubt that when he appeared before the Collector on 30th March and accepted the award he was representing them under the orders of the Court. This would not take away the petitioner's right to make a reference, especially inasmuch as the appointment of the receiver was "without prejudice to the contentions of the parties concerned."

Reading the petition for appointment of the receiver together with the terms of the appointment and the directions given to him it is clear that he was entitled to represent the claimants before the Land Acquisition Collector with the reservation only that his appointment would not prejudice their contention that the amount of the offer was too low. The effect of this would be that they were entitled to make a reference against the award under S. 18 of the Act, but inasmuch as they were represented before the Collector S. 18, Cl. 2 (c) would apply and the period of limitation would be six weeks from the date of the award, viz. six weeks from 30th March. Under O. 40, R. 1 the Court was entitled to so appoint a receiver and give him such powers. There was no appeal against the order appointting him and it must be taken that the petitioner who had notice of his appointment accepted his representation of her before the receiver and as she did not take advantage of her right to make reference within six weeks her claim to do so was barred and her application on 31st August out of time. The rule is accordingly discharged.

Civil Revision Case No. 100 *of* 1934,—By this rule the learned Land Acquisition Collector was asked to show cause why his order rejecting an application of the petitioner for a reference under S. 18, Land Acquisition Act, should not be set aside, The application was rejected on the ground that the Official Receiver of the estate having accepted the award the petitioner cannot claim a reference. In rejecting the application on this ground the learned Land Acquisition Collector has entirely failed to take into account the opening clause in the receiver's letter of appointment which makes the appointment without prejudice to the contentions of the parties concerned. The principal contention of the petitioner in his petition to the Court for the appointment of a receiver was that the offer of Rs. 41,000 which was being made by the Collector was

too low, and by the introduction of this clause there can be no doubt that the right of the petitioner to make a reference was retained. It was clearly the intention of the Judge to allow the petitioner to dispute the question of valuation just as if the receiver had not been appointed. The learned Land Acquisition Collector was therefore not entitled to reject his application on the ground that his right was taken away by the appointment of a receiver. Even apart from the directions of the Court in this respect under the General Law relating to receivers the petitioner would not lose his right of reference by the appointment of a receiver;

" the appointment does not effect existing contracts or rights of action between the party whose property is placed in the hands of the Receivers" : see Woodroffe's Law Relating to Receivers, p. 221.

The order rejecting the application must however be supported on the ground of limitation for the award was made on 30th March and since the petitioner was represented before the Collector at his own request by the receiver under the directions of this Court, his application should have been made within six weeks of 30th March in fact it was not made until 20th September and was therefore out of time and not maintainable. The rule is accordingly discharged. We make no order as to costs of this rule.

G.A. *Rule discharged.*

A. I. R. 1934 Calcutta 761

M. N. MUKERJI, AG. C. J. AND
S. K. GHOSE, J.

Bhudeb Chandra Sarkar—Judgment-debtor—Appellant.

v.

Asutosh Dutta—Decree-holder— Respondent.

Appeal No. 323 of 1934, Decided on 17th July 1934, from original order of Sub-Judge, Second Addl. Court, 24-Pargannas, D/- 2nd June 1934.

(a) Civil P. C. (1908), S. 47—Rent decree —Sum paid in part satisfaction not given credit—Objection falls under S. 47.

An objection that a sum paid in part satisfaction of a rent decree is not given credit falls within S. 47 and so can legitimately form the subject-matter of appeal. [P 761 C 2]

(b) Bengal Tenancy Act (1885), S. 163— S. 163 excludes by implication the procedure as to issue of notice under O. 21, R. 66 —Civil P. C. (1908), O. 21, R. 66.

The provisions of S. 163, Ben. Ten. Act, sanctioning a procedure for issue of a combined order of attachment and proclamation, exclude by implication, the procedure as to the issuing of a notice under O. 21, R. 66. [P 762 C 1]

(c) Bengal Tenancy Act (1885), S. 163— Objection that valuation was too low and evidence should be allowed to prove correct valuation disallowed—Notice under O. 21, R. 66, Civil P. C., refused—Order is not appealable.

Order disallowing objection that the valuation put down in the sale proclamation was too low and that the judgment-debtor was entitled to the notice contemplated by O. 21, R 66, Civil P. C., and that in any event he should be allowed to lead evidence to establish that the valuation suggested by him was correct cannot be challenged by way of an appeal from that order. [P 762 C 1]

Khetra Mohan Ghose and *Mahendra Kumar Ghose*—for Appellant.

Anilendra Nath Roy Chowdhury and *Rabindra Nath Chowdhury*— for Respondent.

Judgment.—This is an appeal by a judgment-debtor from an order dismissing his objection to a proposed sale of his tenure in arrears in execution of a decree for rent obtained in respect of it. The decree for rent, which was passed on compromise, was put into execution, and a combined writ of attachment and sale proclamation was issued under Section 163, Ben. Ten. Act. The judgment-debtor put in an objection in which several grounds were taken. This objection having been overruled, the present appeal has been preferred.

One of the grounds of objection is that a sum of Rs. 4,000 was paid in part satisfaction of the decree, but no credit has been given for that payment. This objection falls within S. 47 of the Code, and so can legitimately form the subject-matter of this appeal. On the merits, however, the objection cannot succeed, because no sufficient evidence to establish it has been adduced. The judgment-debtor has neither examined himself nor produced his accounts. His case is that the payment was made to the decree-holder's son. This gentleman has denied the payment and his evidence is far more reliable than that of the witnesses by whom the judgment-debtor has sought to prove it.

Another objection taken is that the valuation put down in the sale proclamation is too low and that the judgment-debtor is entitled to the notice contemplated by O. 21, R. 66 of the Code and that in any event he should be allowed

evidence to establish that the valuation suggested by him is correct. So far as this objection is concerned the order made by the Court below cannot be challenged by way of an appeal from that order. But apart from that, the provisions of S. 163, Ben. Ten. Act, sanctioning as it does a procedure for issue of a combind order of attcchment and proclamation, exclude, by implication, the procedure as to the issuing of a notice. The judgment-debtor's prayer to be allcwed to adduce evidence, therefore has been rightly rejected.

We think however it would be a wise exercise of discretion to put in, in the sale proclamation, the judgment-debtor's valuation, as in the alternative, in addition to the valuation suggested by the decree-holder. This should now be done as the parties have agreed to such a course being adopted. Subject to the direction just given the appeal is dismissed with costs. Hearing fee three gold mohurs. Let the record be sent down with as little delay as possible.

G.B. *Appeal dismissed.*

A. I. R. 1934 Calcutta 762

MALLIK AND JACK, JJ.

Rash Behari Naskar and *others* — Plaintiffs—Appellants.

v.

Haripada Naskar and *others*—Defendants—Respondents.

Appeal No. 3023 of 1931, Decided on 24th November 1933.

(a) Contract Act (1872), S. 19-A—Executant having no opportunity to cancel contract on ground of undue influence—His representatives can raise defence of undue influence.

Where the executant of a document had no opportunity to have it cancelled on the ground of undue influence, it is open to his representatives to raise the defence of undue influence.

[P 763 C 1]

(b) Sale—Want of consideration—Effect.

Want of consideration will not in itself affect the title of the vendees. [P 763 C 1]

Hiralal Chakravartt—for Appellants.

Rupendra Kumar Mitter, *Balaram Basu* and *Satindra Nath Roy Chowdhuri*—for Respondents.

Biraj Mohan Majamdar—for Deputy Registrar.

Jack, J.—This appeal has arisen out of a suit for confirmation of possession on declaration of title by plaint.ffs who sued on a kabala executed in their favour by Harananda, defendant 4, on 30th October 1929. Plaintiffs allege that defendants 1 to 3 who are the sons of Harananda offered resistance to his taking possession of this land included in the kabala which is their bastu land. The suit was instituted on 14th November 1929. On 22nd November 1929 the defendants filed a petition for time to file objection to a temporary injunction granted at the time of the filing of the suit and they asked for time to file a written statement on 16th December 1929. Defendant 4 Harananda died on 30th December 1929. His heirs were substituted on 2nd January 1930 and a written statement was filed by defendants 2 and 3 on 18th January 1930. The defendants in contesting pleaded that their father was of unsound mind at the time of the alleged kobala, that it was executed under undue influence, and through fraud, that it was bad for want of consideration and that therefore the plaintiffs were not entitled to the lands in suit. The trial Court found that Harananda was of sound mind, that there was no evidence of undue influence or fraud and that the necessary money had been paid. The trial Court accordingly decreed the suit. The lower appellate Court on the other hand held that there was in fact undue influence, that there was no consideration and that therefore the kabala must be said to have been vitiated. That Court accordingly dismissed the suit.

The chief points urged in this appeal are (1) that the Court of appeal below should have held that it was not open to defendants 1 to 3 who are strangers to the transaction to take the defence of undue influence, (2) that the Court should have held that the transaction was not void but voidable at the option of the executant and as he did not seek to avoid it, but on the other hand by his omission to defend the suit ratified it, it was not competent to his heirs to raise the plea of undue influence; and (3) that in fact the plea of undue influence was not taken, that the Court of appeal below wrongly construed para. 8 of the written statement and that as the plea of undue influence was not properly raised the plaintiffs had no opportunity to contest the same. It is quite clear from para. 8 of the written statement that the question of undue influence was in fact raised and as this was ac-

tually the subject-matter of an issue, namely issue 3, there can be no doubt that the plaintiffs had an opportunity of meeting this defence. As regards the contention that the contract was voidable and not void the chief point raised was that as Harananda did not appear in the suit the fact of undue influence was not sufficient to avoid the contract. Under S. 19(a), Contract Act, when consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused. The finding of the trial Court was that the plaintiffs were no parties to undue influence, but in the appellate Court below the learned Judge found that the plaintiffs Bhupendra Naskar and Pyari acted in collusion with each other to produce kabalas and other documents from Harananda and thus deprive him of his property. They did so partly owing to a long-standing dispute between Harananda's Bastu and Bhupedra's Bastu. That being so there can be no doubt that on this finding the plaintiffs took part in the undue influence which was brought to bear upon Harananda.

As regards the fact that Harananda did not appear in the suit it may be noted that the contract made under undue influence naturally could not be cancelled until the undue influence was removed. According to the finding of the lower appellate Court in this case Harananda was living up to the end of his life in the house of Pyari who was exercising undue influence upon him. He had therefore no opportunity to cancel the contract after the removal of the undue influence. The only time when it could be done was after his death and by his representatives defendants 2 and 3. It is therefore open to them to raise this defence of undue influence within three years after the contract and they were quite in time in raising their defence in 1929. As regards consideration the Court of appeal below found that no consideration passed. Although this would not in itself affect the title of the vendees it went to show that the sale deed was the result of undue influence. This appeal, therefore, fails and must be dismissed with costs.

Mallik, J.—I agree.

K.S. *Appeal dismissed.*

A. I. R. 1934 Calcutta 763

MALLIK, J.

Basudeb Maity—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1243 of 1933, Decided on 15th February 1934.

Criminal P. C. (1898), S. 514 — Surety bond to produce accused in Court in certain place on certain date—Failure to produce before Court in different place on different date—Bond is not forfeited.

Where a surety has undertaken to produce the accused before the Court in a certain place on certain dates, his failure to produce him before the Court sitting in a different place on a different date does not cause forfeiture of the bond. [P 764 C 1]

Dinesh Chandra Roy—for Petitioner.

Order.—This Rule is directed against an order by which the petitioner who had executed a surety bond has been held to have ferfeited it. What happened in the case was this. One Bhagbat Bhanja was a man against whom proceedings under S. 110, Criminal P.C., had been started. The hearing of the case was fixed for 8th, 9th and 10th August 1933 at Khakurda camp and the petitioner Basudev maity, a muktear stood surety for the appearance of Bhagbat Bhanja on those three days at Khakurda camp and executed a bond to that effect. On 7th August 1933, there was an application made before the Magistrate alleging that Bhagbat Bhanja had fallen ill whereupon the learned Magistrate adjourned the hearing of the case to 5th and 6th September. Two days later, namely on 9th August, the Court officer informed the Magistrate that Bhagbat had absconded whereupon the Magistrate directed the petitioner Basudeb to produce Bhagbat on 15th August 1933. The petitioner appeared before the Magistrate on 15th August and submitted that the whereabouts of the accused Bhagbat could not be traced. Thereupon the petitioner was called on to show cause why his surety bond should not be forfeited, and the surety bond was subsequently held by the Magistrate to have been forfeited.

The order of the learned Magistrate forfeiting the bond cannot in my opinion be sustained. As observed before what the petitioner had undertaken to do was to produce Bhagbat Bhanja on 8th, 9th and 10th August 1933 at Khakurda camp. But he gave no under-

taking to produce the man at the Sadar Head quarters where the Subdivisional Magistrate was on 9th August and then the petitioner was directed to produce the accused on 15th August. The learned Magistrate in his explanation has tried to show that it was the duty of the petitioner to draw the attention of the Magistrate to the defective nature of the surety bond in question. I need hardly say that it was no part of the duty of the petitioner to draw the attention of the Magistrate to the defects that were in the surety bond in question on account of which defects the petitioner could not be, strictly speaking, taken to task. In the circumstances I am clearly of opinion that there was no forfeiture of the surety bond that was executed by the petitioner and that being so, the order of the Magistrate directing the petitioner to pay Rs. 200 the amount of the surety bond, must be set aside. In the result the Rule is made absolute and the order of the learned Magistrate holding that the petitioner had forfeited his bond is set aside.

K.S. *Rule made absolute.*

A. I. R. 1934 Calcutta 764 (1)

LORT-WILLIAMS AND NASIM ALI, JJ.

W. D. Jordon—Appellant.

v.

Mahadeo Lal and *Brothers* — Respondents.

Appeal No. 156 of 1933, Decided on 23rd March 1934, from original order of Dist. Judge, Midnapore, D/- 4th February 1933.

Provincial Insolvency Act (5 of 1920), S. 72 (2)—Court has no jurisdiction to pass order under S. 72 (2) against discharged insolvent.

Orders under provisions of S. 72 (2) can be made only at some time prior to the date of the discharge of the insolvent, and during the insolvency. Thus where the Court intended to pass an order under S. 72 (2) against a discharged insolvent who had obtained credit during his insolvency but prior to discharge.

Held : that the Court had no such jurisdiction. [P 764 C 2]

Abinashchandra Ghosh and *Shacheendrakumar Ray*—for Appellant.

R. C. Banerjee and *Binaykrishna Ghosh*—for Respondents.

Lort-Williams, J.—This is an appeal from an order made on 4th February 1933, under S. 72 (2), Provincial Insolvency Act. The insolvent was adjudicated on 10th March 1928, obtained the credit alleged on 28th December 1929, and was discharged on 2nd April 1932. The only substantial point raised on appeal is whether the Court had jurisdiction to make an order under the section after the insolvent had been discharged. In our opinion the Court had no such jurisdiction. Orders under the provisions of this section can be made only at some time prior to the date of the discharge of the insolvent and during the insolvency.

This is clear from the terms of the section, which would be grammatically inappropriate if they had been intended to apply to a discharged insolvent, who had committed such an offence during his insolvency and prior to his discharge. Moreover that this was the intention of the legislature is plainly indicated by the fact that S. 71 provides for the criminal liability of the insolvent after his discharge, but only for the offences specified in S. 69 and not for the offence specified in S. 72 (1); whereas, under the analogous Ss. 102, 103, 104 and 105, Presidency-towns Insolvency Act, and S. 162, English Bankruptcy Acts 1914 and 1926, it has been provided that the insolvent shall be liable for all such offences without distinction, in spite of the fact that he has been discharged. The result is that this appeal must be allowed with costs, and the order of the District Judge set aside. Hearing fee two gold mohurs.

Nasim Ali J.—I agree.

V.S. *Appeal allowed.*

A. I. R. 1934 Calcutta 764 (2)

JACK AND KHUNDKAR, JJ.

Mukhram Agarwalla and *others*—Petitioners.

v.

S. Ehsan Ahmad and *others*—Opposite Parties.

Civil Rule No. 1280 of 1933, Decided on 30th May 1934, from order of Sub-Judge, Darjeeling, D/- 5th September 1933.

(a) Civil P. C. (1908), O. 34, R. 6—Decree for sale and personal decree without application for latter relief though improper is valid.

Where a composite decree for sale of mortgaged properties including a personal decree for balance was passed without a separate application for the personal decree being made by the decree-holder:

Held : that such decree though improper was valid. [P 765 C 2]

(b) Civil P. C. (1908), S. 73—Composite mortgage decree for sale including personal relief against mortgagor passed—Holder of such decree is entitled to rateable distribution.

A composite mortgage decree for sale including a personal decree without an application under O. 34, R. 6 for the latter relief is "a decree for the payment of money" within the meaning of S. 73, and the holder of such a composite decree is entitled to a rateable distribution at a time when the net proceeds of the sale themselves fall short of the decretal amount : 1918 *P C* 159 and 1932 *Cal* 775, *Rel. on.* [P 766 C 1]

Radhabenode Pal and *Sudhanshumauli Choudhury*—for Petitioners.

S. Choudhury and *Fanindra Mohan Sanyal*—for Opposite Parties.

Judgment.—This rule is issued on the opposite party to show cause why the judgment and order dated 5th September 1933 of the Subordinate Judge of Darjeeling in Mortgage Execution Case No. 9 of 1933 should not be set aside and the sale confirmed. The circumstances are as follows : The decree-holders Mukhram Agarwalla and others obtained a decree against S. Ehsan Ahmad and others and in execution of that decree they on 4th August 1933 purchased in auction sale the properties of the judgment-debtors worth Rs. 7,000. On the date of sale and shortly before the sale was held Mukhram Agarwalla and another and Nagar Chand Goenka Agarwalla proprietor and partner of the firm of Pokurmull Shew Narayan applied for rateable distribution in execution of the decree held by them against the judgment-debtor. The learned Subordinate Judge directed rateable distribution of their decree which was for Rs. 6,125. It is against this order that this rule has been issued and also against the order of the Court directing the petitioners to deposit the purchase money of Rs. 7,000 as they were led to expect that the amount of this decree would be set off against the purchase money. The grounds of this application are that the Court below had no jurisdiction to recall its order allowing set off and acted without jurisdiction in directing the petitioners to deposit the purchase money ; secondly, that the Court below should have held that the claimant decree-holders were not holders of any decree for the payment of money within the meaning of S. 73, Civil P. C., and as such it acted without jurisdiction in entertaining their claim for rateable distribution and finally that the finding by the Court below that mortgaged properties of Pokhermal's decree had been sold and exhausted and found insufficient to satisfy the decree was not warranted by the evidence on record relied on by the learned Judge.

According to the terms of the final decree in default of defendants paying up by the due date, the shares of the first three defendants in the property will be sold for satisfaction of the decree, the balance of the decretal amount must be satisfied out of other assets of the defendants (including defendant 4's share in the Diana Tea Co.) The mortgaged property was 10 shares in the Tea Co. and the decree for sale was that the shares of three of the judgment-debtors in these Tea shares must be sold in the first instance and if the decretal amount was not realised by sale of their shares, the balance must be realised by the sale of the other shares of the defendants including defendant 4's share. The question is whether this can be regarded as a personal decree. Under the terms of O. 34, R. 6 where the net proceeds of any sale held under R. 5 are found insufficient to pay the decretal amount, on the application of the plaintiff the Court may, if the balance is legally recoverable from the defendant otherwise than out of the property sold pass a decree for such balance. It is therefore argued that there must be a separate application for personal decree. There is authority for holding that a composite decree such as has been passed in this case though improper is not on that account invalid. We find in this case in the preliminary decree also there is a direction that if the decretal amount is not realised by the sale of the property mortgaged the decree-holder will be entitled to realise the balance by personal decree. In the case of 1918 P. C. 159 (1) it was held that

" a decree for the sale of mortgaged property can validly provide that if the proceeds of sale are not sufficient to cover that amount of the mortgage-deed together with interest, the defendant shall pay the balance. It is not a condition precedent to the making of a personal decree for the balance that the mortgaged property should have been sold and the proceeds found insufficient to satisfy the debt."

1. Jeuna Bahn v. Parmeshwar Narayan, 1918 P C 159=49 I C 620=47 Cal 370=46 I A 294 (P C).

This indicates that the words of the section are satisfied in case where the Court passes a decree that on the happening of the event when the net proceeds of the sale are found to be insufficient the balance should be paid. This was followed in the case of 1932 Cal. 775 (2). In the present case, the decree is clearly a composite decree and includes a personal decree. We think therefore that the Court below was not wrong in directing a rateable distribution. The order is further disputed on the ground that it includes a direction as regards that share of defendant 4, that is the decretal amount is to be satisfied out of the assets of the defendants including defendant 4's share in the Diana Tea Co. But an affidavit has been filed by the opposite party to show that the share has also been sold and purchased by the decree-holder for Rs. 50. This amount should have been included in the amount shown as realized in the decree-holders application for execution. He has only shown as realized Rs. 720 on a previous execution case but the affidavit now filed shows that Rs. 50 was realized in a subsequent execution case (Execution Case No. 41 of 1931) by the sale of the share of defendant 4. This amount must accordingly be deducted from the decretal amount which is to be rateably distributed to him.

As regards the alleged order for set off we find that although the petitioner was allowed to bid at the sale and ask for permission to set off, no order for set off was actually passed and he was directed to deposit one-fourth of the bid money in case the sale was knocked down in his favour and having expressed his inability to deposit the requisite amount was allowed by the Court to pay the poundage-fees on the clear understanding that he would have to deposit the bid money in proportion in case the application for rateable distribution was granted. We think the petitioner is entitled to a certain amount of sympathy because no application for rateable distribution having been made up to the date of sale he was naturally under the impression that he would be allowed set off. But in the circumstances of the case, the action of the Court allowing rateable distribution does not seem to have been contrary to law and we find ourselves unable to interfere otherwise than by the modification noted above, with the order which has been passed by the Court below. This rule must accordingly be discharged. There will be no order as to costs.

G.A./V.S. *Rule discharged.*

2. Fala Krista Pal v. Jagannath Marwari, 1932 Cal 775=140 I C 788=59 Cal 1314.

A. I. R. 1934 Calcutta 766

GUHA AND BARTLEY, JJ.

Superintendent and *Remembrancer of Legal Affairs, Bengal*—Appellant.

v.

Forhad and *another*—Respondents.

Govt. Appeal No. 6 of 1933, Decided on 26th July 1934, from order of Asst. Sess. Judge, Dacca.

(a) Criminal P. C. (1898), S. 297—Charges under Ss. 366 and 458, Penal Code—Vaccination and School Registers and Horoscope produced to prove age of the girl—Judge charging jury that registers were no evidence because entries were not made therein by persons knowing age of girl and hence they make no evidence—Misdirection is not sufficient to vitiate verdict.

The accused were charged under Ss. 366 and 458, Penal Code. The defence was that the girl was more than 16 years of age. The prosecution to prove that the girl was below 16 years of age, produced certain inoculation and vaccination registers and her school register and the evidence was that the entries therein related to a girl who was said to be the girl concerned and that the age as entered in the registers was given by her father. Horoscope of the girl was also produced which was said to be prepared by one *H* who was examined in committing Court and admitted that the horoscope was prepared by him, but this *H* did not appear in the Sessions Court though summoned and it was alleged that he did not receive the summons. The Judge in charging the jury directed them that the people who made the entries in the registers did not know the ages they recorded so that these documents would be no evidence at all unless somebody knowing the age gave it, in which case they would corroborate him if he spoke to the age himself. He further told them that the horoscope of the girl had not been proved though its maker *H* was living.

Held : that the Judge's comment on their importance did not amount to a serious misdirection. The weight to be attached to them was purely a question for the jury to decide.

Held further : that the direction given was not a wrong direction of such a character as would tend to nullify the verdict. [P 768 C 1]

(b) Evidence Act (1872), S. 33—Charge under Ss. 366 and 458, Penal Code—Horoscope produced to prove age of girl—Person preparing horoscope examined in committing Court and horoscope

proved—He not appearing in Sessions Court though summoned—S. 33 cannot be invoked.

Where in a case under Ss. 366 and 458, Penal Code, the horoscope of the accused was produced to show that the girl was below 16 years of age and the person, preparing the horoscope was examined in the committing Court and he admitted that the horoscope was prepared by him but he did not appear in the Sessions Court though summoned, and it was alleged that he did not get the summons:

Held : that it was not open to the prosecution to invoke S. 33, Evidence Act and the Sessions Judge was right in refusing to admit evidence given in the lower Court. [P 768 C 1]

D. N. Bhattacherjee and *Anil Ch. Roy Chowdhury*—for Appellant.

A. K. Fazlal Huq and *Abul Hossain*—for Respondents.

Bartley, J.—This appeal by the Local Government is directed against the acquittal of two persons, Forhad and Ramis, who were tried before an Assistant Sessions Judge of Dacca and a jury, on charges framed under Ss. 366 and 458, I. P. C. The prosecution case in brief was that on the night of occurrence these two accused and another man cut away the mat wall of the hut in which a girl called Bimala, now said to be under 16 years of age, was sleeping, carried off the girl and disappeared. A week later, accused Ramis was arrested in Dacca and the girl was discovered in a house there. The defence was, in the main that the girl, who was more than 16 years of age, was in love with accused Ramis, and left the house of her own accord. The jury unanimously found that the accused were not guilty of kidnapping. By a majority of 4 to 1, they found them not guilty of abduction any by a majority of 3 to 2, not guilty under S. 458, I. P. C. The Judge accepted the verdict. In order to appreciate the grounds of appeal framed in the case, it is necessary to mention certain other facts appearing from the record. To prove that the girl was under 16, the prosecution produced and proved certain registers, and in the lower Court examined the man who had drawn up the horoscope of the girl. The registers were records of the vaccination and of the inoculation of the girl, and the record of the date of her birth in a school register opened in 1931. The evidence is that these entries relate to a girl called Mohamaya, now said to be Bimala and that her age was given by her father at the time the entries were made, that is 13 or 14 years after she was born.

With regard to the horscope, the evidence is that it was dawn up by one Pundit Hari Deb Sharma, who was called as a witness in the Court of the Committing Magistrate and there said that he had prepared the horoscope. In the Sessions Court however this witness did not appear, though he had been summoned. The prosecution adduced evidence to show that he was absent from his home on 7th September when a telegram was sent to the local police to produce him, and examined his son to show that he had left home before receipt of a summons to depose in the Court of Session. The Sessions trial began on 4th September. The Public Prosecutor, when these facts came to light, applied, in the alternative for an adjournment of the case to procure the attendance of the witness or that his evidence in the committing Court should be admitted under S. 33, Evidence Act. The Court refused both applications. The grounds of appeal are that the Judge misdirected the jury by telling them that the documentary evidence as to the age of the girl, that is the registers and horoscope was merely corroborative and vanished if the oral testimony was disbelieved. Secondly that he was wrong in refusing to admit the evidence of the witness Sharma before the Magistrate under S. 33, Evidence Act. Thirdly that he should not have told them that the horoscope of the girl had not been proved though its maker, Sharma, was living. Fourthly that he was wrong in his direction that a confession by Ramis was not evidence against the other accused. Lastly, that his charge was defective in substance.

Before proceeding to consider these points in detail, it is necessary to note that the learned Deputy Legal Remembrancer who argued the case for the Crown, admitted with his characteristic fairness, that he was not prepared to contest the position that the jury were entitled, on the evidence on record, to reject the circumstantial story now told regarding the circumstances under which the girl left the house of her parents. It was however urged before us with vigour that the girl was below 16, and that she had been taken or enticed from the lawful guardianship of her parents in circumstances which established an offence under S. 366,

I. P. C. With regard to the registers, the direction of the Judge was that the people who made these entries did not know the ages they recorded so that these documents would be no evidence at all unless somebody knowing the age gave it, in which case they would corroborate him if he spoke to the age himself. It is contended on behalf of the Crown that this direction is wrong, and that the jury should have been told that under S. 35, Evidence Act, these documents are substantive evidence of the factum of age.

Now what S. 35 lays down is that such entries, when they state a fact in issue or relevant fact, are themselves relevant, that is are among the class of facts which the law allows to be proved. Nothing is said about substantive evidence, and when the learned Judge admitted the entries and put them before the jury, we are not prepared to hold that his comment on their importance amounted in the present case to a serious misdirection. The weight to be attached to them was purely a question for the jury to decide. The next point taken is that the evidence of the witness Sharma should have been admitted under S. 33 of the Act. It is not contended that this witness was dead, or could not be found, or was incapable of giving evidence or was kept out of the way by the opposite party. He had given evidence and had been summoned to attend the Sessions Court. That summons had not been served on him, though the prosecution did not discover the fact until the Sessions trial had gone on for some days. In such circumstances we are decidedly of opinion that it was not open to them to invoke the aid of S. 33 of the Act and that the learned Judge was right in refusing to admit evidence given in the lower Court.

It follows that there was nothing incorrect in his statement that the horoscope had not been proved. Next it is said that the Judge was wrong when he told the jury that a statement made by Ramis to a prosecution witness, implicating himself and another accused, was no evidence against his co-accused.

We are not prepared to accept this contention. The statement said to have been made was that he and some others "had brought the girl." In view of the extreme vagueness of this statement and of the defence set up in the case, we are quite unable to hold that the direction given was a wrong direction of such a character as would tend to nullify the verdict. With regard to the charge in general, we have gone through it with care, and are satisfied that it contains no material misdirection or non-direction amounting to a mis-direction, which could warrant any interference with the verdict returned by the jury and accepted by the Judge. The evidence on all material issues was fully and fairly placed before the jury, and as we have indicated above we are entirely unable to hold that there is any error on a point of law which could have affected, or did affect the findings come to by the jury on the facts. In the result we hold that there has been no material misdirection or non-direction by the Judge in this case which justifies any interference with the verdict of the jury. That verdict must accordingly be affirmed and the appeal dismissed. It is in our view unfortunate that an appeal against a unanimous verdict of acquittal in a trial by jury should have to proceed upon grounds of a character so purely technical as those pressed before us in the present instance. The appeal is dismissed and the accused discharged from their bail.

Guha, J.—I agree.

G.B. *Appeal dismissed.*

A. I. R. 1934 Calcutta 768

NASIM ALI, J.

Jasoda Kumar Roy Choudhury and *others*—Appellants.

v.

Abdul Rahaman and *others*—Respondents.

Appeals Nos. 1911 to 1913 of 1931, Decided on 10th May 1934, against appellate decrees of Sub-Judge, Tippera, D/- 27th January 1931.

(a) Bengal Tenancy Act (1885), S. 48-C, Proviso (1), Cl. (2) (as amended in 1928) —Applicability of.

Where an under-raiyati lease is determined and thus the person holding such lease has ceased to be an under-raiyat at the time when the new Act began to operate, S. 48-C, Provisos (i), (2), does not protect him from being ejected by his landlord who has acquired that right under the old law. [P 769 C 2]

(b) Bengal Tenancy Act (1885), S. 188 —S. 188 does not apply to suits for ejecting trespasser.

A suit for the ejectment of an under-raiyat whose term has expired is not governed by

S. 189. Such an under-raiyat being a trespasser a suit for his ejectment arises under the general law and not under the Bengal Tenancy Act: 1932 *Pat* 259. *Ref.* [P 770 C 2]

Bhagirath Chandra Das—for Appellants.

Judgment. — These three appeals arise out of three suits for ejectment. The plaintiffs' case in all the suits is that the defendants held the disputed lands as under-raiyats under the plaintiffs, that the terms of the under-raiyati leases expired, that the defendants were therefore not entitled to remain in possession of the lands after the expiration of the terms of the leases. The defence in all the suits was that though the terms of their under-raiyati leases had expired, the defendants were entitled to remain on the land by virtue of the provisions of S. 48-C of the new Bengal Tenancy Act. In S. A. 1911 arising out of Suit No. 63 there was another objection on behalf of the defendants that the suit for ejectment was not maintainable as all the landlords had not joined in the suit. The Courts below have concurred in dismissing the suit. Hence the present appeal by the plaintiffs. It has been found by the Courts below that the terms of the under-raiyati leases expired before the Bengal Tenancy (Amendment) Act of 1928 came into operation. There cannot be any doubt therefore that before the new Act came into operation, the defendants were trespassers on the land and that the plaintiffs had acquired the right to eject the defendants from the disputed land. Now the question is whether the defendants acquired a new right under the amending Act of 1928, or, in other words, whether the plaintiffs' existing right to eject these defendants from the disputed land was taken away by the amending Act. The provisions of S. 48-C, so far as they are relevant to the matter under consideration, are as follows:

"An under-raiyat shall, subject to the provisions of this Act, be liable to ejectment on the ground that the terms of his lease has expired when he holds the land under a written lease, provided that an under-raiyat shall not be liable to ejectment on the grounds that the term of his lease has expired if the under-raiyat has been in possession of his land for a continuous period of 12 years, whether before or after, or partly before and partly after the commencement of the Bengal Tenancy (amendment) Act of 1928 or has a homestead thereon,"

In the present case the defendants have been found to be in possession of the land for a continuous period of 12 years partly before and partly after the Bengal Tenancy (amendment) Act came into operation. The question therefore is whether under these circumstances the defendants are entitled to the benefit of the proviso. It seems to me that they are not, because the proviso definitely lays down that they must be under-raiyats when the new Act came into operation. The defendants' under-raiyati right came to an end before the new Act came into operation. They could not therefore be considered as under-raiyats at the time when the new Act came into force. Consequently the proviso in terms would not apply to them. Again before the new Act came into operation, the landlords acquired the right to eject these defendants. Under S. 6, Cl. (c), General Clauses Act (Act 10 of 1897 and S. 8, Cl. (e), Bengal General Clauses Act of 1899) which have codified the well established rules of construction relating to the retrospective operation of statutes in England, any right accrued under a repealed enactment cannot be affected by a repealing enactment unless a different intention appears in the repealing enactment. This intention may be either express or implied. There is no doubt that S. 48-C. has not been made retrospective expressly.

Again proviso (i), Cl. 2 of that section does not justify the contention that by necessary intendment of the repealing enactment the provisions of S. 48-C are to be applied retrospectively. Therefore in my judgment the right acquired by the landlords under the old law, that is, the existing right to eject the defendants has not been touched by S. 48-C, Ben. Ten. Act. This view is not inconsistent with the observations of the Chief Justice in the case of 37 C. W. N. 689 (1) at p. 697, namely, that

"the case contemplated by the old S. 49, Cl. (a) and new S. 48-C, Cl. (c) will require to be decided upon other lines,"

inasmuch as those observations are confined to the case of a written under-raiyati lease for a definite term expiring after the commencement of the new Act. In this case, as already observed, the term of the lease expired before the new

1. Jiban Krishna v. Abdul Kader, 1933 Cal 435=143 I C 164=60 Cal 1037=37 C W N 689 (S B).

Act came into operation. The position would be different if the under-raiyati lease expired after the new Act came into operation, as in that case on the date the Act came into operation, the defendants would be under-raiyats and consequently they would be entitled to get the benefit of the proviso to S. 48-C. The defendants are therefore liable to be ejected on the ground that they are now trespassers on the land in suit. In S. A. 1911 another objection was taken by the defendants that the suit was not maintainable inasmuch the entire body of the landlords did not bring the suit, or, in other words, S. 188, Ben. Ten. Act is a bar to the present suit. S. 188, Ben. Ten. Act, lays down:

"Where two or more persons are joint landlords, anything which the landlord is under this Act required or authorized to be must be done either by both or all those persons acting together or by an agent authorized to act on behalf of both or all of them."

Therefore it is clear that it must be shown that the institution of this suit is required or authorized by the Bengal Tenancy Act. As stated above the defendants are mere trespassers on the land. A suit for ejecting a trespasser is not a suit which is authorized by the Bengal Tenancy Act. The right to bring such a suit arises under the general law. Consequently S. 188 would not apply to a suit for ejecting a trespasser: see 1932 Pat. 259 (2). The next question for consideration in this appeal, that is in S. A. 1911, is whether the plaintiffs are entitled to claim khas possession of the 16 annas share of the holding in suit. It has been found by the Courts below that by the kabuliat, Ex. (a), the shares of plaintiffs 1 to 3 were resettled with the defendants after the expiration of the terms of the lease. Mr. Das appearing on behalf of the appellants contended that the kabuliat, Ex. (1), simply shows the settlement of the share of plaintiff 1. In view of the findings of the Courts below I am not prepared to hold that the share of plaintiff 1 only was resettled by Ex. A. Plaintiffs 1 to 3 therefore will not be entitled to get any relief in this suit.

The result therefore is that S. A. No. 1911 is allowed in part and the suit out of which the said appeal arises is decreed in part. The plaintiffs in the said suit other than plaintiffs 1 to 3 will get a decree for joint possession to the extent of their shares along with the defendants in that suit. The other two appeals, that is, S. A. Nos. 1912 and 1913 are also allowed. The judgments and decrees of the Courts below are set aside and the suits out of which those appeals arise are decreed in full. The plaintiffs in all the appeals will get their costs in the trial Court as well as in the lower appellate Court. There will be no order for costs so far as these second appeals are concerned as the respondents have not appeared in any of these appeals.

G.A. *Appeal allowed.*

2. Lachmi Lal v. Ganesh Chamar 1932 Pat 259=140 I C 14.

A. I. R. 1934 Calcutta 770

MALLIK AND JACK, JJ.

Dwijabar Das—Plaintiff—Appellant.

v.

Haripada Biswas—Defendant—Respondent.

Appeal No. 1696 of 1933, Decided on 7th February 1934, from appellate decree of Addl. Sub Judge, Khulna, D/- 5th May 1933.

(a) Bengal Village Self-Government Act (5 of 1919), S. 7—Joint Hindu family of son and father—Son managing its affairs—Assessment on manager is legal though no property is owned or occupied within Union Board—Such manager is qualified voter under S. 7.

A person who is neither the owner nor the occupier of a building within the Union Board is generally not assessable but where he is duly nominated by his father to manage the affairs of his joint family consisting of himself and his father, an assessment on such a manager is really an assessment on the family and is therefore legal, entitling him to vote under S. 7 of the Act. [P 771 C 1]

(b) Bengal Village Self-Government Act (5 of 1919), S. 7 (2), Explanation—Person not living within Union except on Sundays and gazetted holidays is not 'resident' within Union—Hence his election as President of Union is illegal.

"Ordinary residence" connotes either permanent or usual abode. A man, who lives six days out of seven in the week beyond the limits of the Union Board and lives within the Union only on Sundays and gazetted holidays cannot be said to be ordinarily residing within the Union under S. 7 (2) Explanation. Hence he is not entitled to be a member of that Union. Consequently his election as president of the Board is illegal and ultra vires. [P 771 C 2; P 772 C 1]

Upendra Kumar Ray and *Nanigopal Das*—for Appellants.

Roopendrakumar Mitra and *Amritalal Mukherji*—for Respondents.

Mallick, J.—This appeal arises out of a suit for setting aside an election of the defendant as the Chairman of the Barrackpur Union Board within the district of Khulna. The suit was instituted by two persons, Krishnagopal Das and Dwijabar Das, and the grounds, on which the election of the defendant, Haripada, was sought to be set aside, were, among others, that Haripada had not had the requisite qualifications of a voter according to the provisions of S. 7, Bengal Village Self-Government Act, 1919 and that he was not a resident of the Union as contemplated by S. 7, sub-S. (2) of that Act. The Court of first instance found both these points aginst the defendant and decreed the plaintiffs' suit. On appeal, this decision was reversed by the Court of appeal below, and the learned Subordinate Judge, who heard the appeal, dismissed the suit, holding that Haripada had the requisite qualifications of a voter and that he was a resident within the Union. Dwijabar, plaintiff 2, is the appellant before us, plaintiff 1, Krishnagopal, not having joined in the appeal.

The controversy before us centred round the questions whether Haripada was a qualified voter or not and whether he was a resident within the Union of Barrackpur. It appears that Haripada's name was entered in the voters' list and it appears also that he has been assessed with the Union rate of Rs. 2 per year.

It was contended that, as he was neither the owner nor the occupier of a building within the Union, he was not legally assessable and that the assessment made on him was therefore illegal and that, accordingly, he was not qualified as a voter. This contention may be technically correct, but, in my opinion, not so in substance. What happened, on this point, was this. Haripada's father was an old retired pensioner, who left all his family affairs in the charge of his only son, Haripada. Haripada was, as it were, the karta of a joint undivided Hindu family, consisting of himself and his father and the assessment shown on Haripada was really an assessment on the family. The record shows that Haripada's father duly nominated his son to manage the family affairs. In these circumstances the first ground on which the election of the defendant was attacked was not, in my judgment, of any real substance.

But the same cannot be said of the other ground, namely that the defendant Haripada was not a resident within the Union. It appears that Haripada was in Government service, being attached to the office of the Deputy Account-General, Posts and Telegraphs, Calcutta, and it appears also that he lives in Calcutta and goes to Barrackpur only on Sundays and gazetted holidays. The question is whether, in these circumstances, he can be said to be a "resident" within the Union. I am of opinion that he cannot. A person, to be such a resident, must, according to the explanation to sub-S. (2), S. 7, Bengal Village Self-Government Act, "ordinarily reside" within its limits. A man who lives six days out of seven in the week beyond the limits of the Union and lives within the Union only on Sundays and gazetted holidays cannot be said to be ordinarily residing within the Union. "Ordinary residence" connotes either permanent or usual abode; or, in other words, an abode where the person lives the greater part, if not most of his time. The learned Subordinate Judge was of the opinion that, by the occasional visits of the defendant to Barrackpur village, he was in a position to take a prominent effective part in the administration of the Union Board and that this was sufficient to give him the status of an ordinary resident within the meaning of the explanation to sub-S. (2), S. 7. The learned Subordinate Judge was perhaps thinking that the legislature had made "ordinary residence" within the Union a necessary qualification for a member, simply for the reason that a person, who would be ordinarily residing within the Union, would be able to take a practical and effective part in the administration of the Union Board and, as the defendant by his occasional visits could take such effective part, his occasional visits would give him the status of an ordinary resident. The simple answer to this is that if the defendant would be ordinarily residing within the limits of the Union, the part which he could take in the administration of the Union Board would have been still more effective. I am clearly of opinion that, in the circumstances of the case, the defendant Haripada cannot be said to be a person

ordinarily residing within the limits of the Union and, that being so, he was not entitled to be a member of that Union and, not being entitled to be a member, his election as president of the Board was illegal and ultra vires.

As a last resort, a point was taken on behalf of the respondent that the appeal was incompetent, inasmuch as the plaintiff Krishnagopal, who was a member of the Board, had not joined in the appeal and Dwijabar, the sole appellant before us, was himself not a voter, but only a rate-payer. Apart from the question, whether a rate-payer can or cannot apply to have the election set aside, we have got sufficient materials before us to show that Dwijabar was a voter. Plaintiff 1, Krishnagopal, deposed that Dwijabar was a registered voter and his statement does nct appear to have been challenged in the man's cross-examination.

The voters' list and the assessment list were called for and they were placed before us. In the voters' list, there was the name of Dwijabar entered. The name however was penned through and the correction purported to have been made by the Circle Officer. The signature of the officer that is to be found does not appear to be like the admitted signature of the officer. The assessment list also shows the name of Dwijabar and against his name there was a figure "4 annas"—the amount that was to be paid in a quarter and that would make the assessee a voter. The figure "4 annas" has clearly been changed to 3 annas and, in order to have the total of the page intact, three other palpable changes have been made, by which two entries each of 5 annas have been changed to 5 annas 3 pies and another 6 annas to 6 annas 6 pies. These changes are palpable and are apparently unauthorised and subsequently made. I have no hesitation therefore to hold that Dwijabar was assessed at 4 annas a quarter and he is therefore a voter. The result is that the appeal is allowed. The decree of the lower appellate Court is set aside and that of the Court of first instance, setting aside the election of Haripada, restored. The appellant will have his costs from the respondents throughout. Let the assessment list and the voters' list be sent down in a sealed cover with the record and let a copy of the judgment be sent to the District Magistrate.

Jack, J.—I agree.

G.A. *Appeal allowed.*

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* A. I. R. 1934 Calcutta 772

ROY, J.

Neelima Basu—Plaintiff.

v.

Jaharlal Sarkar—Defendant.

Original Suit No. 2321 of 1929, Decided on 2nd February 1934.

*** (a) Transfer of Property Act (1882). S. 3—Sub-Registrar signing on back of deed can be valid attesting witness.**

If the conditions for a valid attestation under the Transfer of Property Act are fulfilled, there is nothing in law to prevent a Sub-Registrar from being treated as an attesting witness even though the signature of the sub-Registrar might have been made alio intuitu, to satisfy the requirements of the Registration Act : 1929 *Mad* 1 (*F B*), *Foll* ; 1929 *Cal* 123, *Ref* and 1932 *All* 527, *Diss from.* [P 774 C 2]

*** (b) Transfer of Property Act (1882), Ss. 3 and 123—Sub-Registrar is not required to sign in presence of executant—Absence of evidence to show that he has signed before executant—Endorsement is not valid attestation under Transfer of Property Act—Registration Act (1908), S. 59.**

Endorsement by a sub-Registrar on a deed is by itself no proof of his signing it in the presence of the executant since he is not bound to sign before the executant under Registration Act. Therefore, in the absence of other evidence to prove that the sub-Registrar affixed his signature to the registration endorsement on a document in the presence of the executant he cannot be said to be a valid attesting witness within the meaning of S. 3, T. P. Act. [P 775 C 1]

P. C. Ghose and *B. C. Mitra* — for Plaintiff.

J. N. Majumdar —for Defendant.

Judgment.—The plaintiff sues for a declaration that she is the owner of a 3/4ths share in premises No. 26, Mushalmanpara Lane in the town of Calcutta, for partition and other incidental reliefs. The plaintiff is the sole surviving daughter of one Heeralal Sarkar, deceased. The defendant is the brother of Heeralal Sarkar and an uncle of the plaintiff. It is conceded that if the deed of gift executed by ono Jeebankrishna Sarkar, an uncle of Heeralal, on 16th November 1895, in favour of Heeralal Sarkar be held valid, the plaintiff, as Heeralal's daughter, would be entitled to a 3/4ths share in the property and the defendant would be entitled to the remaining 1/4th share. If, on the other hand, it is held that the gift by Jeebankrishna Sarkar in favour of Hee-

ralal was not a valid gift, the plaintiff and the defendant would each be entitled to a half share in the property. The validity of the deed has been challenged on three grounds specified in the issues raised by counsel for the defendant, namely: (1) the deed was not properly attested, (2) the conditions mentioned in the deed were not fulfilled and (3) the deed was not acted upon. Counsel for the defendant, in his final address, made no reference to the second and third grounds and I presume that was because he took the view that there was no substance in them.

In my judgment, the validity of the deed of gift cannot be successfully challenged on those grounds. It appears that by the deed of 16th November 1895 Jeebankrishna Sarkar made a gift of his eight annas share in the premises in suit in favour of his nephew Heeralal Sarkar on condition that Heeralal and his heirs should pay Jeebankrishna Sarkar Rs. 10 per month during Jeeban's life. It was provided by the deed that in case there was failure to pay Rs. 10 per month, Jeeban on cancelling the deed of gift, could take possession of the property. In the written statement, it was alleged that the conditions mentioned in the deed of gift were not fulfilled and the deed was never given effect to or acted upon. No evidence was adduced on behalf of the defendant in support of these allegations. It was admitted that Jeeban never cancelled the deed of gift. Moreover, we find that in the deed of sale, dated 25th June 1901, under which Heeralal and the defendant acquired the remaining eight annas share of the premises from another branch of the family, there is a clear recital that Heeralal had obtained eight annas share by virtue of the deed of gift executed by Jeeban and had been in enjoyment and possession thereof. I do not think there can be any doubt that, if the gift was otherwise valid, Heeralal obtained the eight annas share of Jeeban in the property and that the eight annas share of Heeralal is now vested in the plaintiff.

On the question as to whether the deed of gift was properly attested or not there is however considerable difficulty in the plaintiff's way. Under S. 123, T. P. Act, a gift of immovable property must be effected by a registered instrument attested by at least two witnesses. On the face of the deed in suit the name of one person alone appears as an attesting witness. Counsel on both sides have argued before me the question as to whether the signature of the Registrar on the back of the deed can be said to be the signature of an attesting witness. The word "attested" has been defined in S. 3, T. P. Act, and it is clear from the definition that an attesting witness must have seen the executant sign or must have received from the executant a personal acknowledgment of the signature and he must himself sign the instrument in the presence of the executant. Counsel for the defendant has contended that the Registrar who made an endorsement to the effect that execution was admitted by the executant could in no circumstances be treated as an attesting witness. He relied on the case of 1932 All 527 (1). In that case, a Full Bench of the Allahabad High Court held that the signatures of the sub-Registrar and the witnesses identifying the executant at registration are not sufficient attestation of a mortgage deed for the purpose of the Transfer of Property Act, even assuming that the sub-Registrar and identifying witnesses did receive from the executant a personal acknowledgment of his signature or mark, and that they did sign in the executant's presence. The Full Bench further held that the mere fact that a person sees or receives an acknowledgment of the execution of a document and signs it does not make him an attesting witness, unless he signs with the idea of bearing testimony to the execution and with the idea further of permitting himseif to be cited as a witness to prove the execution and that although the registering officer receives a personal acknowledgment from the executant of the fact of his executing the document and puts his signature under a statement that the executant admitted the execution, he does not sign as an attesting witness. Counsel also drew my attention to the case of 1929 Mad 1 (2), in which a Full Bench of the Madras High Court held that the signa-

1. Lachman Singh v. Surendra Bahadur Singh, 1932 All 527=139 I C 1=54 All 1051 (F B).
2. Veerappa Chettiar v. Subramania Ayyar, 1929 Mad 1=116 I C 367=52 Mad (F B).

tures of the registering officer and of the identifying witness affixed to the registration endorsement under Ss. 58 and 59, Registration Act (16 of 1908) are a sufficient attestation within the meaning of S. 59, T. P. Act, and its subsequent amending Acts. The learned Judges in that case did not accept the argument that the signatures were made alio intuitu, to satisfy the requirements of the Registration Act, and could not therefore be invoked in aid for another purpose, viz., attestation under the Transfer of Property Act, though in fact all the conditions laid down by the latter Act are fulfilled and they agreed with the decision of the Calcutta High Court in 1928 Cal 154 (3). In the Madras case, there was a clear finding of fact that the sub-Registrar had made his signature in the registration endorsement referring to the admission of execution by the executants of the document in the presence of the executants, and counsel for the defendant argued that even if I were disposed to follow the Madras Full Bench case the plaintiff could not succeed as there was no evidence before the Court in this case that the Registrar had signed in the presence of the executant. Counsel pointed out that the law does not require the registering officer to sign in the presence of the executant and under S. 59, Registration Act, the registering officer is only required to affix his signature to all endorsements made in his presence on the same day. Counsel for the plaintiff relied on 6 Cal 17 (4), and 11 Cal 429 (5), in support of his contention that a Registrar can be an attesting witness. Counsel also referred me to 1929 Cal 123 (6), for the proposition that a person may be a witness to the execution of a document though he may not have written his name at the time by way of saying that he was a witness. In the course of his judgment in that case however Rankin, C. J., observed :

" The question is whether it is right to hold as a matter of law that, even although, on the construction of the document, the name is put alio intuitu, the fact that the name is on the document at all makes the man an attesting witness. In my judgment, any such proposition is erroneous."

He further observed that it was

" wrong to say that because a man's signature is on the document at all —disregarding the purpose for which it is on the document and disregarding altogether what his signature is put to authenticate—the man in question is an attesting witness.

I have carefully considered all the cases cited by learned counsel and I am of opinion that the law has been correctly laid down in the case of 1929 Mad 1 (2). In my view, if the conditions for a valid attestation under the Transfer of Property Act are fulfilled, there is nothing in law to prevent a Registrar from being treated as an attesting witness even though the signature of the Registrar might have been made alio intuitu, to satisfy the requirements of the Registration Act. But the plaintiff's difficulty in this case is that, though the endorsement of the Registrar shows that the executant had admitted execution of the document before the Registrar, there is no evidence at all that the Registrar had signed in presence of the executant. Counsel referred me to S. 90, Evidence Act, and as the document was over 30 years old, asked me to presume that the decument was duly attested and that the signature of the Registrar was made in the presence of the executant. I do not think I can or ought to make any such presumption in this case. S. 90, Evidence Act, simply says that the Court may presume in the case of a document executed or attested that it was duly executed or attested by the persons by whom it purports to be executed and attested. I am unable to say that the document in this case purports to be attested by the Registrar.

When he made his endorsement on the back of the document the Registrar was simply carrying out his statutory duties under the Registration Act and was not purporting to attest the document. He made his signature alio intuitu and it would be wrong to disregard the real purpose for which his signature appears on the document. It may be true that the endorsement made by the Registrar in the course of his duties shows that the Registrar received from the executant a personal acknowledgment of his signature. But the Re-

3. Radha Mohan v. Nripendranath Nandy, 1928 Cal 154=105 I C 422.
4. Hurro Sundari v. Chunder Kant, (1880) 6 Cal 17=6 C L R 303.
5. Nitye Gopal Sircar v. Nagendra Nath, (1885) 11 Cal 429.
6. Abinash Chandra v. Dasarath Malo, 1929 Cal 123=114 I C 84=56 Cal 598.

gistration Act did not require him to affix his signature in the presence of the executant and the Registrar could and might have affixed his signature to the endorsement at any time in the course of the same day. In the circumstances, I do not see how any presumption could possibly be made in favour of the plaintiff that the signature of the Registrar was affixed in the presence of the executant and that the document was duly attested. I must hold therefore that the document was not validly attested and could not affect the immovable property which was the subject-matter of the deed of gift. It follows that each of the parties has a half-share in the premises in suit, and I make a declaration accordingly. As both parties desire that the property should be sold, there will be a decree for sale and division of the proceeds in terms of prayer (d) of the plaint. There will be a decree for accounts in terms of prayer (c) of the plaint. Usual costs as in a partition suit.

V.S. *Order accordingly.*

A. I. R. 1934 Calcutta 775

MITTER AND MCNAIR, JJ.

Pranballav Saha and *another*—Plaintiffs—Appellants.

v.

Bhagban Chandra Seal and *others*—Respondents.

Letters Patent Appeal No. 12 of 1933, Decided on 17th April 1934, against judgment of M. N. Mukerji, J., D/- 6th January 1933.

Transfer of Property Act (1882), S. 60—Equity of redemption of part of mortgage property transferred—Mortgagee releasing other part after such transfer—If mortgagee did so with notice of transfer then transferee was entitled to claim redemption.

By virtue of the interpretation available in the Calcutta High Court on S. 60, T. P. Act, as it stood before the amendment of 1929, where a mortgagee with notice that the equity of redemption in a part of the mortgaged property has been conveyed, released any other part of the mortgage estate, he was bound to abate a proportionate part of the mortgage debt as against such transferee. And such transferee was entitled to claim redemption of his property only. Thus the mortgagee could not release a part of the mortgaged land, and then seek to enforce his entire claim upon another portion in which third parties had become to his knowledge interested as assignees of the equity of redemption: 1 *C L J* 337, *Foll.*

But such a notice to the mortgagee was essential. Therefore where there was no notice the transferee could not claim the redemption of his property only : *American and English Law Referred.* [P 776 C 1; P 777 C 1]

D. N. Bagchi and *Hare Krishna Pramanik*—for Appellants.

Kalipada Chakravarty— for Respondents.

Mitter, J.—This appeal has been preferred by the plaintiffs under S. 15 of the Letters Patent from a decision of my learned brother Mukerji, J., and arises in an action commenced by the appellants for enforcing a mortgage security. It is not necessary to restate the facts as they have been stated with sufficient fulness by my learned brother Mukherji, J. The question of law which falls for determination in this appeal is whether defendant 8 who is a purchaser of a portion of the equity of redemption is entitled to redeem his property only when subsequent to his purchase the plaintiffs without the knowledge of the said purchase released from the mortgage some other of the mortgaged properties. The contention of the plaintiffs-appellants before us is that it is only when the mortgagee grants a partial release with the knowledge of change of ownership of a part or the whole of the mortgaged properties that a partial redemption is to be allowed and that where he does so without any such knowledge the transferee has no equities in his favour on which he can rely for claiming such partial redemption. The learned Judge points out that he has not been able to discover any authority bearing on the question and he has come to the conclusion that where the transferee could never have the knowledge of release as in the present case where a release took place after the transfer partial redemption can be insisted on. In coming to this conclusion Mukherji, J., has relied on certain equitable grounds and it is best to reproduce what he has said in this connexion.

> "An innocent transferee of a part of the equity of redemption too has his rights protected on equitable considerations. In my judgment, such a transferee is entitled to urge on equitable grounds that when he took the transfer there was one indivisible mortgage, and when after he acquired an interest in the equity of redemption, the integrity of the mortgage was broken by the mortgagee and the mortgagor behind his back, he is entitled to claim a partial redemption, the mortgagee himself being no longer competent to rely on the integrity of the mortgage."

In considering this question we must first turn to the legislative provision for partial redemption in the Transfer of Property Act. This is contained in S. 60 of the Act as it stood before its amendment by the Transfer of Property Amendment Act of 1929, the suit having been commenced in 1928. S. 60 so far as is material ran as follows:

"Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only on payment of a proportionate part of the amount remaining due on the mortgage except where a mortgagee, or if there are more mortgagees than one, all such mortgagees, has or have acquired in whole or in part the share of a mortgagor."

This section would seem to suggest that a part of the mortgaged property is not to be redeemed except on the payment of the mortgage money, the only exception to the rule being the case of the mortgagee having himself acquired part of the mortgaged property. On a strict construction of this section it has been recently by a Full Bench of the Madras High Court in the case of 1918 Mad. 1030 (1) in which the judgment was delivered by Sir John Wallis, C. J., as he then was, that a mortgagee voluntarily releasing from the suit a portion of the mortgaged property is not bound to abate a proportionate part of the debt and is entitled to recover the whole of the mortgage amount from any portion of the mortgaged property. This view is clearly opposed to the view of this Court in the case of 1 C. L. J. 337 (2). The general rule deducible from the authorities of this Court is stated in Sir Rash Behari Ghose's classic book on the Law of Mortgages in the following words:

"The general rule on the subject is that the rights of persons who have acquired an interest in the mortgaged estate since the making of the mortgage, of which the mortgagee has notice, cannot be defeated or impaired by any subsequent arrangement to which they are not parties. If therefore a mortgagee with notice that the equity of redemption in a part of the mortgaged property has been conveyed, releases any part of the mortgaged estate, he must abate a proportionate part of the mortgage debt as against such purchaser. In other words a mortgagee cannot release a part of the mortgaged land, and then seek to enforce his entire claim upon another portion in which third parties have become to his knowledge interested as assignees of the equity of redemption:" See Ghose's Law of Mortgages, Edn. 5, p. 336.

This general rule is supported by the following decisions of the Calcutta High Court, 30 Cal. 755 (3), 33 Cal. 613 (4), 6 C. L. J. 46 (5), 6 I. C. 842 (6) and 17 I. C. 927 (7). Although it is pointed out by Sir Dinshaw Mulla in his recent commentary on the Transfer of Property Act that the Calcutta decisions regarding the interpretation of S. 60 to the effect that the principle of the sections affects the case of a release by the mortgage are erroneous we are bound to follow the course of decisions of this Court. The learned commentator in his note under S. 60 under the heading 'Release of a share by the mortgage' says this:

"Even prior to the amendment it was recognized that the cases which held that a release by the mortgagee of a share was equivalent to a purchase by the mortgagee of that share were incorrect for the effect of the release is only to diminish the mortgagee's security and the rest of the property remains subject to the mortgage for full amount."

Under the recent amendment in 1929 it is to be noticed that the insertion of the word 'only' after the word 'except' in the last paragraph of the section makes it clear that there can be proportionate abatement only where the mortgagee has acquired an interest in the equity of redemption. But the amendment does not govern the present case. The question however whether notice of the transfer of the equity of redemption is essential, has never been directly raised in this country though such notice is necessary both in the English as well as in the American law. In the case of 21 Ch. D. 685 (8), Fry, L. J., formulates the legal position thus:

"The argument put forward was this, that there had been a release of the plaintiffs' lien by their giving it up in certain cases. I can conceive that if a person who was entitled to a lien upon properties, which he knew to belong to *A*, *B*, *C* and *D* released the lien to *A*, he could not afterwards insist upon it as against *B*, *C* and *D* because he would without their privity

1. Peru Mal v. Raman, 1918 Mad 1030=42 I C 352=40 Mad 968 (F B).
2. Surjiram Marwari v. Barhamdeo Prasad, (1905) 1 C L J 337.
3. Hari v. Veliat, (1903) 30 Cal 755=7 C W N 723.
4. Imam v. Baijnath, (1906) 33 Cal 613=3 C L J 576=10 C W N 551.
5. Hakimlal v. Ram Lal, (1907) 6 C L J 46.
6. Mir Eusuff v. Panchanan, (1911) 15 C W N 800=6 I C 842.
7. Dalip Narayan v. Chait Narain, (1912) 17 I C 927.
8. Kettlewell v. Watson, (1884) 21 Ch D 685 =51 L J Ch 281=30 W R 402=46 L T 83 on App 26 Ch D 501.

and consent be increasing the burden on them. But it appears to me that in order to raise such an equity you must show that he knew that the estate which had originally been in one person, had got into the hands of various persons. No such evidence has been adduced in the present case:" 21 Ch. D. 685 (8), at p. 714. On appeal 26 C. H. D. 501.

Fisher in his law on Mortgages in para. 1522 states the law as indicated in the decision of Fry, L. J., in the following words:

"If part of an estate be released from a lien, the release will prevent the lien from being enforced against any part of the property which at the time of the release had got into the hands of other persons, with the knowledge of the owner of the lien."

The American law is stated in Jones on Mortgage, para. 723 as follows: The mortgagee who has actual or constructive notice of the equity of such purchaser must regard it and therefore if he releases a part of the mortgaged debt he must abate a proportionate part of the mortgage debt as against such purchaser. The principle on which this rule is based is explained in one of the American cases: in 66 Am. St. Rep. 87 (9), cited in the decision of A. T. Mookerjee, J., in 15 C. W. N. 800 (6), at at p. 805 in the following words:

"While the whole of the debt is secured by the whole of the land each parcel of the land as between the different properties is equitably subject only to so much of the debt as corresponds to the proportion between its value and the value of all the land; and if its owner should be compelled to redeem the mortgage he can resort to the others for a rateable contribution and for that purpose is entitled to the benefit of subrogation to the mortgage-title. To release any particular parcel from the mortgage incumbrance is to make, as respects that, any such subrogation impossible. The mortgagee therefore releases at his peril if he had notice of the conveyance cut of which the equities in question arise; and if he does so without receiving from the releasee his proper contributory share of the debt, he is still equitably chargeable with the residue of that share in favour of the owners of the remaining parcels."

We are therefore of opinion that in the absence of any authority directly covering the question in issue we should be prepared to follow the English and American authorities on the point, and with great respect we differ in view of these authorities from the conclusion arrived at by our learned brother Mukherji, J., in this behalf. It remains to notice two cases to which reference was made by the learned advocate for the respondent. In the case of 30 Cal. 755 (3) it was no doubt held that where the mortgagee released one of the mortgaged properties the mortgage should be treated as having been split up and the release should be held to have the same effect as if the mortgagee had himself bought the property released and the mortgaged debt should be apportioned between that property and the mortgaged property. In this case suit upon the mortgage was brought without making the purchaser of one of the mortgaged properties from the mortgagor which had been released by the mortgagee, a party to the suit, it was held that the suit could not be dismissed on that ground as the property cannot strictly speaking be considered property comprised in the mortgage. The precise question now raised before us did not arise in that case. The next case is that of 1927 Cal. 195 (10) decided on 2nd February 1928 by B. B. Ghose and Panton, JJ. In this case the mortgagee after relinquishing his claim on a portion of the mortgaged property was held not entitled to throw the whole burden of the mortgaged debt on the remainder of the properties. What happened in this case was that the mortgagee did not desire to proceed against certain portion of the mortgaged properties which were purchased by her husband and her husband's brother at sales by which only the equity of redemption passed to them. The learned Judges followed the decision in 1 C. L. J. 337 (2) and refused to follow the Full Bench of the Madras High Court in 1918 Mad. 1030 (1). In these two cases the precise question now before us did not arise for determination.

The result is that the judgment of my learned brother Mukherjee as well as of the Courts below must be set aside and the following decree will be made. There will be a preliminary decree for sale of all the mortgaged properties except the property released. A decree is passed for the sum claimed which represents the principal amount of the mortgage with interest up to the date of the suit and interest at the bond rate on the principal amount from the date of the suit till the date fixed by the decree of the first Court as the period of

9. Brooks v. Benham, 66 American St. Rep. 87.

10. Muktakeshi v. Ramani, 1927 Cal 195=98 I C 504.

grace, and thereafter at the rate of six per cent. per annum till the date of payment. If this sum is not paid within 3 months from this date the mortgaged properties as in the amended plaint would be sold. The plaintiff is entitled to his costs in all the Courts against defendant 8 and the costs of the First Court against the other defendants. The costs are to be added to the mortgage money.

McNair, J.—I agree.

G.A. *Appeal allowed.*

A. I. R. 1934 Calcutta 778

REMFRY, J.

William Charles Binns—Plaintiff.

v.

W. & T. Avery Ltd.—Defendants.

Original Suit No. 512 of 1933, Decided on 8th March 1934.

(a) Specific Relief Act (1877), S. 26—Unilateral mistake in recording contract—Party knowing such mistake cannot take advantage of it.

Where the parties have made an agreement and one party records it erroneously, the other party, if he knows at the time that there is an error acts fraudulently if he seeks to take advantage of that error and cannot be allowed to enforce it. [P 779 C 2]

(b) Specific Relief Act (1877), S. 31—Equitable relief for rectification of contract.

A Court can give effect to an equitable defence which in a suit brought for the purpose will entitle the defendant to rectification of the document although no suit for it has been filed and although no claim has been made for it in the pleadings: 28 *Bom* 420, *Rel on.* [P 779 C 2]

Barwell and *N. C. Chatterjee* — for Plaintiff.

Isaacs and *B Das*—for Defendants.

Facts.—This is a suit for damages brought by the plaintiff. He claimed that, by a written contract dated 15th April 1932, the defendant company agreed to employ him for a period of four years from that date on a salary of Rs. 460 per month until December 1932, from which date the salary was to be Rs. 600. He alleged that the defendant company, in breach of their contract, on 4th February 1933, tendered to the plaintiff an agreement with a salary of Rs. 525 a month, which he refused to accept and that thereupon the defendant company suspended him. The defendant company pleaded inter alia that the plaintiff had, on 15th April, expressed his willingness to renew his agreement on a salary of Rs. 500 and that, in the alleged agreement, dated 15th May 1932, the figure Rs. 600 was a clerical error and the plaintiff was aware that there was a mistake, when that agreement was signed; and the defendant company denied that there was any contract at a salary of Rs. 600 or at all. Thus in this suit the main point in issue was as to what was arranged on 15th April 1932.

Judgment.—(His Lordship stated the the Iacts as given above and after discussing the evidence concluded.) I find that the plaintiff agreed to accept a salary of Rs. 500 on 15th April 1932, and that the agreement was drawn up for a salary of Rs. 600 owning to a mistake on the part of the defendant company and did not express the intention of the parties, and that the plaintiff, fully realising the mistake, deliberately sought to take advantage of it. It was argued for the plaintiff that, on those findings, the result must be that the Court must enforce the contract as drawn up, for, as there was no counterclaim for rectification of that document, this Court could not give any equitable relief and that S. 22, Contract Act, provides that an agreement is not affected by a unilateral mistake. For the defendant, it was argued that a case of fraudulent misrepresentation had been established, and that, apart from anything in the nature of fraud, there was a mutual mistake of fact, or a mistake on the part of the defendant company in recording the agreement, or a mistake induced by the conduct of the plaintiff. Any case of fraud must come within the particulars given. There is nothing to support the allegation that the plaintiff fraudulently concealed that he was then only drawing Rs. 460 a month. I find nothing to support the allegation that the defendant company relied on anything stated by the plaintiff, but, as stated above, in my opinion, the plaintiff knew when he saw and signed the agreement that the real agreement was that his salary should be Rs. 500. Whether this amounts to fraud and comes within the particulars will be discussed later. I find nothing to support any case of a mutual mistake—the fact being that the plaintiff was under no mistake of fact at all.

The parties appear to have been ad idem in the sense that both Mr. Allin-

son and the plaintiff knew that they were signing an agreement for Rs. 600. At the same time the plaintiff knew that that was not the real agreement and Mr. Allinson then thought that it was. Unless it was the duty of the plaintiff to point out the mistake, he did nothing to induce the defendant company to sign the agreement. Undoubtedly when a written contract has been signed by the parties, the party alleging that it has been erroneously recorded and that he signed it under a mistake, must establish that fact beyond all doubt. Even if such mistake is established it was contended that unless fraud is also established the plea must fail. On this point Jenkins, C. J., in 28 Bom. 420 (1) laid it down that a mistake known at the time to the other party may be proved and performance in accordance with the terms of the error will not be compelled. He also said that this rule applied when the party could not have reasonably supposed that the words expressed the real intentions of the parties.

In 30 Beav 445 (2) Romilly, M. R. ordered the rectification of a lease where the lessee agreed to pay £230 and signed the lease for £130, knowing that there was an error, but he did not characterize the conduct of the defendant as fraudulent and based his decision on the ground that the lease did not correctly express the agreement of the parties.

For the plaintiff it was pointed out that this decision had been commented on by text-writers and by Farwell, J., as he then was, in 1 Ch 616 (3). But there the learned Judge said that that decision could only be supported on the ground of fraud, but he adds that Romilly, M. R., refrained from describing the defendant's conduct as fraudulent. It follows that the view taken was that that conduct was fraudulent. In 15 Ch D 215 (4), Brett L. J., described the conduct of a man who sought to take advantage of what he knew to be a mistake as fraudulent. It was contended on behalf of the plaintiff that Lord Atkin in (1932) Ac 161 (5) expressed an opinion that conduct of that sort was not fraudulent. But the point under consideration was whether it was the duty of a servant to make a full confession of his shortcomings, before receiving his pay. The position of the plaintiff was entirely different ; he knew that he was signing an agreement which contained a mistake. All that I need decide for the purposes of this case is that where the parties have made an agreement and one party records it erroneously, the other party if he knows at the time that there is an error acts fraudulently if he seeks to take advantage of that error and cannot be allowed to enforce it.

It was argued on behalf of the plaintiff that, even if there was an error in drawing up the agreement and even if the plaintiff acted fraudulently in seeking to take advantage of that error, the defendant company could obtain no relief in this case but must in order to obtain relief file a suit for rectification of the agreement as drawn up. This was based on the ground that there was no counter-claim for rectification. Reliance was placed on the decision in 8 Cal 118 (6). In that case the defendant in a suit for rent sought to set up a defence that the lease was fraudulently drawn up and did not correctly express the agreement between the parties. He claimed that it is valid in part and invalid as to the rest. The Court certainly held that his remedy was to file a suit for rectification. Jenkins, C. J., held in 28 Bom 420 (1) that the Court could give effect to an equitable defence which in a suit brought for the purpose would entitle the defendant to rectification of the document although no suit for it had been filed and although no claim had been made for it in the pleadings. This decision was followed in this Court in 1923 Cal 53 (7). This was also decided by the Judicial Committee, but I have mislaid the reference.

In my opinion, the general rule is as stated by Jenkins, C. J., but, even if the matter is one for the discretion of the Court, that discretion should be exer-

1. Dagdu v. Bhana (1904) 28 Bom 420=6 Bom L R. 126.
2. Garrard v. Frankel (1862) 30 Beav 445 = 8 Jur N S 985=31 L J Ch 604.
3. May v. Platt 1900) 1 Ch 616 = 69 L J Ch 357=48 W R 617=83 L T 123.
4. Tamplin v. James (1880) 15 Ch D 215 = 29 W R 311=43 L T 520.
5. Bell v. Lever Brothers, Ld. (1932) A C 161= 101 L J K B 129=37 Comcas 98=48 T L R 133=148 L T 258.
6. Anarullah Shaikh v. Koylash Chunder (1881) 8 Cal 118.
7. Nanda Ram v. Jogendra Chandra 1923 Cal 53=70 I C 960.

cised in this case in favour of the defendant company. In this case the defence was not that the defendant company claimed that the agreement should be rectified and enforced as rectified. The plaintiff had, on his own evidence, repudiated the agreement set up by the defendant company. No suit would lie for specific performance of the agreement as set up by the defendant company. The defence was that the agreement set up by the plaintiff was obtained fraudulently, which was always a legal defence. It was also argued that the defendant company should not be allowed to give evidence of any previous contract because it was not pleaded. But obviously that fact could be proved as part of the circumstances and as the defendant company did not rely on it except as evidence it was not necessary to plead it. (After considering the issues his Lordship proceeded.) The question of damages does not require any consideration on the findings of fact and law arrived at above. But in case it should become material, I will deal with it shortly. For the plaintiff it was argued that he was entitled to the whole of the Rs. 600 a month for a year less Rs. 450 earned by him, in that year. For the defendant company it was argued that at most he was entitled to Rs. 600 for three months.

It appears that the plaintiff did his best and only obtained a post for three month at Rs. 150 a month with some commission which he did not claim. He only tried to obtain work in India. The agreement was for four years and there was no provision for giving notice on either side. The plaintiff was a fitter—a highly trained workman. I think the plaintiff is correct as far as he goes—the period should certainly be for one year as the agreement was for over three years longer, but as the point was not argued I have not considered whether the plaintiff might not be entitled to further damages as he has not yet obtained employment. The difficult question is whether the plaintiff was bound to mitigate the damages by accepting the defendant company's offer at a salary of Rs. 525. The only English case near the point is 2 Q B 253 (8). There however the breach of contract was the dissolution of a partnership of four persons. Two of the old partners carried on the business and offered the plaintiff the same terms. Nominal damages and no costs was the result.

I notice however that according to Sutherland on Damages the matter has been more fully considered in America. I regard American decisions as far from binding, but certainly illuminating. Apparently the view taken is that an offer by the master must be accepted unless it involves giving up any right of action or would be degrading. No such points required consideration in the case cited. Undoubtedly, the rule that damages must be mitigated only requires that a reasonable course of action must be taken, and certainly does not require the plaintiff to do anything unreasonable or of a speculative nature. But in my opinion, the plaintiff cannot decline to mitigate his damages on the ground that, owing to his own conduct, he had made it difficult to accept the offer made. He cannot increase his damages by his own default or his own wrong. In this case therefore if the decision had been that there was a mistake, but the plaintiff was entitled to take advantage of it I would have assessed the damages at Rs. 75 a month for 12 months less the Rs. 450 earned, on the ground that any difficulty in accepting the offer of the defendant company was of the plaintiff's own making. If the finding had been that there was no mistake on the part of the defendant company, then I think it would be unreasonable to expect the plaintiff to accept their offer, and the damages should be at the rate of Rs. 600 a month for 12 months. In my opinion, the suit must be dismissed with costs.

V.S. *Suit dismissed.*

8. Brace v. Calder, (1895) 2 Q B 253=64 L J Q B 582=59 J P 693=72 L T 829.

A. I. R. 1934 Calcutta 780

MALLIK AND JACK, JJ.

Dindayal Shah—Petitioner.

v.

Hara Prasad Jadav Chand—Opposite Party.

Civil Rule No. 1265 of 1933, Decided on 17th January 1934, from order of 1st Court Munsif, Alipore, D/- 7th November 1933.

(a) Attachment—Order to attach moveables in certain place—Nazir is not authorized to take them away.

An order of the Court to attach the moveables that would be found in a certain place does not authorize him to take them away. [P 781 C 1]

(b) Civil P. C. (1908), Ss. 115 and 151—Order under S. 151—Its propriety cannot be questioned in revision.

The propriety of an order made under S. 151 cannot very legitimately be questioned under S. 115 of the Code. [P 781 C 1]

Bepin Chandra Mallik and *Kushiprasun Chatterjee*—for Petitioner.

Ramaprosad Mukhopadhyaya — for Opposite Party.

Order. — The petitioner who is the plaintiff instituted a suit for recovery of rent from one Narottam Lal and he applied to the Court for attachment before judgment of some moveable properties lying on the premises of Narottam. The Nazir of the Court went to the place and although the order of the Court was to attach the moveables that would be found there he wanted to take away the things, whereupon Haraprasad Agarwalla, the opposite party who I may mention here, is a brother of Narottam, paid down the entire amount claimed by the plaintiff against Narottam under protest claiming the properties which were sought to be taken away by the Nazir as his and thereby saved the properties from being removed from the place. Thereafter Haraprosad applied to the Court for the refund of the money which had been paid by him and the learned Munsif allowed his prayer and directed a refund. It is against this order of the Munsif that the present Rule is directed.

We do not think that this is a fit case where we should exercise our revisional powers. The order made by the learned Munsif was an order made under S. 151, Civil P. C., and the propriety of an order made under S. 151 cannot very legitimately be questioned under S. 115 of the Code. Besides, it would appear from what has been stated above that if Haraprasad deposited the money it was only because he did so to prevent the Nazir of the Court from doing a thing which he had not been authorised by the Court to do. The Rule must therefore stand discharged. We make no order as to costs in this Court.

K.S. *Rule discharged.*

A. I. R. 1934 Calcutta 781

LORT-WILLIAMS AND NASIM ALI, JJ.

Shacheendrabhooshan Ray — Appellants.

v.

Pramathanath Ray—Respondent.

Appeal No. 32 of 1933, Decided on 13th March 1934, from original order of Second Sub-Judge, 24-Parganas, D/- 8th December 1932.

Execution—Stay of sale — Execution sale of part of judgment-debtor's share in property cannot be stayed only on the ground that injunction staying sale of other part has been issued.

Execution sale of a part of the judgment-debtor's share in a property cannot be stayed merely on the ground that another Court in different suit has issued an injunction staying sale of the remaining part of the judgment-debtor's share in the property. [P 782 C 1]

Hemendrachandra Sen and *Jaygopal Ghosh*—for Appellants.

Roopendrakumar Mitra and *Bijanbihari Mitra*—for Respondent.

Lort-Williams, J. — This appeal arises out of a sale in execution of a mortgage decree. The mortgagor had mortgaged a one-sixth share in certain property, and, in the sale proclamation it was stated that this one-sixth share of the property, which belonged to the judgment-debtor, would be sold. Subsequently however a third party brought a suit against both the decree-holder and the judgment-debtor in this suit, stating that a part of the property belonged to him, and all that the judgment-debtor owned was a 12th share. That suit having been filed, an application was made to that Court asking for an injunction restraining the sale of the share of this property claimed by the plaintiff in that suit. An injunction was granted and communicated to the executing Court with the result that that Court made an order that the sale proclamation should be sent to the nazir for sale with the direction that a 12th share only of the properties mentioned therein should be sold. On this an application was made under S. 47, Civil P. C. by the judgment-debtor, which is described by the Subordinate Judge as being one praying for stay of sale of this one-twelfth share. The real effect of the application however seems to have been that the judgment-debtor contended that the Court had no jurisdiction to allow the sale to proceed of the one-twelfth share only, and that, in view of

the order of injunction made by the other Court, the executing Court ought not to proceed with any part of the sale of the judgment-debtors' property. The Subordinate Judge disagreed with the contention raised on behalf of the judgment-debtor and we are of opinion that his decision was right. No authority bearing on the point had been cited before him and no authority has been cited before us.

In principle, we can see no objection to the sale proceeding in respect of the remaining part of the judgment-debtor's property. There seems to be sound reasons in law why the judgment-debtor's application ought to be refused, because, in view of fact that the injunction granted only applies to half of the property mortgaged, no bar has been imposed by the Court against the decree-holder proceeding with the execution of his decree, so far as the balance of the property is concerned. Therefore, there is no order of the Court, which will prevent limitation running against the decree-holder, with regard to this portion of the property. For this reason alone, it appears to us that the decision of the learned Subordinate Judge was right. The argument, raised to the effect that the sale of a small share of this property would have the result of lessening its value in the market, is one which might have been considered by the learned Judge, if he had been disposed to exercise his discretion in the matter and make an order staying the sale. Whether or not this point can be raised in the proceedings now pending under O. 21, R. 90 of the Code, we do not at present decide. This appeal is accordingly dismissed with costs three gold mohurs.

Nasim Ali, J.—I agree.

W.S. *Appeal dismissed.*

A. I. R. 1934 Calcutta 782

LORT-WILLIAMS AND NASIM ALI, JJ.

Hanuman Das Mundra—Plaintiff—Appellant.

v.

Damodar Laik and *others*—Defendants—Respondents.

Appeal No. 1080 of 1932, Decided on 16th March 1934, from appellate decree of 3rd Court Sub-Judge, Midnapore, D/- 29th June 1931.

Deed—Construction of — Patta — Implication of words 'Thica Mokra, Mourashi, Putra Pautradikramay' explained.

The words Thica Mokra, Mourashi, Putra Pautradikramay in a pottah along with a stipulation that there will be no remission of rent on any account, taken together, imply that a hereditary tenure with a fixed rent is intended to be created: 1931 *Cal* 265, *Ref.* [P 782 C 2]

Peary Mohan Chatterjee, Khitindra Nath Bose and *Bankim Chandra Roy*—for Appellant.

Amrendra Nath Bose and *Narendra Nath Choudhury*—for Respondents.

Nasim Ali, J.—The appellant in this case is the plaintiff in a suit for enhancement of rent of a tenure under S. 7, Ben. Ten. Act. The defence of the tenants was that their rent was not liable to be enhanced as it was a Mokarari Mourashi tenure, that is, a heritable tenure the rent of which is fixed in perpetuity. In support of this defence, a pottah of 1250 B. S. was produced by the defendants. The Courts below have found that this document is a genuine document and this finding has not been challenged before us. The only point that has been urged in this appeal is that on a proper construction of the pottah, the Courts below should have held that the tenure was only heritable but that its rent was not fixed in perpetuity. We have gone through this pottah, and we are of opinion that the construction put upon it by the Courts below is correct. The words 'Thica Mokra, Mourashi, Putra Pautradikramay' along with a stipulation that there will be no remission of rent on any account taken together, lead us to think that by this pottah a hereditary tenure with a fixed rent was intended to be created. The learned Advocate for the appellant argued that the word 'Mourashi' was not enough to show that the rent was fixed in perpetuity. But there are other expressions in this pottah which clearly indicate that the intention of the grantor was to fix the rent in perpetuity. The word 'Thica' as it appears from Wilson's glossary means 'a contract by which a person engages to pay a fixed amount of rent or revenue.' This word does not, in our opinion, mean 'temporary,' as was contended by the learned Advocate for the appellant. This contention of the appellant would be wholly inconsistent with the words "Putra

Pautradikramay" mentioned in the lease.

The tenure was evidently intended to be held from generation to generation and not for a temporary period. This view gains further support from the use of the word 'Mokra' in the lease. It was pointed out by Suhrawardy, J., in the case of 1931 Cal 265 (1) that the word 'Mokra' is a corruption of the Arabic word 'Mokarrar'. In view of the accepted meaning of the words 'Mokarari' and 'Mourashi' in a lease, there cannot be any doubt that the tenancy was not only hereditary but that its rent was also fixed in perpetuity. Reading the document as a whole, we are of opinion that this was a Mokarari Mourashi lease, and, consequently, the rent of the tenants cannot be enhanced. The appeal is, accordingly, dismissed with costs.

Lort-Williams, J.—I agree.

W.S. *Appeal dismissed.*

1. Nabendra Kishore Roy v. Chowdhury Mian, 1931 Cal 265=131 I C 584.

A. I. R. 1934 Calcutta 783

. C. GHOSE AND BARTLEY, JJ.

Secy. of State—Appellant.

v.

Surjyamal Haribaksh—Respondents.

Appeal No. 314 of 1932, Decided on 22nd March 1934, from appellate decree of Special Sub-Judge, Assam Valley, 29/30th July 1931.

Railways Act (1890), S. 75—Meaning of word 'loss' discussed.

'must be taken upon the facts of each case whether a loss has occurred within the meaning S. 75. The expression 'loss of goods' means that the goods are not forthcoming. Proof that goods have been misdelivered or have not been duly delivered is by no means conclusive evidence as to whether or not a loss has occurred. It is an error to think that the loss of the goods by the railway could only occur if the goods are lost through inadvertence or involuntarily. Loss by theft or by means of fraud is a loss within the meaning of S. 75. S. 75 also includes cases of loss by wilful neglect or connivance of railway officers. [P 784 C 1,2]

Govt. Pleader Sharatchandra Basak and *Roopendrakumar Mitra*—for Appellant.

Radhabinode Pal, Holiram Deka and *Bijalibhooshan Sanyal* — for Respondents.

Judgment.—In this case the facts, which are not disputed, are that the plaintiff is a dealer in Assam silk, endi and muga, and other silk cloths and yarns at Gauhati. On 3rd May 1927, four conspirators, intending to cheat him, came to his shop paid him an advance of Rs. 20-4 as. and bought goods worth Rs. 710-4 as., leaving Rs. 690 to be paid, when the railway receipt would be sent to them by value payable post to an address in the municipal market in Calcutta. The plaintiff, believing their story, sent the goods by railway parcel from Gauhati to Ranaghat and sent the railway receipt by value payable post to the address in the municipal market. The address in the municipal market being a bogus address, the receipt, after a time, was returned to the plaintiff. He then took steps and asked the station master at Ranaghat to return the parcel to him. But, long before that date, the conspirators had appeared at Ranaghat with a forged telegram purporting to be from the plaintiff at Gauhati and a forged letter posted at Gauhati, written on the plaintiff's printed note paper addressed to the station master at Ranaghat and a bogus indemnity bond. These documents induced the station master at Ranaghat to make over the parcel to them. Afterwards, when the facts became known, the police were informed and they arrested Jateendranath Mukherji, one of the conspirators, and he was sent up for cheating, and was convicted.

The plaintiff has sued the railway administration for the sum of Rs. 690, which he lost by the loss of the parcel. The trial Court found that the parcel was delivered by the station master and the parcel clerk at Ranaghat to Jateendranath Mukherji and another person, who produced certain forged documents, and that, in doing so, the railway officers were guilty of negligence and carelessness, but that as the plaintiff who sent the consignment of Assam silk to the value of Rs. 710 did not declare the value of the same, he was hit by S. 75, Railways Act, and, accordingly, the trial Court dismissed the suit. In appeal, the learned Subordinate Judge found that a fraud was 'intended to be practised on the plaintiff firm by a bogus customer and that a well-planned case of cheating had been laid out and it was successfully carried out either with the connivance of the station staff at Ranaghat or through their gross and deliberate carelessness. The learned Sub-

ordinate Judge further found that, in his view, the wrong delivery of the parcel did not amount to a loss within the meaning of S. 75 and therefore S. 75 did not apply to the case. He allowed the appeal and decreed the suit.

In this Court, the only question is whether S. 75, Railway, Act, is a bar to the plaintiff's success of the suit. The learned Subordinate Judge has found and Dr. Pal on behalf of the plaintiff, respondent, has urged that, having regard to the decision in the case in 1924 Cal 725 (1), it should be held that misdelivery, such as in this case, does not amount to a loss within the meaning of S. 75. We observe that in the case of 1924 Cal. 725 (1), the dispute with the railway company was as to the application of risk note form B. Under that risk note, the railway company would be responsible for wilful negligence or theft by railway servants. It was held by Page, J., that the onus was on the railway company to show that the goods were lost by inadvertence or involuntarily. In that case, if the railway company had admitted that the goods were lost by theft committed by railway servants, they would have lost the suit. The learned Subordinate Judge was, in our opinion, in error in thinking that the loss of the goods by the railway could only occur if the goods had been lost through inadvertence or involuntarily. Loss by theft or by means of fraud is, in our opinion, clearly a loss within the meaning of S. 75. This view will appear clear from the observation of Page, J., in the case of 1924 Cal 725 (1). There the learned Judge observes thus :

"It appears to me that it is equally inaccurate to affirm that goods which are not duly delivered, or have been misdelivered, are lost, as to assert that they are not lost. The true view would seem to be that in either case the goods may or may not be lost, and that prcof of non-delivery is by no means conclusive evidence as to whether or not a loss has occurred."

In our opinion, it must be taken upon the facts of each case whether a loss has occurred within the meaning of S. 75. The learned Government Pleader, on behalf of the appellant, has quoted the cases in 1919 Mad 140 (2), 1921 Lah. 1 (3) and 1925 All. 273 (4), in all of which it has been held that the expression "loss" includes cases where the goods are not forthcoming and under S. 77 mere non-delivery may amount to a loss. We are of opinion that we need not refer to the decision of other High Courts. The decision of Suhrawardy and Page, JJ., in the case of 1924 Cal. 725 (1), which was followed in 1926 Cal. 612 (5), is in our opinion, sufficient for our purpose.

The facts in this case are clear. A set of four thieves went to Gauhati to the shop of the plaintiff ; while some of them ordered the goods, one of them stole some note-paper of the plaintiff. Thereafter, one or more of the conspirators remained at Gauhati and in the name of the plaintiff sent to the railway station master at Ranaghat a bogus telegram and a forged letter written on the plaintiff's note paper and one of the conspirators arrived at Ranaghat with other bogus papers and induced the station master and the parcel clerk to make delivery of the parcel to him. The Courts below have concurrently found that the station master and the parcel clerk were guilty of carelessness and connivance. There is no doubt however that the goods were practically stolen by Jateendranath Mukherji. He was traced and tried in a criminal Court and convicted. It is thus clear that the goods were stolen by some thieves and disposed of by them. Dr. Pal argues that the mere fact that the goods were taken away by some thieves does not lead to the inference that the railway administration had really lost the goods, for they have not given any evidence to show that they made any endeavour to recover the stolen goods. We are of opinion that the argument has no force in this case. The goods had been obtained by fraud by some thieves. The railway administration complained to the police, who would have produced the goods, if they could have recovered the same from the thieves. In the circumstances of this case, we are of opinion that the goods

1. East Indiau Railway Co. v. Jogpat Singh 1924 Cal 725=79 I C 126=51 Cal 615.
2. M. and S. M. Ry. Co. Ltd. v. Haridoss Parmalidoss, 1919 Mad 140=49 I C 69=41 Mad 871.
3. Hill, Sawyers and Co. v. Secy. of State, 1921 Lah 1=61 I C 926=2 Lah 133 (FB).
4. E. I. Ry. Co. v. Fazal Ilahi, 1925 All 273=85 I C 474=47 All 136.
5. Gopiram Behariram v. Agents, E. I. Ry. and O. & R. Ry., 1926 Cal 612 = 94 I C 762.

were lost by fraud and theft, and it was a loss within the meaning of S. 75, Railways Act.

It is next urged on behalf of the plaintiff, respondent, that S. 75 should not be read so as to include cases of loss by wilful neglect or connivance of railway officers. The section has no such qualification. It plainly says that, when any articles mentioned in Sch. 2 are contained in any parcel or package delivered to a railway administration for carriage by railway and the value of such articles in the parcel or package exceeds one hundred rupees, the railway administration shall not be responsible for the loss, destruction and deterioration of the parcel or package unless the person sending or delivering the parcel or package to the administration caused its value and contents to be declared or declared them at the time of the delivery of the parcel or package for carriage by railway. The plaintiff did not declare the value of the silk in the parcel ; he is hit by S. 75, and he cannot escape the effect of the section on the ground that the loss happened by the negligence or connivance of railway servants. It appears to us that in the case of valuable goods declaration of value is a matter of importance to the railway administration, as it would put the responsible officers of the railway on their guard and they would take special care to guard the said parcel. Under S. 75, the railway administration may require the consignor to pay a percentage on the value of the parcel by way of compensation for increased risk. Though they are not compelled to require such additional payment, yet the declaration would put responsible officers of the railways on their guard and for lack of such a declaration the plaintiff would stand to suffer in the case of loss of his goods.

In the last place it was urged by Dr. Pal that the railway administration did not directly plead loss of the parcel and therefore they are not entitled to succeed under S. 75 in this Court. The reply is that in para. (4) of their written statement they directly raised the plea of protection under S. 75 and it is also pointed out that the plaintiff in the notice he served on the railway administration pleaded loss of the parcel. In our opinion, there is no force in the argument. In the result we are of opinion that S. 75 applies to the facts of the present case and that, as the plaintiff did not make the requisite declaration, his suit must fail. The appeal is allowed and the suit is dismissed with costs in all Courts.

W.S. *Appeal allowed.*

A. I. R. 1934 Calcutta 785

M. C. GHOSE, J.

Amulya Charan Pal—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1238 of 1933, Decided on 2nd May 1934.

Criminal P. C. (1898), Ss. 504 and 514—Surety undertaking to produce accused till disposal of case—Case sent to another Magistrate—Surety is not discharged.

A person stood surety for the accused that he would produce him till the disposal of the case. The case was sent to another Magistrate and when called upon to produce accused, the surety contended that the bail bond had exhausted when the case was sent to the latter Court.

Held : that the bail bond was a contract between the Crown and the surety and that the surety was liable to produce the accused till the case was disposed of ; 30 *Cal* 107 and 1934 *Cal* 101, *Disting*. [P 786 C 2]

Probodh Chandra Chatteriee—for Petitioner.

Prafulla Chandra Guha — for the Crown.

Order.—In this case a rule was issued on the District Magistrate of Sibsagar to show cause why the orders complained of in the petition should not be set aside or why such other or further order should not be made as to this Court may seem fit and proper. It appears that one Nepal Chandra Roy was accused of cheating under S. 420, I. P. C., and he was produced in the Court of Mr. Sarma, Magistrate of Sibsagar, on 23rd January last. The Magistrate allowed the accused person to go on furnishing a bail for Rs. 200. Thereupon the petitioner Amulya Charan Pal executed a bail-bond to this effect :

"The above-named Nepal Chandra Rai will attend the Sibsagar Court in connexion with the case pending against him on the morning of 16th February 1933 at 11 A. M. during the time of first enquiry and shall appear on every (subsequent) day till the disposal of the case etc. etc."

On 16th February the Magistrate found that the place where the offence was committed was not in Sibsagar but in Lakhimpur District and the case

was accordingly sent to Dibrugarh Court for trial. The Magistrate of Dibrugarh called upon the surety to produce the accused. The surety took various adjournments but did not produce the accused whereupon the Magistrate of Dibrugarh sent back the bail bond to the Magistrate of Sibsagar with a request to take necessary action to enforce the provisions of the bond. The Magistrate of Sibsagar in whose Court the bail-bond has been given called upon the surety to produce the accused. The surety did not produce him but argued that as the case had been transferred to Dibrugarh he was not bound to produce the accused at Shibsagar. The Magistrate did not accept the argument and forfeited the bail-bond and directed the surety to pay Rs. 200. The appeal to the District Magistrate was dismissed.

It is urged by the learned advocate on the authority of the case in 30 Cal 107 (1) that when a surety executed a bail-bond guaranteeing that the person for whom he stood surety would appear at the Court of a Deputy Magistrate before whom the case was pending and the accused failed to appear before the District Magistrate to whose file the case had been transferred there was no breach of the condition of the bail-bond. In that case it was the District Magistrate who called upon the surety to produce the accused before the Magistrate in whose Court the bail-bond was executed. The case of 1934 Cal 101 (2) has also been quoted in support of the proposition that the bail-bond in this case has exhausted itself. In that case, the bail-bond was forfeited by the Magistrate before whom the case was pending. The forfeiture order was reversed on appeal. Thereupon the case was transferred to the original Magistrate and he proceeded to pass an order forfeiting the bail bond. It was held that such a forfeiture was wrong. In the present case the surety made a contract with the Magistrate of Shibsagar that he would produce the accused on every subsequent date in his Court till the disposal of the case.

The case against the accused has not been disposed of. The charge under S. 420, I. P. C., is still pending against him and a warrant without bail has been issued for his arrest. But it is urged that though the case is pending against him in the Dibrugarh Court it has been disposed of so far as the Shibsagar Court is concerned. This view does not appear sound. The petitioner voluntarily stood surety for the accused person that he would produce him before the Magistrate of Shibsagar until the case against the accused was disposed of. He knew very well that the case was not disposed of and that the charge was still pending against the accused person. Before the Magistrate of Dibrugarh he took the plea that he had executed the bail-bond at Shibsagar and would not produce the accused at Dibrugarh. Before the Magistrate of Shibsagar he took the plea that as the case had been sent to Dibrugarh Court the bail-bond had exhausted itself. The proposition does not appear correct. It was a contract between the Crown and the surety. The surety contracted with the Crown that he would produce the accused before the Magistrate until the case against the accused was disposed of. The case has not been disposed of and the surety has failed to produce the accused. The rule is discharged.

K.S. *Rule discharged.*

1. Samsuddin Sarkar v. Emperor (1902) 30 Cal 107=6 C W N 885.
2. Hem Lal Ganguli v. Emperor 1934 Cal 101 =1934 Cr C 145 = 147 I C 1041 = 35 Cr L J 532.

A. I. R. 1934 Calcutta 786

M. C. GHOSE AND MCNAIR, JJ.

Kailash Chandra Das and *another*— Petitioners.

v.

Narayan Chandra Das and *others*— Opposite Parties.

Civil Rule No. 117 of 1934, Decided on 18th April 1934, from order of Third Court Sub-Judge, Dacca, D/- 17th January 1934.

Court-fees Act (1870), Sch. 2, Art. 17 (6) —Accounts—Art. 17 (6) applies only where it is not possible to ascertain even approximately money value of subject-matter.

To bring the case within the scope of Art. 17 (6) it must be established that it is not possible to ascertain even approximately the money value of the subject-matter of the dispute. Where therefore a suit on accounts valued at Rs. 1,200 is decreed for Rs. 9,154, the appeal on such a decree should be valued at the enhanced sum. Such appeal will not be governed by Sch. 2, Art. 17 (6) as it cannot be said in the case that the money value of the subject-matter of the dispute is not ascertainable even approximately within that section. [P 787 C 1,2]

Atul Chandra Gupta, *Bankim Chandra Banerji* and *Mihir Mohan Mukherjee* — for Petitioners.

Prokash Chandra Pakrashi—for Opposite Parties.

Judgment.—In this case a rule was issued on the opposite party to show cause why the order complained of should not be set aside or why such other or further order should not be made as to this Court may seem fit on the grounds stated in the petition. The facts are that the opposite party had brought a suit on accounts valuing their suit at Rs. 1,200 and paying court-fees upon that amount. The trial Court finally decreed the suit for a sum of Rs. 9,154. Against that decree the petitioner made an appeal. The Court of appeal below on a preliminary objection came to the conclusion that the appeal is to be valued for the purposes of court-fees at Rs. 9,154 only and that the court-fee payable on that sum is Rs. 705 and that this court-fee must be paid or the appeal will stand dismissed.

It is urged before us that the plaintiffs, opposite party, having paid the court-fees on Rs. 1,200 only the petitioners are not bound to pay the court-fee for a larger sum specially because the plaintiffs have not paid the court-fees on the decree of Rs. 9,154. It is urged on behalf of the opposite party that under S. 11, Court-fees Act, the plaintiffs are not bound to pay the additional court-fee until they apply for the execution of the decree. From this fact it is urged that the amount for which the decree is to be executed is uncertain and that therefore this appeal comes properly under Sch. 2, Art. 17 (6), which applies to suits where it is not possible to estimate money value of the subject-matter of a dispute and where such a suit is not specially provided by the Court-fees Act. In our opinion, the appeal does not properly come under the clause quoted. To bring the case within the scope of this clause, it must be established that it is not possible to ascertain even approximately the money value of the subject-matter of the dispute. In this case there is a decree for Rs. 9,154 against the petitioner. Unless the petitioner succeeds in getting that decree set aside or altered in appeal the decree will stand until the contingency arises when the opposite parties do not pay the requisite court-fees in execution. But this contingency in our opinion, does not alter the value of the decree as against the petitioner. In our opinion the order of the Court of appeal below was correct and this rule must be discharged with costs—hearing fee one gold mohur.

G.A. *Rule discharged.*

A. I. R. 1934 Calcutta 787

PATTERSON AND GUHA, JJ.

Misil Mirdha and *others*—Petitioners.

v.

Abdul Rahim and *others*—Opposite Parties.

Criminal Revn. No. 1098 of 1933, Decided on 15th March 1934, against order, D/- 18th April 1933.

Criminal P. C. (1898), S. 145 (5), (7)—Order dropping proceedings under S. 145 by reason of death of one party is ultra vires—Fresh proceedings are therefore without jurisdiction—Court should continue enquiry as provided in S. 145 (7), holding original proceedings as still subsisting.

Once proceedings under S. 145, Criminal P. C., are started they must be proceeded with until the question of possession has been determined and the order of proceedings can only be cancelled under S. 145 (5) when the Court is satisfied that no dispute likely to cause a breach of peace exists or has existed. An order dropping such proceedings merely by reason of death of one party is ultra vires and fresh proceedings are without jurisdiction. Under such circumstances the Court should continue enquiry under S. 145 (7) holding original proceedings as still subsisting, and question of possession on the date on which first proceedings were started should be decided according to law. [P 788 C 1, 2]

D. N. Bhattacharya and *Hamidul Huq Chowdhury*—for Petitioners.

N. K. Basu and *Priya Nath Dutt*—for Opposite Parties.

Judgment.—This Rule relates to certain proceedings under S. 145, Criminal P. C., and is directed against an order dated 18th April 1933, declaring the opposite party to be in possession of the disputed fisheries. The order complained of was made as a result of proceedings which were started by an order dated 4th February 1933. There had been previous proceedings with regard to the same matter, based on an order dated 7th November 1932. Those proceedings had however been dropped on 4th January 1933 by reason of the death of the principal member of the opposite party. The order of 18th April 1933, against which this Rule is directed, has been attacked on various grounds, but it will

be sufficient for the disposal of this Rule to consider only one of these grounds, viz. that the order dropping the previous proceedings was ultra vires, that those proceedings ought to be regarded as still subsisting, and that the subsequent proceedings were therefore without jurisdiction. This contention is, in our opinion, well founded, and must be given effect to. The object of S. 145 is to prevent breaches of the peace from occurring as a result of disputes regarding land or water or the boundaries thereof, and it provides a summary procedure for determining which party was in possession at the date on which the proceedings were started. Once proceedings under that section have been started, they must be proceeded with until the question of possession has been determined, and the order on which the proceedings are based can only be cancelled if the Magistrate is satisfied that no dispute likely to cause a breach of the peace exists or has existed, vide sub-S. (5).

In the present case, there was nothing before the Magistrate who dealt with the original proceedings to show that no dispute likely to cause a breach of the peace existed, or had existed, and the order dropping the proceedings does not in fact purport to have been made under sub-S. (5). The order dropping the proceedings was made merely because one of the parties to the proceedings had died but such an eventuality is provided for in sub-S. (7) which empowers the Magistrate to cause the legal representatives of the deceased to be made parties, and directs that the Magistrate shall thereupon continue the enquiry. It is therefore clear that the order of 4th January 1933 by which the proceedings were dropped, was ultra vires, and that the proper course for the Magistrate, on being informed of the death of one of the parties to the proceedings, was to continue the enquiry after making such substitution as might seem to him to be necessary. The result of the original proceedings having been dropped and fresh proceedings having been taken was, as the event has proved, to debar the petitioners from giving evidence in support of their claim to have been in possession of the disputed fisheries from time immemorial, and to limit the scope of the enquiry to the question of possession during the brief interval which elapsed between the withdrawal of the attachment which followed as a matter of course on the dropping of the original proceedings on 4th January 1933, and the initiation of fresh proceedings on 4th February 1933. In these circumstances it is clearly necessary in the interest of justice that the original proceedings should be revived and that the question of possession on the date on which those proceedings were started, viz. on 7th November 1932, should be decided according to law.

The Rule is accordingly made absolute, the order dated 18th April 1933 declaring the opposite party to be in possession is set aside, and the proceedings as a result of which that order was made are declared to have been without jurisdiction. The order dated 4th January 1933 by which the first proceedings were dropped, is set aside as being ultra vires and those proceedings, namely the proceedings based on the order of 7th November 1932, are declared to be still subsisting. The records will be sent back to the Magistrate with the direction that he should continue the enquiry based on the order dated 7th November 1932, and dispose of those proceedings according to law. The Magistrate will consider whether, in view of the revival of the original proceedings, the attachment of the fisheries in dispute which was in force during the pendency of those proceedings, should not be restored.

G.A. *Rule made absolute.*

A. I. R. 1934 Calcutta 788

PATTERSON, J.

Hem Chandra Bhaduri and *others*—Defendants—Appellants.

v.

Purna Chandra Sarkar and *others*—Respondents.

Appeals Nos. 1696 and 1697 of 1930, Decided on 1st August 1933, from appellate decree of 2nd Court, Sub-Judge, Pabna, D/- 6th January 1930.

Evidence Act (1872), Ss. 43, 11 and 13—Previous judgment not inter partes though does not operate as res judicata is admissible in evidence for limited purpose but not for discussing basis of its decision.

A previous judgment which is not inter parties is admissible in evidence under S. 43 read with Ss. 11 and 13. Though such a judgment does not operate as res judicata, it is to be treated as an evidence to be used for certain limited purposes and to be considered along with other evi-

dence, if indeed any other evidence exists. But in no case such judgment not inter parties can be dealt with to discuss the basis of its decision: 1925 *Cal* 194; 22 *Cal* 533; 19 *All* 277 (*PC*), *Rel. on*; 6 *Cal* 171 and 13 *Cal* 352 (*FB*), *Diss from.* [P 792 C 1, 2]

Jatindra Nath Sanyal and *Probodh Nath Sanyal*—for Appellants.

Bansorilal Sarkar—for Respondents.

Judgment. — The lands that form the subject-matter of the suits out of which these appeals arise, are situated in Mauza Jagtala which at one time constituted or formed a part of a Patni Taluk. As a result of a partition by the civil Court, this Patni Taluk was split up into a number of Sahams, and possession was delivered in accordance with the partition thus effected in or about the year 1894. During the pendency of the partition proceedings in the civil Court, one of the cosharer patnidars, namely Ishan Chandra Sarkar, granted a darpatni lease of his undivided 2½ gandas share in the Patni to one Dina Bandhu Bhaduri, and it appears that some of the other cosharer patnidars also granted darpatni lease of their respective shares at or about the same time. As a result of the partition, Saham No. 6 was allotted to the plaintiffs' predecessor-in-interest Ishan Chandra Sarkar, and Dina Bandhu and after his death his sons Saroj Bandhu and Kumud Bandhu, thereupon entered into possession as darpatnidars. In consequence however of certain defects in the map and Chitta on which the partition was based, disputes arose between the darpatnidars of Saham No. 6 and the darpatnidars of the two adjoining Sahamas, Nos. 9 and 14 and this dispute formed the subject-matter of certain proceedings in the course of the "Petty Settlements" of Sahams Nos. 9 and 14 that were commenced at the instance of the patnidars of those Sahams in or about the year 1904. The final publication of the Record of Rights of Saham No. 9 took place on 27th March 1907 and the final publication of the Record of Rights of Saham No. 14 took place on 24th July 1907.

In the course of the Petty Settlement of Saham No. 14 certain plots of lands were treated as appertaining to Saham No. 6, and were therefore excluded from the Record of Rights of Saham No. 14. The darpatnidars of Saham No. 14 accordingly instituted proceedings under S. 106, Ben. Ten. Act, with a view to having the Record of Rights corrected, the proceedings in question being numbered as Suits Nos. 1 and 7 of 1908. These suits were decreed by the Assistant Settlement Officer on 21st March 1908, but were dismissed on 4th April 1910 as a result of appeals to the Special Judge. The result of the order of the Special Judge allowing the appeals ought to have been the exclusion of the lands covered by the suits in question from the Record of Rights of Saham No. 14, but through some mistake the corrections made by the Assistant Settlement Officer in favour of the darpatnidar of Saham No. 14 were allowed to stand with the result that the darpatnidars of Saham No. 14 were somehow able either to obtain possession, or to maintain their existing possession, of the lands in question, in spite of the fact that the settlement records were, (or ought to have been if it had not been for the mistake above referred to) against them.

In respect of certain other plots of lands which the darpatnidars of Saham No. 6 had unsuccessfully claimed in the course of the settlement proceedings as appertaining to their Saham. the latter instituted two suits in the regular civil Courts for declaration of their title and for confirmation or recovery of possession. One of these suits was instituted in January 1908, and was subsequently renumbered as Suit No. 364 of 1914, while the other one was instituted in March 1913, and was subsequently renumbered as Suit No. 165 of 1914. In Suit No. 364 the principal defendants were the darpatnidars of Saham No. 14 and in Suit No. 365 the principal defendants were the darpatnidars of Saham No. 9, the lands to which these two suits related having been recorded at the Petty Settlements as appertaining to Sahams Nos. 14 and 9 respectively. These two suits were tried together, and during their pendency the Patnidar, (viz. the plaintiffs in the present suit or their predecessors-in interest), sued the Darpatnidars, (viz. the plaintiffs in those two suits), for arrears of rent, and having obtained a decree, they put the property to sale, and purchased it in execution on 19th April 1915. The sale was confirmed on 30th March 1916 and symbolical possession

was delivered to the plaintiffs on 12th January 1918. Inspite of the fact that the Darpatnidars' title had been extinguished by the sale of 19th April 1915 the latter were, for some reason which is not apparent to me, permitted to proceed with their suits which they did but without success, those suits being dismissed by the trial Court on 31st March 1919. It is further a matter for surprise that the Darpatnidars were not only permitted to prosecute their suits after their title had been extinguished, but were even permitted to file and to prosecute appeals against the decrees by which their suits had been dismissed. The appeals were partially successful, the result being that, by its judgment dated 9th August 1920 the appellate Court granted a declaration in respect of a portion of the lands in suit to the effect that the Darpatnidars' title had subsisted at the time of the suit, but had ceased to exist on 30th March 1916 the latter being the date on which the present plaintiffs' purchase in execution of the decree obtained by them had been confirmed. The suits were however dismissed in respect of the Darpatnidars' prayer for confirmation of possession or recovery of possession, the reason for this portion of the order being of course the fact that the Darpatnidars' title had been extinguished during the pendency of the suits. It should further be observed that what the appellate Court actually did was to decide which trijunction point should be adopted in re-laying the Batwara map with a view to ascertaining whether the lands in suit appertained to Saham No. 6 or to Sahams Nos. 9 and 14, as the case might be, and to direct that the plaintiffs' title be declared to have existed at the time of the suits, not in respect of any specified plots of land, but in respect of such portions of lands in suit as might be found to fall within Saham No. 6 on the Batwara map being relayed in the prescribed manner.

It is certainly a matter for surprise that inspite of the protracted nature of this litigation between the Darpatnidars of Saham No. 6 and the Darpatnidars of Sahams Nos. 9 and 14 the present plaintiffs should have taken no steps to have themselves made parties to Suits Nos. 364 and 365, although they had purchased the property as far back as the year 1915, 4 years before the suits were dismissed by the trial Court, and 5 years before the appeals were disposed of. Their case is that they had no knowledge of these proceedings, but it is not necessary to consider the truth of this assertion nor to arrive at any definite finding on the point. The District Settlement commenced in or about the year 1919, and the proceedings were not concluded till the year 1922 or thereabouts. The record-of-rights as finally published is in favour of the present defendants, but this does not in my opinion raise any presumption in favour of the principal defendants in respect of their Darpatni rights as against the present plaintiffs' alleged Patni rights. The fact of the defendants being in possession of the lands in suit came to their knowledge (so they alleged) for the first time in the year 1925, and they thereupon instituted the suits out of which these appeals have arisen on 16th April 1926.

The suit out of which Appeal No. 1696 of 1930 arises is Suit No. 34 of 1928, the principal defendants being the Darpatnidars of Saham No. 14, and the suit out of which Appeal No. 1697 of 1930 arises is Suit No. 35 of 1928, the principal defendants being the Darpatnidars of Saham No. 9. In Suit No. 34 the lands in dispute have been described in Schedules Ka, Kha and Ga of the plaint. The lands described in Schedule Ka are alleged by the plaintiffs to have formed part of the lands in respect of which title was found in favour of the Darpatnidars in Suit No. 364 of 1914. The lands claimed in Suit No. 35 are alleged by the plaintiffs to have formed the subject-matter of Suit No. 365 of 1914, which was heard and decided along with Suit No. 364. The lands described in Schedule Kha of Suit No. 34 are alleged by the plaintiffs to have formed part of the land to which Suit No. 1 of 1908 related, and those described in Schedule Ga are alleged by the plaintiff to be comprised within the lands which form the subject-matter of Suit No. 7 of 1908.

In the present proceedings no local inquiry has been held, and no attempt has been made to re-lay the Batwara map with reference to the map prepared during the time of the District Settlement. The plaintiffs have in fact relied entirely on the judgment of the trial

Court in Suit No. 364 in respect of their claim to the lands of Schedule Ka of Suit No. 34, and on the judgment of the appellate Court in Suit No. 365, (the same judgment as that in Suit No. 364), in order to establish their claim to the lands of Suit No. 35, while in respect of the lands of Schedule Kha and Ga of Suit No. 34 they have relied entirely on the judgment of the appellate Court in Suits Nos. 1 and 7 of 1908 respectively. Some other oral and documentary evidence was produced on the side of the plaintiffs, but very little importance appears to have been attached to such evidence by the plaintiffs themselves, and no reliance has been placed thereon by either of the Courts below. The position is therefore that the success or failure of the plaintiffs' suit depends in the first instance on the legal effect of the judgments referred to above.

What the Courts below did was, in the first instance, to accept the plaintiffs' contention that the judgments referred to above were binding on the principal defendants, and were indeed conclusive on the question of title. The Courts below then proceeded to consider whether the plaintiffs had succeeded in showing that the lands claimed in the present suits were covered by the judgments and decrees of the appellate Courts in Suits Nos. 364 and 365 of 1914 and in Suits Nos. 1 and 7 of 1908. The trial Court held that certain parts of the lands claimed by the plaintiffs in the present suits, were covered by those judgments and decrees, and accordingly decreed both the suits in part. The lower appellate Court agreed in the main with the trial Court, but modified the findings in respect of some of the plots claimed in the present suits and alleged by the plaintiffs to be covered by the judgments and decrees in the Appellate Court in the previous suits referred to above. The principal defendants have now appealed to this Court, and have challenged the judgment and decree of the Courts below, mainly on the ground that the plaintiffs have failed to prove their alleged title, and also on certain other grounds.

In my opinion both the appeals must be allowed on the first ground referred to above. Both the Courts below have treated the decisions of the appellate Courts in suits Nos. 364 and 365 of 1914, and in Suits Nos. 1 and 7 of 1908, as being binding on the principal defendants, the latter having been parties to those decisions. They have in fact, though perhaps not in so many words, held that those decisions operate as res judicata on the question of title. I am of opinion that the Courts below were clearly wrong in taking such a view and for various reasons. In the first place the provisions of S. 11. Civil P. C., do not apply in terms to the proceedings in question inasmuch as the present plaintiffs were not parties to the former suits. It has been suggested on behalf of the plaintiffs that the latter in some way or other were representatives of the Darpatnidars of Saham No. 6 who were the plaintiffs in Suit Nos. 364 and 365, and the defendants in Suits Nos. 1 and 7. But it is clear from the findings of the Courts below, that the sale at which the plaintiffs purchased the property was a rent sale, and that what the plaintiffs got by the purchase was the Darpatni itself and not merely the right, title and interest of the judgment-debtors. Both the Courts below have found on a consideration of the entire evidence including the sale certificate, that the proceedings which resulted in the purchase of the property, were proceedings between the entire body of landlords and the entire body of tenants, and this is a finding of fact which cannot be called in question in this Court.

The Darpatni rights having been acquired by the patnidars, they have merged in the patni right, and this being so, it must be held that these suits have been brought by the plaintiffs solely in their capacity as patnidars, and not in any way as the representatives or successors in interest of the former darpatnidars. Moreover even if by their purchase the plaintiffs had only acquired the right title and interest of the darpatnidars, and even if it were held that there had been no merger and that the plaintiffs were entitled to the benefit of the findings on the question of title arrived at on appeal in Suits Nos. 364 and 365, the plaintiffs would not be entitled to a decree for possession in the present proceedings inasmuch as it was held on appeal in Suits Nos. 364 and 365 that the darpatnidars were not entitled to a decree for possession. The plaintiffs cannot have it

both ways: they cannot, as representing darpatnidars, get the benefit of the decision on the question of title arrived at by the appellate Court in Suits Nos. 364 and 365, without at the same time being debarred from obtaining possession under the terms of the very judgment and decree in which that decision was incorporated. Again it is abundantly clear that if the darpatnidars had been unsuccessful in Suits Nos. 364 and 365 of 1914, or in Suits Nos. 1 and 7 of 1908, the plaintiffs, as patnidars, would not have been bound by the decisions arrived at in those suits, not having been parties thereto. For these and other reasons it must be held that the judgments and decrees referred to above do not operate as res judicata in respect of the present proceedings, and the principal defendants in the present proceedings, although they were parties to the former proceedings, are in no way bound by the decisions arrived at in those proceedings.

It has been further contended on behalf of the appellants that if the judgments and decrees in Suits Nos. 364 and 365 of 1914, and in Suits Nos. 1 and 7 of 1908, do not operate as res judicata, they are not admissible in evidence at all. It appears to have been at one time held by this Court that a previous judgment which was not inter partes could not in any circumstances be admitted in evidence in any subsequent proceedings: vide 6 Cal. 171 (1) and 13 Cal. 352 (2). It was however pointed out by a Full Bench of this Court in 25 Cal. 522 (3) that those decisions had been materially qualified by the observations made by their Lordships of the Privy Council in 22 Cal. 533 (4) and 19 All. 277 (5); and in recent years the tendency has been to admit such judgments in evidence under certain circumstances and for certain limited purposes, under the provisions of S. 43, Evidence Act, read with Ss. 11 and 13 of that Act, vide the decision of this Court in the case of 1925 Cal. 194 (6). This being the present state of the law it seems to me that the judgments in question have been rightly admitted, and that although they do not operate as res judicata they ought to be treated as pieces of evidence to be used for certain limited purposes and to be taken into consideration along with the other evidence, if indeed any other evidence exists. The lower appellate Court has however gone far beyond this, and has discussed, for example, the basis of the decisions arrived at by the appellate Court in Suits Nos. 364 and 365, and has come to the conclusion that the reasons given in the judgment of that Court in support of its decision were sound, and that the decision arrived at was the right decision. This is clearly not the proper way of dealing with a judgment not inter partes, which does not operate as res judicata, and which has been received only for certain limited purposes.

I have indicated above the very peculiar nature of the decision arrived at by the appellate Court in Suits Nos. 364 & 365, and it seems to me that having regard to the circumstances in which that decision was arrived at and the nature of the decision itself, it is of no value whatever in arriving at a decision regarding the present plaintiffs' title to the lands described in Schedule ka of Suit No. 34 or to the lands to which Suit No. 35 relates. As regards the effect of the decision of the appellate Court in Suits Nos. 1 and 7 of 1908, this was merely a decision on the question of possession and its effect was the same as an entry in the Record of Rights regarding possession, that is to say its effect was to entitle the darpatnidars of Saham No. 6 who were the principal defendants in those suits, to the benefit of the presumption regarding their possession that would have arisen out of an entry recorded in their favour in the finally published Record of Rights. This presumption would however have been of little value to the darpatnidars in respect of the question of their title to the lands covered by that decision, and the decision is in my opinion of no value whatever so far as the present plaintiffs who are the darpatnidars, are concerned.

1. Gajju Lall v. Fatteah Lall, (1881) 6 Cal 171=6 C L R 439.
2. Surendra Nath v. Broja Nath Pal, (1886) 13 Cal 352 (F B).
3. Tepu Khan v. Rajani Mohan Das, (1898) 25 Cal 522=2 C W N 501.
4. Ram Ranjan v. Ram Narain, (1895) 22 Cal 533=22 I A 60=6 Sar 530 (P C).
5. Bitto Kunwar v. Kesho Pershad, (1897) 19 All 277=24 I A 10=7 Sar 131 (P C).
6. Gopi Sundari v. Khirode Gobinda, 1925 Cal 194=82 I C 99.

The result is that the plaintiffs must be held to have failed to establish their title, and for this reason alone their suits must be dismissed. In these circumstances it is not necessary to consider the other points that have been urged on behalf of the appellants. On the questions of limitation, acquisition of title by adverse possession, and absence of notice under S. 167, Ben. Ten. Act, I may however remark that those points have been decided in favour of the plaintiffs by both the Courts below, and I see no reason to doubt the correctness of the findings on those points arrived at by those Courts. The plaintiffs having failed to prove their title, the appeals are allowed, the judgments and decrees of both the Courts below are set aside, and both the suits are dismissed with costs in all Courts. Leave to appeal under S. 15 of the Letters Patent has been asked for and refused.

G.A. *Appeals allowed.*

A. I. R. 1934 Calcutta 793

LORT-WILLIAMS AND M. C. GHOSE, JJ.

Abdul Hamid — Judgment-debtor — Appellant.

v.

Prokash Chandra Nandi and *another* —Decree-holders—Respondents.

Appeal No. 379 of 1932, Decided on 16th March 1934, from original order of Sub-Judge, 2nd Court, Mymensingh, D/- 22nd August 1932.

(a) Partition Suit—Delivery of possession of party's share in execution of final decree not complete—Fresh delivery of possession is available in law—Execution.

Where after delivery of possession made in execution of a final decree for partition, a party cannot get actual possession of his share, Court should order for fresh delivery of possession.

In execution of a final decree for partition *A's* share was delivered, but it was found that *A* could not get actual possession of his share as some huts belonging to other co-sharers were standing on it. [P 793 C 2]

Held : that Court's order for a fresh delivery of possession by removing the huts was within jurisdiction. [P 794 C 1]

(b) Bengal Tenancy Act (8 of 1885), S. 18—According to the Bengal Tenancy Act before 1929 transferee of jote right without recognition by co-sharers was mere trespasser.

Under the law, as it existed to the end of 1928 a jote which was an occupancy holding was not transferable without the consent of the landlords and the landlords were entitled to ignore the transfer and treat the transferee as a mere trespasser.

A co-sharer of a taluk under partition purchased a jote, which was larger than his share in the taluk, but he did not obtain recognition of the transfer of the jote from the other co-sharers of the taluk. In the final partition a part of his jote on which huts were standing, fell within the sharers of other co-sharers in the taluk. [P 794 C 1]

Held : that Court could ignore his jote right in a final partition when he had failed to obtain consent of other co-sharers and could therefore order for removing his huts standing on the jote allotted to other cosharer to enable him to get possession of the allotted jote. [P 794 C 1]

(c) Execution—Execution Court cannot go behind decree.

Where a partition decree gives one party actual possession of his share, the other party who has omitted to prove his special right in the trial Court cannot agitate the matter in the execution Court. [P 794 C 1]

Hamidul Huq Chowdhury — for Appellant.

Priya Nath Dutt—for Respondents.

M. C. Ghose, J. — This is an appeal by defendant 81 in an execution case arising out of a final decree in a partition suit. The partition suit was instituted in 1928. A preliminary decree was passed in March 1931 and a final decree in September 1931. The final decree was amended on petition in 1932. The respondents, who were defendants in the partition suit as co-sharers, applied for possession of their share. A commissioner was directed by the Court to deliver possession to the respondents. He delivered possession on 24th April 1932. At that time it was found that there was within the respondents' share some huts belonging to the appellant. Thereupon on 27th April 1932 the respondents applied to the Court for fresh delivery of possession by removal of the appellants' huts. After hearing the objection filed by the appellant the Court by an order dated 22nd August 1932, overruled the appellant's objection and passed an order for delivery of possession to the respondents by removing the huts of the appellant. Against that order the present appeal is made. The first ground taken in appeal is that the Court below acted without jurisdiction inasmuch as there is no provision in law for a second delivery of possession. It appears that the delivery of possession made on 24th April 1932 was not complete. Under the final decree the respondents were entitled to get actual possession and as the appellant had some huts standing on a portion of the land they could not get actual possession. In

the circumstances, the Court acted within jurisdiction in ordering a fresh delivery of possession by removing the huts of the appellant.

The next point urged is that the learned Subordinate Judge was wrong to order removal of the appellant's huts. It appears that the appellant was owner of a small share of the taluk which was under partition and within the taluk he had purchased a jote right; the area of his jote was larger than the area of his share of the taluk. In the final partition his own jote was allotted to him as far as possible within his share of the taluk. But as the area was in excess, certain portions of the jote fell within the shares of other cosharers of the taluk. All the co-sharers had demanded actual possession of their shares and the Court by its final decree directed actual possession to be given.

The appellant in this case did indeed file a written statement in which he mentions his jote right, but he did not give evidence in Court nor did he take any steps to guard his jote rights. Under the law as it existed to the end of 1928 a jote which was an occupancy holding was not transferable without the consent of the landlords and the landlords were entitled to ignore the transfer and treat the transferee as a mere trespasser. In this case there is nothing to show that the appellant obtained recognition of the transfer of the jote from the other cosharers of the taluk. In the circumstances the Court of trial did not take into account the jote right in making the final partition. Further, the matter cannot be agitated in the execution stage. The execution Court has no jurisdiction to go behind the decree and alter or revise it. The decree gave the respondents actual possession of the shares. The appellant should have proved his jote right in the trial Court. Having omitted to do so he cannot now agitate the matter in the execution Court. The appeal therefore fails and is dismissed with costs, hearing fee being assessed at two gold mohurs.

Lort-Williams, J.—I agree.

G.A. *Appeal dismissed.*

A. I. R. 1934 Calcutta 794

LORT-WILLIAMS AND M. C. GHOSE, JJ.

Emperor

v.

D, a Pleader

Civil Ref. No. 10 of 1933, Decided on 5th February 1934, from order of Munsif, Second Court, D/- 12th September 1933.

Legal Practitioners Act (1879), S. 14 — Pleader can be charged under S. 14 only when fact of his signing petition of satisfaction of decree has been finally established.

Where the point for inquiry under S. 14 is whether a pleader has signed and filed a petition of satisfaction in a mortgage execution case and he denies the same, no charge can be framed against him under S. 14, unless it is established beyond reasonable doubt that he has actually signed the petition concerned. [P 794 C 2]

Basak and *Rupendra Coomar Mitter*—for Reference.

Bankim Chandra Mukerji and *Asoke Nath Roy*—for Opposition.

Facts.—The point for inquiry was whether the pleader signed and filed the petition of satisfaction in the mortgage execution case. The pleader Babu *D* stated in his petition showing cause that he did not sign and file the petition of satisfaction. It was nobody's case that the pleader Babu *D* was empowered by the decree holders to act on their behalf. The pleader admitted that he got notice in the Miscellaneous Judicial Case No. 1 of 1926; he was aware of that case and he happened to be present when that case was heard.

M. C. Ghose, J. — Upon hearing Dr. Basak in support of the reference and Mr. Mukerji on behalf of the pleader against whom these proceedings were started, we are of opinion, upon consideration of all the circumstances, that it is not established beyond reasonable doubt that the pleader *D* actually signed the petition of compromise which was put in. It is true that the Munsif, who tried the suit, found against the pleader but, on appeal, the Additional District Judge disbelieved the evidence and came to the conclusion, as a final judge of fact, that it was not established that *D* signed the petition. In this view of the matter we are of opinion that the charge framed against him has not been established. The reference is rejected.

Lort-Williams, J.—I agree.

G.A. *Reference rejected.*

A. I. R. 1934 Calcutta 795

M. C. GHOSE, J.

Ananda Charan De—Judgment-debtor—Petitioner.

v.

Mahalakshmi De and *others*—Opposite Parties.

Civil Rule No. 1416 of 1933, Decided on 4th May 1934, from order of Sub-Judge, Faridpur, D/- 11th September 1934.

Civil P. C. (1908), O. 21, R. 90 and O. 1, R. 10—Pre-emption—Landlords petitioning under S. 26 (f), Ben. Ten. Act, are proper parties to proceedings for setting aside sale—Ben. Ten. Act (8 of 1885), S. 26 (f).

A petition of pre-emption under S. 26 (f), Ben. Ten. Act, was pending. The decree-holder, who was also the auction purchaser and the judgment-debtor together filed a petition of compromise agreeing to set aside the sale and the landlords (who wanted to pre-empt) applied to be made parties to the proceedings for setting aside the sale in order to contest the petitioner's application to set aside the sale.

Held: that the landlords having received notice of the transfer and having filed the petition under S. 26 (f), Ben. Ten. Act, for pre-emption were proper parties to the proceedings for setting aside the sale. [P 795 C 2]

Jogesh Chandra Roy and *Gunendra Krishna Ghose*—for Petitioner.

Asita Ranjan Ghose—for Opposite Parties.

Judgment.—This is a petition by the judgment-debtor. The facts are that in execution of a money decree of 1930 the petitioner's property now in suit was sold in auction on 26th January 1931 and purchased by opposite party No. 6. Thereafter on 16th March 1932 the petitioner filed an application under O. 21, R. 90, Civil P. C., to set aside the sale. Meantime opposite parties Nos. 1 to 4 who are co-sharer landlords in respect of the property applied under S. 26-F, Ben. Ten. Act, for pre-emption. While that petition of pre-emption was pending, on 23rd May 1932, the decree-holder the auction purchaser and the judgment-debtor together filed a petition of compromise by which they agreed that the sale should be set aside. The Court passed the following order.

"The petition of compromise filed by both parties be kept on the record and put up on the date fixed for necessary orders. Thereafter on the prayer of the opposite parties they were made parties to the sale set aside case and the matter was contested between the judgment-debtor and them."

In the result the Munsif found on the evidence that the sale had been brought about by the fraudulent suppression of the sale process and thereby the judgment-debtor had suffered substantial loss. He set aside the sale. In appeal the learned Subordinate Judge has come to the conclusion that the petition of the judgment-debtor was barred by limitation. In that view he has reversed the finding of the Munsif and confirmed the sale. In this Court it is urged by the learned Advocate for the petitioner that the learned Subordinate Judge committed an error in his finding on limitation by relying upon a statement of a witness in the cross-examination which was made to him in a puzzle. I am of opinion that the finding of fact of the Court of appeal below is not liable to be set aside by this Court in revision.

It was strenuously contended that as the decree-holder and the auction purchaser agreed with the judgment-debtor to set aside the sale the Court had no jurisdiction to allow the landlords to be made parties in order to contest the petitioner's application to set aside the sale. The Munsif held that the landlords having received notice of the transfer and having filed the petition under S. 26 F, Ben. Ten. Act for pre-emption had an interest in the matter and under O. 1, R. 10, Civil P. C., it cannot be said that his action was illegal. The matter was not argued in the Court of appeal below at all. An unreported case decided by Sir C. C. Ghose, J., on 3rd September 1931 has been quoted in support of the contention that the landlords had no jurisdiction to oppose the petition to set aside the sale. I have perused that judgment. In that case the sale was actually set aside by the Munsif and thereafter he refused to consider the petition of the landlords for pre-emption. In the present case the sale was not set aside by the Munsif. He kept the petition pending and heard the opposition of the landlord. There is, in my opinion, no error of law or procedure in this matter. In the result the Rule is discharged with costs—hearing fee is assessed at one gold mohur.

W.S. *Petition dismissed.*

A. I. R. 1934 Calcutta 796

ROY, J.

Ramlal Murlidhur—Plaintiff.

v.

Haribux Puranmull—Defendant.

Suit No. 49 of 1934, Decided on 7th March 1934.

(a) Arbitration Act (9 of 1899), S. 4—Document of submission signed by one and accepted by other party is valid within the Act—Both parties need not sign.

It is not necessary that there should be the signatures of both parties to a written submission. A document signed by one party and accepted by the other party is enough for the purposes of the Act : 1929 *Cal* 97 and 1931 *All* 136, *Ref*. [P 797 C 1]

(b) Arbitration Act (9 of 1899), S. 19—Arbitration clause in original contract between importer and first dealer of goods—Sowdahs between successive dealers must on construction prove clear submission to arbitration clause in original contract to make order under S. 19.

Goods bought from an importing firm by a particular dealer are often sold in the market to various successive dealers, and the ultimate buyer takes delivery from the importer. The sowdahs between successive dealers are more or less always in the same form such as : "As we bought the goods of importer we sold to you in the same way. All the terms and conditions are the same as there in the original contract between the importer and the particular dealer." The original contract between the importer and dealer usually contains a clause by which the parties thereto agree to refer any disputes between them to arbitration. Such an arbitration clause cannot be said to be an incident of a contract for the sale or purchase of goods. Therefore unless the language of the particular sowdahs clearly indicates that the parties thereof definitely mean to bind themselves with that arbitration clause, that sowdah in its usual form as above cannot incorporate the arbitration clause in the contract which constitues a collateral bargain between original parties, and there is no valid submission to make order under S. 19 : 1921 *Cal* 767 and 1920 *Cal* 795 ; 1930 *Cal* 774 ; *T. W. Thomas Co., Ltd.* v. *Portsea Steamship Co., Ltd.* (1912 *A. cases* 1) ; *Weir & Co.* v. *Piric & Co.*; (1893) 3 *Comr cases* 263 ; (1911) *Probate* 54, *Ref*. [P 798 C 1, 2]

S. R. Das—for Applicants.

Sudhir Roy—for Ramlal Murlidhar.

Judgment.—This is an application on behalf of the defendant firm under S. 19, Arbitration Act, for an order that all proceedings in this suit be stayed. It appears that on 28th June 1923 the defendant firm entered into a sowdah or contract with the plaintiff firm for the purchase of thirty bales of saris 10 yards 44 inches Hati border of two colours, shipments July, August and September. An entry was made in the plaintiff firm's sowdah beek setting out the terms of the contract between the plaintiff firm and the defendant firm which was signed by or on behalf of the defendant firm. The entry contains the following words :

"As we bought the goods of Punna Lal Sagoremull we sold to you in the same way. All the terms and conditions are the same as there."

There was, it is admitted, an arbitration clause in the contract by which the plaintiff firm had bought the goods, which they had sold to the defendants, from Punna Lal Sagoremull, and the applicant relies on the words I have just quoted in the entry in the plaintiff firm's book relating to the sowdah in suit as having the effect of incorporating the arbitration clause in the contract or sowdah in suit. It is on the strength of that arbitration clause that is alleged to have been incorporated in the sowdah in suit that the present application is sought to be maintained.

It appears, that the goods, the price of which is the subject matter of the present suit, were delivered to the defendant firm on 11th January 1933. On 5th December 1933 the plaintiff firm through their solicitors made a demand on the defendants for payment of what they claim to be due to them for price of goods delivered. On 11th December 1933 the defendant firm replied to the letter of the plaintiff firm's solicitors. In the letter of 5th December the plaintiff firm's solicitors had threatened that failing payment within 24 hours from the receipt of their letter their instructions were to take steps against the defendant firm. In their reply through their solicitors Messrs. P. D. Himatsingka & Co., on 11th December 1933 the defendant firm in the last paragraph of their letter wrote :

"Please note that if in spite of what is aforesaid your clients take any steps they will do so at their own risk as to costs."

The correspondence seems to have ended there so far as the evidence before me goes. On 9th January 1934 the present suit was filed. This is a suit for the recovery of the price of goods sold and delivered to the defendants. Summons in the suit was served on the defendant firm on 10th January 1934, and on 13th January 1934 the defendant firm entered appearance. It is admitted that on 25th January 1934 the time for filing the defendant firm's written statement expired. On 9th February 1934

notice of motion was taken out by the defendant firm for their present application. On the same day, it appears, that the plaintiff firm's solicitors took out a summons to compel the defendant firm to file their written statement within a particular limited time, and it has been suggested by learned counsel for the respondent that the adjournment of that application amounted to a step in the proceedings. Now, the application for stay has been resisted on various grounds, but the main objection of the respondents is founded on the contention that there was no valid or binding submission under which matters could be referred to the arbitration of the Bengal Chamber of Commerce.

There are really two points involved in that contention or objection of the plaintiff. It is said, first of all, that the sowdah in suit being in the form in which we find it, and having been signed only by the defendant firm, there could be no submission within the meaning of the Arbitration Act. In my view there is no substance in this point at all, and I cannot say that this point was very seriously pressed by counsel. To my mind it is clear law that it is not necessary that there should be the signatures of both parties to a written submission. A document signed by one party and accepted by the other party is enough for the purposes of the Act. Reference may be made to the cases of 1929 Cal 97 (1) and 1931 All. 136 (2). There is a further point however which requires very careful consideration.

It has been submitted that the defendant firm cannot rely on the arbitration clause in the contract between the plaintiff firm and Punna Lal Sagoremull as that clause cannot be said to have been incorporated in the sowdah in suit, having regard to the language of the sowdah. There are two cases of this Court in which this very point has been considered in the case of sowdahs which were practically in the same terms as the sowdah in suit. In 1921 Cal 767 (3) Mookerjee and Fletcher, JJ., held that the arbitration clause was not incorporated whereas in the case of 1930 Cal. 774 (4), Rankin, C. J. and C. C. Ghose, J., held that the arbitration clause was incorporated.

In the latter case the learned Judges, though they referred to the case of 1921 Cal. 767 (3), did not say that the judgment of Mookerjee and Fletcher, JJ., was wrong. They contented themselves by saying that it was not necessary for the purpose of their judgment to go into any discussion as to whether or not the decision in that case was right in the particular facts appearing therein. It does not appear from the reports how the particular facts in the case of 1930 Cal. 774 (4) differed from the facts of the case of 1921 Cal 767 (3). The sowdahs seem to have been in the same form and were more or less in the same language. That is the state of the authorities so far as this Court is concerned on the very question which has arisen before me for discussion.

Counsel have referred to various English cases in which questions had arisen as to how far clauses in a charter party were incorporated in a bill of lading. I do not think that any useful purpose can be served by discussing the English cases. In most of the cases it was held that the arbitration clause was not incorporated in the subsequent contract contained in the bill of lading between the shipowner and the consignee. It is true that in one of the cases, I mean that reported in 3 Com. Cas. 263 (5), it was held that the arbitration clause in a colliery guarantee was incorporated into the charter party. In the same volume there is another case in which it was held that the arbitration clause was not incorporated.

It seems to me that the question is really one of construction of the particular sowdah in suit, but the English cases are useful for certain observations made by learned Judges in the course of their judgments in those cases. I should like particularly to refer to the case reported in 1912 A. C. 1 (6), and to the

1. Radha Kanta Das v. Baerlien Brothers, Ltd., 1929 Cal 97=117 I C 540=56 Cal 118.
2. Shankar Lal Lachmi Narain v. Jaini Bros., 1931 All 136=132 I C 324=53 All 334.
3. Chatturbhuj Chandunmull v. Baseodas Daga, 1921 Cal 767=60 I C 909=47 Cal 799.
4. Vali Mohamed Ayoob v. Shamdeo Gopiram, 1930 Cal 774=128 I C 333=34 C W N 447.
5. Weir & Co. v. Pirie & Co., (1898) 3 Com Cas 263.
6. T. W. Thomas & Co. Ltd. v. Portsea Steamship Co. Ltd., (1912) A C 1=81 L J P 17 =55 S J 615=12 App MC 23=105 L T 257

observations of the Lord Chancellor and Lord Loreburn at p. 6, and the observations of Lord Gorell at pp. 8 and 9 of the reports. I may also refer to the judgment of Vaughan Williams, L. J., in the case of (1911) p. 54 (7), at p. 63. In my view, in this case, the clause for arbitration which is to be found in the plaintiff firm's contract with Punna Lal Sagoremull was not and could not be incorporated in the sowdah in suit. The words of the sowdah are in my view, ambiguous, and it is certainly open to question whether the words were intended to refer to the arbitration clause at all. I think the arbitration clause constituted a collateral bargain between the plaintiff firm and Punna Lal Sagoremull, and it cannot be said that an arbitration clause is an ordinary incident of a contract for the sale or purchase of goods.

In this connexion I should like to quote a pssage from the judgment of the Lord Chancellor in 1912 A C 1 (6) at p. 6. There the Lord Chancellor observes:

"The arbitration clause is not one that governs shipments or carriage or delivery or the terms upon "which delivery is to be made or taken"

It should be borne in mind that in that case the learned Judges were considering the question as to how far an arbitration clause in a Charter Party was incorporated in the Bill of Lading. I think it is difficult to say, on the language of the sowdah, that the parties in this case were intending to bind themselves to a clause for arbitration by the Bengal Chamber of Commerce or that they were intending to make the arbitration clause a term or condition of the bargain between themselves. It is common knowledge that goods bought from an importing firm by a particular dealer are often sold in the market to various successive dealers, and the ultimate buyer takes delivery from the importer. The sowdahs between successive dealers are more or less always in the same form, and in the absence of unambiguous indications in the sowdahs it is hardly reasonable to suppose that the ultimate purchaser was entering into a bargain with the last seller, that any disputes between them should be referred to arbitration under the rules of the Bengal Chamber of Commerce, a a body of whom perhaps the last purchaser had never known or thought of. To my mind, using the language of Lord Gorell in the case of 1912 A C 1 (6) at p. 9:

"There is a wide consideration which, I think, it is important to bear in mind in dealing with this class of cases. The effect of deciding to stay this action would be that either party is ousted from the jurisdiction of the Courts and compelled to decide all questions by means of arbitration. Now, I think, broadly speaking, that very clear language should be introduced into any contract which is to have that effect, and I am by no means prepared to say that this contract was ever intended to exclude, or does carry out any intention of excluding the jurisdiction of the Courts."

I am not prepared to say that the language of this sowdah is such as to make it clear that the parties ever intended to exclude or that the language ever had the effect of carrying out any intention of excludings, jurisdiction of of the ordinary Courts of Law. I have been referred by Counsel for the plaintiff firm to the cases of 1920 Cal 795 (8), and my attention has been drawn to a passage in the judgment of Mookerjee, J, at p. 1025: The learned Judge there says:

"It is plain that before the jurisdiction of the Court to make an order for stay under S. 19 can be invoked, it must be established beyond doubt that there is a valid submission. This is by no means clear in the case before us, for it is at least doubtful whether the arbitration clause in the Japanese Contract Form was or was not incorporated, by reference, as a condition in the contract between the parties."

That case also related to a sowdah more or less in the same terms as the sowdah in the suit, and the Japan Cotton Trading Co. Ld. were the importing firm concerned in that case. In my view, unless I am satisfied that the words of this particular sowdah clearly established the incorporation of the arbitration clause in the contract of Punna Lal Sagoremull into the sowdah, I ought to make any order for stay of the suit under S. 19. That being my view, think I ought to refuse this present application. Certain other objections were advanced by Counsel for the plaintiff firm to my making any order in favour of the applicants in this case. It was submitted that the defendant firm had taken a step in the proceedings by reason of the application made for

7. The Portsmonth, (1911) P. 54=80 L JP 36,

8. Kedar Nath v. Sumpatram Dooghur 1920 Cal 795=60 I C 951=47 Cal 1020,

adjournment of the sammons taken out by the plaintiff firm to compel the defendant firm to file their written statement. I am not prepared to accept that submission as correct. It was further contended that the applicant firm were not, when the suit was commenced, or at any other time, ready or willing to do all things necessary to the proper conduct of the arbitration. It seems to me that it is difficult to say on the affidavits before me that the applicants were at any time ready or willing to go to arbitration. The goods, the price of which form the subject matter of the suit, were as I have already said, delivered on 11th January 1933. No payment was made by the defendant firm and when a demand was made by the plaintiff firm's solicitors on 5th December 1933, there was no offer to go to arbitration or any indication at all by the defendant firm that they should like to have their disputes settled by arbitration, though it seems that the plaintiff firm's solicitors were threatening to take proceedings in Court. It is true that in their letter of 5th December the plaintiff firm's solicitors had not distinctly stated that they would take proceedings in Court, but the reply of 11th December of the defendant firm's solicitors, to my mind, fairly clearly indicates that the defendant firm's solicitors realised that the plaintiff firm's solicitors had been threatening proceedings in Court. It was at no time before the institution of the suit suggested by the defendant firm, the applicant in the present motion, that the dispute between the parties should be settled by arbitration. Even after the suit had been filed on 9th January 1934 the defendant firm did not evince any desire or intention to go to arbitration though they entered appearance so far back as 13th January 1934. It has been suggested in the affidavit in reply that there were negotiations for settlement between the defendant firm and Punna Lal Sagoremull, and that the defendant firm had only applied for stay of the suit as the negotiations had fallen through. It is not suggested that the negotiations for settlement were on the lines that there should be an arbitration between the plaintiff firm and the defendant firm, or between the plaintiff firm and defendant firm and Punna Lal Sagoremull. It seems to me quite clear that assuming the statements in the affidavits in reply to be correct, the defendant firm only realised that they might have some right to go to arbitration after they definitely ascertained that the disputes between the parties could not be settled amicably, and it was only then that they took action and brought on the present application. I am not satisfied that the defendant firm at any time at all genuinely desired to go to arbitration, and I am inclined to think that this idea of an application for stay of the suit under S. 19 was conceived after the defendant firm had taken the advice of their lawyers, and that they never themselves at any time thought that they had definite rights under the sowdah to go to arbitration. I do not believe they had any desire to have recourse to arbitration until it was apparent that the suit would be proceeded with in Court. In these circumstances I am clearly of opinion that I ought not to exercise my discretion in favour of the applicant. The application will therefore be dismissed with costs.

G.A. *Application dismissed.*

A. I. R. 1934 Calcutta 799

GUHA AND BARTLEY, JJ.

Jogesh Chandra Mukherjee—Plaintiff Appellant.

v.

Rai Beharilal Mitra Bahadur and *others*—Respondents.

Appeal No. 1441 of 1930, Decided on 15th August 1933, from appellate decree of Addl. Dist. Judge, Bakarganj, D/- 13th January 1930.

(a) Compromise decree—Party to decree including collusive compromise decree is bound by it—But third party affected by such decree is not bound.

A party to a decree, even if it were a collusive decree is bound by it, and neither of the parties to the compromise decree, though collusive, can escape its consequences. It may be open to a third party affected by a collusive decree to challenge the same but not any other parties to the decree. [P 801 C 2]

(b) Registration Act (1908), S. 17 (11)—Compromise decree declaring rights of person in land in suit—Document requires no registration.

Where a decree passed in terms of compromise evidenced by solenamas declares in favour of a tenant, a howla right in a land in suit as it relates to the subject-matter of the litigation, it does not require registration to be valid and operative in law. [P 802 C 2]

(c) Civil P. C. (1908), S. 11—Dismissal of suit for want of cause of action against some defendants—No issue being raised between plaintiffs and these defendants and no decision arrived at, it cannot be res judicata in second suit.

Where a suit is dismissed against some defendants for want of cause of action against them, and no issue is raised as between the plaintiff and these defendants, there is no decision which can be operate as res judicata in the second suit. [P 802 C 2]

Atul Chandra Gupta and *Radhika Ranjan Guha*—for Appellant.

Jogesh Chandra Roy, *Apurba Chandra Mukherjee*, *Manmathanath Das Gupta*, *Jitendra Nath Banerjee* and *Iswar Chandra Chakravarti* — for Respondents.

Judgment.—This is an appeal by the plaintiff in a suit for recovery of possessions of the lands specified in Sch. (gha) and for confirmation of possession of the lands of Sch. (ga) of the plaint, on declaration of his title to the same. The plaintiff's claim in suit was based upon the solenamas in terms of which a previous suit, No. 63 of 1913, was disposed of as between the plaintiff's father and the two sets of landlords, representing the entire interest in the lands in suit. The contesting defendants, defendants 1, 4 and 5 in the suit, resisted the claim of the plaintiff as made in the suit. Defendant 1 was the landlord, while defendants 2, 4 and 5 were persons claiming to be in possession of the lands in suit, holding the same under the landlords. The solenama on which the plaintiff's title was based, and under which the plaintiff claimed howla right in the lands in suit, were characterised by the defendants as documents fraudulently obtained by the plaintiff's father; they were not acted upon and given effect to; and they would not create any howla right in favour of the plaintiff's father. It was asserted that the lands were in the landlord's khas possession and from 1298 B. S. defendants 4 and 5 have been holding the same as tenants under the landlords. On the pleadings of the parties, various issues were raised for trial in the suit: and the most material of those issues for the purpose of this appeal are issues 9 and 6 raised in the case:

"Is the solenama alleged to have been entered into in T. S. No. 63 of 1913 of this Court, between the plaintiff's father and the zamindar defendants, legally admissible in evidence in this suit? Is it bona fide, valid or binding between the parties? Is the suit barred by the principle of res judicata?

The Court of first instance gave its decision in favour of the plaintiff. The plaintiff's howla right to the lands in suit was declared and the plaintiff was held entitled to get khas possession of schedule (gha) lands: and his possession in regard to (ga) schedule lands was confirmed. On appeal by the contesting defendants, the decision and decree passed by the trial Court in favour of the plaintiff were reversed. The plaintiff's suit was dismissed by the Court of appeal below. The plaintiff has appealed to this Court. In view of the nature of the controversy between the parties it is unnecessary at the outset to refer to the facts and circumstances relating to the solenamas filed in suit No. 63 of 1913, brought by the plaintiff's father against the landlords, the Chakrabarties, and against Hari Charan and Ledu, amongst others. The plaintiff's claim in that suit was based on esat howla and nim howla right and it was asserted that the entry in the Record of Rights showing that the lands were the maliks' khas lands was incorrect. The Chakrabarti defendants in that suit alleged that the lands appertained to a different estate altogether, thus denying the title of the landlord defendants in the suit. Hari Charan and Ledu, defendants 4 and 5 in the present litigation were made defendants in the suit of 1913, as pro forma defendants on the allegation that they had manufactured a kabuliat from a co-sharer landlord. The suit was dismissed, so far as Hari Charan and Ledu were concerned, on the ground that the plaintiff in suit No. 63 of 1913 had no cause of action against them. The plaintiff's suit so far as it was directed against the Chakrabarti defendants was dismissed, and the dismissal of the suit against the Chakrabertis appears to have been finally upheld by this Court, on 4th February 1919. As has been already indicated, the solenamas were filed in Court determining the rights of parties so far as the plaintiff landlord, defendants in suit No. 63 of 1913, were concerned. The howla right of the plaintiff in that suit was to be declared in the lands in suit. It was specifically stated in the solenamas that the lands

"shall continue to be in possession of the plaintiff in howla right under the zamindar defendant."

It was provided in the solenamas that if separate kabuliats were not executed the petition of compromise "shall be operative against the plaintiff as a kabuliat." The trial Court in its judgment, dated 10th September 1914, stated that the solenama will govern the plaintiff and defendants 1 to 3, representing the zamindary interests at the time. It was distinctly mentioned that

"as regards defendants 1 to 3 it is ordered that the compromise made, be recorded and a decree be drawn up in terms of the same, so far as they relate to the subject-matter of this suit."

It may be mentioned in this connexion that the subject-matter of suit No. 63 of 1913, so far as the lands claimed in the suit was the same as the subject-matter of the present litigation. A decree followed upon the judgment; and in the decree drawn up in the suit which was signed on 18th September 1914, by the Subordinate Judge who tried suit No. 63 of 1913, it was ordered that the plaintiff's osat howla and nim howla rights be declared as provided by the solenamas:

"The plaintiff shall remain bound by the terms of the solenamas filed by defendants 1 to 3."

There were appeals to the District Judge and to this Court, directed against the decision of the trial Court, but there is no indication whatsoever in the judgments of the appellate Courts that the rights of parties recognized by the solenamas between the plaintiff in the suit and the landlord defendants, was challenged or controverted. The compromise between the parties concerned had been recorded by the trial Court, and there is nothing contained in the judgment of the District Judge or in the judgment of this Court, which bears the interpretation that the compromise arrived at by the parties was not to be treated as valid and binding, as between the parties to the same. It is no doubt true that the terms of the compromise were not in accordance with the decision of the Court, dismissing the plaintiff's suit as against the Chakrabarti defendants. Keeping the above position in view could it be said that the compromise was not recorded and was not given effect to either by the District Judge or by this Court as the final Court of appeal. In our judgment, in view of the fact that the compromise was recorded in so many words by the Court of first instance, in which it was filed and there being nothing in the judgments of the appellate Courts which in any way affected the rights of parties as recognized by the landlords in favour of the plaintiff's father, it could not be said that the compromise was not recorded, and that it was not given effect to by the appellate Courts. The question of compromise being given effect to by the appellate Courts could not arise, seeing that the parties to the compromise did not in any way attempt to challenge the same.

The learned Additional District Judge has characterised the solenama in suit No. 63 of 1913 as "mere frauds," and he has held that they could not confer any title on Protap, the father of the plaintiff in the present case. It appears to us that the landlord defendants having suffered a compromise decree to be passed in suit No. 63 of 1913, by which he acknowledged the title of the plaintiff's father to the lands in suit in the manner mentioned therein he could not be allowed to raise the question of the compromise decree being invalid or not binding on him. The Chakrabarti defendants were not bound by the compromise decree, and they are not parties to the present litigation; but as between the plaintiff and the landlord defendants the terms of compromise must be held to be binding and operative on the question of title of the plaintiff to the lands in suit. The compromise decree was not challenged by any one, much less by the landlord defendant at any previous stage as fraudulent, and it was not established in this case to be in any way fraudulent excepting that in the course of argument it was sought to be made out that the compromise was in fraud of third parties, and therefore invalid and inoperative. It may be taken to be well established that a party to a decree, even if it were a collusive decree, was bound by it, and neither of the parties to the compromise decree, even though it were collusive, could escape its consequence. It may be open to a third party affected by a collusive decree to challenge the same, but not any other parties to the decree. In the case be-

fore us the Chakrabarti defendants whose interest was affected by the compromise decree, are not the parties challenging the same: it is the landlord who entered into the compromise with the plaintiff's father, who wants to resile from it. As indicated above, we are unable to give effect to the defence raised by the landlord defendant in the suit out of which this appeal has arisen, that the compromise decree in suit No. 63 of 1913 was not binding and operative as between him and the plaintiff.

The question of the effect of non-registration of the solenamas filed in suit No. 63 of 1913, was raised, on behalf of the contesting defendants in the suit. It was contended that a permanent tenure, in the shape of a howla could not be created in favour of the plaintiff by a solenama which was not registered. It is necessary to consider in this connexion that the solenamas filed in Court relates to the subject-matter of the litigation in which they were filed : and a decree was passed incorporating the terms of the solenamas. If the decree related to the subject-matter of the suit, as it undoubtedly did, it is difficult to appreciate how the solenamas required registration in the matter of recognizing the title of the plaintiff to the lands in suit, as a howla right. The decree passed in the suit of 1913 did not operate to create a howla lease, but it merely declared the howla right in the lands in suit. On the recitals contained in the solenamas filed in Court there can be no doubt that there was no present demise; the lands were in the possession of the plaintiff in the suit, as mentioned in the solenamas, and they were to remain in his possession as before. There was no permanent tenancy created by the solenamas; there was the pre-existing tenancy, and it was recognized by the landlord according to the decree passed by the Court which incorporated the terms of solenamas filed by the parties concerned. The decree passed in terms of compromise evidenced by solenamas filed in Court, which related to the subject-matter of the litigation, did not require registration to be valid and operative in law, and there is therefore no substance in the contention raised on behalf of the defendants that the solenamas creating a howla required registration, and non-registration of the solenamas made it impossible for the plaintiff to assert his title to the lands as appertaining to a howla.

The plaintiff in the suit, has, in our judgment, succeeded in establishing his title to the lands, by virtue of the compromise decree passed in suit No. 63 of 1913, and it was not open to the landlord defendants to question that title. The question was raised on behalf of defendants 4 and 5, that the dismissal of suit No. 63 of 1913, so far as it was directed against them, operated as a bar to the plaintiff's claim in this suit, so far as they were concerned. The plea of res judicata appears to have been raised on behalf of defendants 4 and 5. As has been mentioned above, the suit No. 63 of 1913 was dismissed so far as those defendants were concerned for want of cause of action against them. No issue was raised as between the plaintiff in the suit of 1913 and these defendants, and there was no decision which could operate as res judicata against the plaintiff in the present suit. We are therefore unable to appreciate how the question of res judicata could be raised on behalf of defendants 4 and 5, seeing that suit No. 63 of 1913 was dismissed so far as they were concerned, for want of cause of action. It appears however that defendants 4 and 5 claimed to be in possession of the lands in suit from 1298 B. S., holding the same as tenants by virtue of settlement obtained from the landlords. This part of the case requires investigation by the Court of appeal below : and the case has therefore to be sent back to the lower appellate Court for a decision of the question whether defendants 4 and 5 had such a title in them to be on the lands in suit, as could stand in the way of the plaintiff's recovering possession of the same, as claimed in the suit.

In the result the appeal is allowed. The decision of the Court of appeal dismissing the plaintiff's suit is set aside. The plaintiff is held to have established his howla right in the lands in suit as against the landlord defendants, and is entitled to a decree to that extent, the plaintiff's howla right to the lands in suit being declared, as a consequence of the decision arrived at by us on the question of title as between the plaintiff and the landlord defendants in the

suit. The case is remanded to the lower appellate Court for decision on the question as to whether the plaintiff is entitled to recover possession of the lands in suit from defendants 4 and 5. The decision on remand is to be given on the materials already on the record. The appeal is allowed, the case is remanded. The plaintiff-appellant is entitled to his costs against the landlord defendants in the suit in all the Courts. Costs as between the plaintiff and defendants 4 and 5 in the suit will abide the result on remand.

G.A. *Case remanded.*

A. I. R. 1934 Calcutta 803

(Special Bench)

BUCKLAND, AG. C. J., COSTELLO AND PANCKRIDGE, JJ.

United Provinces Electric Supply Co. Ltd., In re.

Reference under Stamp Act, Decided on 13th March 1934.

(a) Transfer of Property Act (1882), S. 105 — Meaning of term "premium" discussed—Provision in instrument purporting to be lease without specific condition of re-entry, that on payment of a certain sum in lump or by instalments, property demised would become absolute property of so-called lessee, shows that there is out and out sale and that sum to be paid is not premium within meaning of S. 105—Such instrument is not assessable to stamp duty under Stamp Act (1899), Art. 35 (c)—Deed, Construction of.

An indenture purporting to be a lease-deed on the face of it, provided in one of the clauses that the lessor had demised to the lessee certain lands together with electric generating station and other building, etc., belonging to the lessor in consideration of an annual rent of Rs. 3,000; and further provided that the lessee shall take over the liability to pay up a certain loan incurred for the installation of the electric generating station in certain fixed half-yearly instalments: In another clause the deed provided that if the lessee paid up the whole of the apportioned loan either by instalments or in a lump sum, the electric generating station, with the buildings and appurtenances, etc., excepting the land would become the absolute property of the lessee. The condition of re-entry in case of default of payment was omitted.

Held: that the sum to be paid by the so-called lessee was not a premium within the meaning of S. 105, but was in the nature of purchase price to be paid for the acquisition of the electric generating station and was not referable to the lease of the land of Rs. 3,000 per annum.

Held further: that the instrument was not assessable to stamp duty under Stamp Act, Sch. 1, Art. 35 (c). [P 807 C 1, 2; P 808 C 1]

(b) Stamp Act (1899), Ss. 31, 32 and 57—Adjudication under S. 31 is not final.

There is nothing in the provisions of S. 32 which indicates that an adjudication under S. 31 is, necessarily, in all cases and for all purposes final. Under S. 57, a reference lies to the High Court in such cases. [P 804 C 2]

Page and *D. R. Dass*—for Applicants.

Sircar and *Bose* — for Board of Revenue.

Costello, J.—This matter comes before us by way of a case stated under S. 57 (1), Stamp Act (2 of 1899). It is concerned with the adjudication of stamp duty, in respect of an indenture, dated 5th March 1931, made between the Municipal Board of Lucknow, on one side, and the United Provinces Electric Supply Company Ltd., on the other. It appears that the Municipal Board of Lucknow was the owner of a certain piece of land, which had been acquired by the Government of the United Provinces of Agra and Oudh, for the Board, under the provisions of the Land Acquisition Act (10 of 1870) and a notification of the Government of the United Provinces of Agra and Oudh, No. 2790/11/644A/2, dated 17th November 1892. For the purposes of carrying out a scheme of reorganization of its waterworks, the Board had obtained a loan from the Government of the United Provinces of Agra and Oudh of the sum of Rupees 18,50,000, under the provisions of the Local Authorities Loans Act (9 of 1914). This loan was repayable in forty half-yearly instalments of Rs. 80,035 as from 30th September 1927. A part of this loan had been applied in the erection on the piece of land in question of an electric generating station and all the necessary plant and machinery connected therewith.

The United Provinces Electric Supply Company, Limited (hereinafter referred to as "the applicants"), is a company, incorporated under the Companies Act of 1913, and has its registered office at 12, Mission Row, Calcutta, and this company was the holder of an electric license, issued to it under the provisions of the Indian Electricity Act of 1910, known as the Lucknow Electric License, 1914, and also of amending electric licenses, issued to the company on 15th March 1916, and 25th January 1924, under the provisions of the Electricity Act. The company entered into an agreement with the Board, on 5th March 1931, for the supply of such electrical energy as might be needed for municipal purposes as set forth in that agreement

—which was known as the Bulk Supply Agreement—and for the purposes of the supply, the Board agreed to grant a lease to the company of the land in question and of the electric generating station upon the terms and conditions set out in a deed which is the indenture of 5th March 1931, which indenture is the subject-matter of the present proceedings. On 22nd April 1931, the applicants lodged this indenture with th local Collector, for the purpose of the adjudication of the stamp duty, chargeable upon it. By the indenture, the Board, as I have stated, granted a lease of the land, already mentioned, together with the buildings upon it, to the company, for a term of 34 years and 170 days in consideration of the payment of a yearly rent of Rs. 3,000 and of the repayment by the company of the balance of the moneys borrowed by the Board from the Local Government amounting to the sum of Rs. 16,62,500 in 35 half-yearly instalments of Rs. 47,500. Put shortly, it was agreed in the indenture that, if the company paid up the whole of the apportioned loan, either by instalments or in a lump sum, then the electric generating station with the buildings and appurtenances would become the absolute property of the company. The applicants have stamped the document for the amount of Rs. 180-12-0 upon the footing that it was a lease at a rent of Rs. 3,000 per annum for the term of 34 years and 170 days, and thus fell within Art. 35 (a) (vi), Sch. 1, Stamp Act, and also an agreement falling within Art. 5 (c), Sch. 1, Stamp Act. The Collector of Stamp Revenue however treated the document as being a lease for a period of 34 years and 170 days at a yearly rent of Rs. 3,000 with a premium payable of Rs. 16,62,500 and, accordingly, assessed it for stamp duty not only under Arts. 35 (a) (vi) and 5 (c) Sch. 1, Stamp Act, but also under Art. 35 (c) which involved an extra duty of Rs. 24,937-8-0.

On 27th June 1931, the Collector formally adjudicated that this further duty of Rs. 24,937-8-0 was payable. The applicants, not being content with that, and having been advised that the deed was properly stamped, they, on 5th August 1931, submitted the opinion to the Collector, who however held that, as he had made the adjudication, he had no power to reconsider it. On 10th August 1931, the applicants appealed to the Board of Revenue as being the Chief Revenue authority, requesting, if necessary, that the matter might be referred to the High Court. On 31st October 1931, the applicants were informed by the Collector that the Board of Revenue had upheld the Collector's decision and accordingly, on 20th January 1932, the applicants requested the Board to refer the case to the High Court under S. 57, Stamp Act. On 15th February 1931 the Board replied however that the question of a reference was under consideration in connexion with a similar case and that it would reply further as soon as the decision had been arrived at in that case. On 23rd March 1932, the Board stated to the applicants that, as the adjudication by the Collector was made under S. 31, Stamp Act, it was final by reason of the provisions of S. 32, and therefore the Board was not in a position to refer the case to the High Court. It is not necessary for the purposes of the present proceedings that I should express any opinion as to whether or not that view of the matter was correct. But in passing, I am bound to say that it seems a little difficult to extract from the provisions of S. 32, anything which indicates that an adjudication under S. 31 is necessarily, in all cases and for all purposes, final.

It appears that the appellants did not pay the substantial sum demanded by way of extra duty, and so, on 16th August 1932 the Collector wrote that the only course left open to him was to impound the deed under S. 33, and to proceed to realise the duty and penalty under the provisions of S. 48, Stamp Act. Thereupon, the applicants, on 25th August 1932, pointed out to the Collector that, as he proposed to act inter alia under the provisions of S. 40, Stamp Act, he had then an opportunity of drawing up a case and referring it for the decision of the Board under the provisions of S. 56 (2), and the applicants requested the Collector to take that course. On 29th August 1932 the applicants reinforced their arguments by forwarding to the Collector a further legal opinion which they had obtained. Nevertheless, on 1st September 1932, the Collector replied refusing to make a reference under S. 56 (2) and stating

that, unless payment was made by 15th September 1932, he would impound the document and take action under S. 40. On the 6th of the same month, the Collector, apparently after perusing the opinion which had been sent to him, confirmed his refusal to make a reference. Thereupon, on 13th September 1932, the applicants petitioned the Board of Revenue to exercise control over the Collector under the provisions of S. 56, and to state a case to the High Court under S. 57. Three days later the Collector made an order impounding the document, and directing that the additional stamp duty together with an equal sum, by way of penalty, should be realised from the applicants. The Collector duly informed the applicants that the document had been impounded and formally demanded payment of the amount of duty adjudicated and the penalty. On 29th October, the Collector, wrote to the applicants asking for payment and stating that the Board had rejected the application for reference to the High Court. Thereupon, the applicants came before this Court, and on 24th March 1933 obtained from Lort-Williams, J. an order, in the nature of a Rule, calling upon the Board to show cause why the Member of the Board of Revenue should not state a case, with his opinion, on the question of the proper stamp duty chargeable on the deed. This order was served on 4th April 1933. The matter was mentioned to the Court, on 10th April and an order was made that the matter should stand out of the list until 22nd May 1933. On that date, no cause having been shown, the Rule, issued on 24th March 1933, was made absolute and the Board of Revenue was required to state a case by 3rd July 1933. On 27th June the case was filed by the Board of Revenue, and on 25th July a supplementary case was filed by the Board.

The learned Advocate General appearing before us for the Board of Revenue was at first disposed to argue, on the authority of the decision in the case of 1932 Cal. 736 (1) (this was the matter referred to in the letter of the Board of Revenue to the applicant, dated 15th February 1932), that the present proceedings were not competent, apparently on the footing that a mere adjudication cannot be challenged so as to enable proceedings in review of such adjudication to be filed. Again, it seems to me a little difficult to understand the basis of any such contention seeing that although S. 56 (1) refers to "powers exercisable by the Collector under Ch. 4 and Ch. 5 and under clause of the first proviso to S. 26," in sub S. (2) of S. 56, action under S. 31 is mentioned. S. 31 is in Ch. 3, not in Ch. 4, or Ch. 5. However the point is of no importance in the present case, because directly it was brought to the attention of the learned Advocate-General, by counsel for the applicants, that the Collector had, in fact, taken action under S. 40, he frankly conceded that the present proceedings are quite in order. What we have now to decide therefore is whether or not the Collector and the Board of Revenue were right in holding that the sum of Rupees 16,62,500 is in the nature of a premium for the lease granted by the Indenture of 5th March 1931. It is to be borne in mind that the word "premium" is not defined in the Stamp Act, but in S. 105, T. P. Act, 1882, it is described as "a price paid or promised" for the transfer of a right to enjoy an immovable property for a certain time, express or implied.

In popular parlance in England, at any rate, the expression "premium" is more often used to denote a consideration passing between a lessee and his assignee, rather than consideration passing from a lessee to a lessor. Moreover even when it is used in the latter sense it would, generally speaking, mean something over and above the consideration, for the lease, which is given in the form of a rent. It is a little remarkable that S. 105, T. P. Act, looked at strictly, would seem to contemplate that a consideration for a lease must be either "a price paid or promised" or money, share of services or any other thing of value rendered periodically on a specified occasion. The former is called a "premium" and the latter is called "rent." Construed literally, it would appear that it was not within the contemplation of S. 105 that there should ever be both a premium and a rent. I think we must assume however that even so, it is possible for the consideration for a lease to take the form partly of a price paid and

1. In re Cooke & Kelvey 1932 Cal 736=140 I C 57=59 Cal 1171 (SB).

partly of rent. The view taken by the Board of Revenue, and contended for by the learned Advocate-General, before us, is this: that from the document itself, it would appear that the demise to the company was in consideration of all the rent and covenants reserved and contained in the document, and on the part of the company to be paid, and observed. The Board of Revenue, in their statement of 25th July, pointed out that in addition to the covenants to pay an annual rent of Rs. 3,000 and to pay the Municipal rates, taxes, etc., the company covenanted to take over as from 1st April 1930 the liability of the Board to pay the Government of the United Provinces of Agra and Oudh, the 35 half-yearly instalments of Rs. 47,500 aggregating Rs. 16,62,500. The covenant to take over the liability of the lessor to the Government was, so it was contended, clearly a part of the consideration for the lease and therefore the Collector was right in treating the amount payable to the Government as a price promised to be paid for the lease, i. e., a premium as defined in S. 105, T. P. Act. It is the fact that by the indenture the Board did demise to the company the subject-matter of the lease described as follows:

"All that piece or parcel of revenue-free land, situated in mahalla Aishbagh, in thana Chowk, in the city of Lucknow, consisting of 7 bighas 6 biswas 10 biswansis, 10 kachwan or thereabouts, as more particularly delineated on the plan annexed hereto, and therein surrounded by a red verge line, together with the Electric Generating Station thereon, or on part thereof, erected and all other buildings, sheds and erections upon the said land, shown in yellow in the said plan, and secondly, all and singular the plant machinery and all other fixtures and fittings and other cables and pipes, now being in or upon and attached or belonging to the said Electric Generating Station buildings, and premises, together with all ways, passages, lights, drains, rights, easements and appurtenances to the said premises or any of them belonging or therewith usually held or enjoyed, but excepting and reserving out of this present demise, to the Board, the water pipes and their fittings and the weighbridge now being upon part of the demised land, which weighbridge the Board shall forthwith remove making good all damage thereby caused."

These covenants are set forth in para. 2 of the document. No doubt it may be said that the whole of the moneys which were to be paid by the applicants was the consideration granted for the lease either in the form of a price or in the form of rent. But in Cl. (3), para. 2, it was provided in effect that if and when the applicants should have paid 35 half-yearly instalments of Rs. 47,500 that is to say on the payment of the balance of the apportioned loan, and the interest that accrued thereon, then the Electric Generating Station and the premises demised under the lease other than the land would be and would remain thenceforth the absolute property of the applicants to be dealt with and disposed of by them as they might think it. It is on the strength of these provisions that it was contended for the applicants that the payment of the sum of Rs. 16,62,500 was not in the nature of a price paid (or premium) for the granting of the lease but was a price to be paid for the acquisition by the company of the Electric Generating Station and the plant and machinery and other fixtures and fittings attached or belonging to the Electric Generating Station.

In support of this view of this view of the matter, it was pointed out to us that there is no proviso for re-entry and that even if the applicants failed to discharge the obligation, they had entered into, to pay the half-yearly instalments of Rs. 47,500 for the period of 17½ years, the Board, as lessor, could not eject them and the applicants would still be entitled to enjoy all the property comprised in the demise in exchange of the payment of the bare rent of Rupees 3,000 per annum. It would appear, from the terms of the lease, that the subject-matter of the lease, other than the land itself, would not become the property of the applicants, unless, and until they had completely paid the sum of Rs. 16,62,500. But having regard to the terms of the lease it seems quite a possible interpretation to put upon it that the annual payment of Rs, 3,000 was rent for the land demised and the other sum—the large sum to be paid—was in the nature of the purchase price for the rest of the subject-matter of the demise. But having regard to the fact that even if the applicants failed to maintain payment of a half-yearly instalment of Rs. 47,500, they would still be in the position of enjoying not only the land but the whole of the subject-matter of the demise for the comparatively small payment of Rs. 3,000

per annum, a more reasonable course might be to endeavour to make an apportionment so as to ascertain what part of the total sum of Rs. 16,62,500 ought to be regarded as being in the nature of a price paid for the demise of the subject-matter of the lease other than the land, and therefore under the definition, as contained in S. 105, T. P. Act, a premium to that extent.

No doubt it would be possible, and even practicable, to arrive at some kind of apportionment of the total sum of Rs. 16,62,500 and to treat it as being partly the price of the demise of the subject-matter of the lease, other than the land, and partly the price of the acquisition of the property in such subject-matter upon payment by the applicants of the total amount of that sum. This apportionment might be done on some such basis as this: An estimate could be made by a competent surveyor, or other expert in such matters, as to what would be a fair and economic return to the Board for the leasing of the whole of the subject-matter of the lease for a period of thirty-four years and one hundred and seventy days, either in the form of "premium" or of rent alone or a combination of both. The capital value of such return could then be compared with the total amount actually to be paid by the applicants under the lease, that is to say, the sum of Rs. 16,62,500 plus the total of the rent at Rs. 3,000 per annum for thirty-four years and one hundred and seventy days. The difference between these two sums might, not unreasonably, be taken to be the price payable for the ultimate acquisition of the property in the Electric Generating Station, plant machinery, etc. Looking at the matter from that angle, it might be possible to arrive at some sort of opinion as to whether or not the sum of Rs. 16,62,500 was wholly premium, or partly premium and partly price for sale of immovable property in the nature of chattels real. I do not think it necessary that we should go into the matter to that extent however because the simple question which, in my opinion, we have to answer is whether or not the Collector and the Board of Revenue were correct in characterising the whole sum of Rs. 16,62,500 as a premium for the lease. In my opinion, upon a careful scrutiny of the terms of the indenture concerned, and in particular, having regard to the fact that at the end of the period of 17½ years, the applicants, if they keep up payment of the instalments, will have acquired the absolute property in the Electric Generating Station and the other buildings, sheds and erections on the land together with all plant, machinery and other fixtures and fittings now attached or belonging to the Electric Generating Station, we ought to hold that the view of of the Collector and the Board of Revenue was not correct, and that the stamp duty chargeable in respect to the instrument of 5th March 1931, is as contended for by the applicants.

Panckridge, J.—I agree.

Buckland, Ag. C. J.—I have very little to add to the judgment of my learned brother. The question to be determined is whether the sum of Rs. 16,62,500 to be paid under Cl. 3 of the document is a fine or premium for which the lease was granted, to quote the words of Art. 35 (c), Stamp Act, or, in the words of the Transfer of Property Act, defining a premium, "a price paid or promised" in consideration of the lease. Reliance is placed on behalf of the Crown upon the words "that in .... consideration of the ..... covenants hereinafter reserved and contained." etc., as meaning that in consideration of the covenant to pay the sum in question, the demise was granted. I do not stress too heavily the point that the words quoted are common form and that for their true meaning and effect the covenants themselves must be examined though I know of no reason why a lease should not be granted in consideration of a covenant on the part of a lessee, whereby he agrees to pay a sum of money in return for goods supplied or to be supplied or services rendered or to be rendered. In such circumstances, if the agreement between the parties were properly stated, there could be no question of the money being paid as the price or premium for the lease itself, though a covenant to make such payment, in return for something other than the lease, might well be one of the covenants in consideration of which the lease was granted.

Turning to Cl. 3 of the document I find it impossible to avoid the conclusion that the sum of Rs. 16,62,500 is

referable to anything but the price of the plant machinery and electric generating station. These is nothing to show that any portion of it is referable to the lease of the land at Rs. 3,000 per annum which may or may not be a fair annual value of the land itself and no question of apportionment between the two arises. The only contention put forward on behalf of the Crown is that this payment was to be made by way of premium, or price, for the lease, but as I do not take this view and it has not been argued that the document is not otherwise sufficiently stamped I agree with my learned brother's conclusions.

R.K. *Reference allowed.*

A. I. R. 1934 Calcutta 808

MALLIK AND JACK, JJ.

Chandra Benode Das. In the matter of.

Civil Rule No. 1597 of 1933, Decided on 26th January 1934, against order of Subdivisional Officer, Sunamganj.

Legal Practitioners Act (18 of 1879), S. 12—Conviction of pleader under S. 17 (2), Criminal Law Amendment Act, is sufficient to take action against him under S. 12—Criminal Law Amendment Act (14 of 1908), S. 17 (2).

Conviction of pleader under S. 17 (2), Criminal Law Amendment Act, for assisting and promoting a meeting of an unlawful association discloses that his action is nothing short of an open and defiant violation of law rendering him liable to action under S. 12, Legal Practitioners Act. [P 809 C 1]

Basak and *Rupendra K. Mitra*—for Petitioner.

Mallik, J.—This rule was issued on Babu Chandra Benode Das, a pleader of Sunamganj Munsiff's Court in the District of Sylhet, to show cause why he should not be suspended or dismissed under the provisions of S. 12, Legal Practitioners' Act. The grounds on which the Rule was issued were that Babu Chandra Benode Das had been convicted by the Subdivisional Officer of Sunamganj on 7th August 1930 under S. 118, Criminal P. C., and directed to execute a bond for Rs. 500 with two sureties each in like amount, to be of good behaviour for one year and again by the Subdivisional Officer, Sunamganj, on 26th February 1932 under S. 17, Cl. (2), Criminal Law Amendment Act, and sentenced to rigorous imprisonment for a year and a half and to pay a fine of Rs. 50, convictions which imply such a defect of character as would bring him within the purview of S. 12, Legal Practitioners Act. Babu Chandra Benode Das has not appeared before us. But by an explanation sent to us he has shown cause against this rule. The grounds which he has taken in his explanation are practically three in number. In the first place, he has contended that as his license has been renewed under the order of the High Court no further action should be taken against him under the Legal Practitioners Act; secondly, that the order that was made against him binding him over on 7th August 1930 under S. 118, Criminal P. C., was not a conviction for an offence; and thirdly, that his conviction under S. 17, Cl. (2), of the Criminal Law Amendment Act, did not disclose any defect of character that would bring him within the purview of S. 12. As regards the first point taken by him all that I need observe is that it was at the instance of a Full Court that the present rule was issued after the order for renewal of license of Babu Chandra Benode had been made.

The second point taken by him in his explanation was that the order made under S. 118, Criminal P. C., was not a conviction for an offence. That may be so. But there is no doubt that Babu Chandra Benode Das was convicted for an offence when he was convicted under S. 17, Cl. (2), of the Criminal Law Amendment Act. The question is whether that conviction in the circumstances of the case did disclose a defect of character as contemplated by S. 12, Legal Practitioners Act. The conviction under S. 17, Cl. (2) took place on 26th February 1932 not very long after Babu Chandra Benode Das was released from jail where he had been sent in connexion with the order that had been made under S. 118, Criminal P. C., for having delivered seditious speeches in the month of June 1930 on several occasions at several places, speeches which were found to create hatred and enmity between classes. Taking all these circumstances together there can be no doubt that when Babu Chandra Benode Das assisted and promoted a meeting of an unlawful association for which he was ultimately convicted under S. 17, Cl. (2) of the Criminal Law Amendment Act, his action was nothing

short of an open and defiant viclation of law. Remembering that it is the duty of the Courts to enforce and maintain obedience to law and of the members of the legal profession to assist the Courts in doing so an open and defiant violation of law coming from a member of that legal profession was, in my judgment, such a defect of character as would unfit him to be a pleader. I am therefore convinced that Babu Chandra Benode Das made himself liable to action under S. 12, Legal Practitioners Act. I would accordingly make the rule absolute and regard being had to the circumstances of the case I would suspend him from practising as a pleader for six months from 1st February 1934.

Jack, J.—I agree.

G.A. *Rule made absolute.*

A. I. R. 1934 Calcutta 809

MUKERJI AND S. K. GHOSE, JJ.

Mahamad Hossain Khan—Petitioner.

v.

Mansur Ali and *others* — Opposite Parties.

Appln. No. 5 of 1934, Decided on 27th April 1934, for leave to appeal to His Majesty in Privy Council, from appellate decree No. 2162 of 1931.

Suits Valuation Act (1887), S. 8—Plaintiff valuing his claim in plaint is not always entitled to set up subsequently that it is not correct—Practice.

A party who has previously made a valuation of his suit or appeal for the purpose of court-fees is not always precluded from adopting for his proposed appeal a higher valuation as representing the actual or market value of the claim made in the suit. But where a plaintiff having discretion to value his claim in alternative ways chooses to value his claim in the plaint in a particular way, he is not entitled to set up subsequently that his valuation given in the plaint is not real : 1931 *Cal* 417 and 1930 *Cal* 737; *Cal P A No.* 62 *of* 1931, *Ref.* [P 810 C 1]

Amendra Nath Bose and *Hemendra Narain Bhattacharjee*—for Appellant.

Atul Chandra Gupta and *Manmatha Nath Das Gupta*—for Opposite Parties.

Order. — This is an application by the plaintiff for leave to prefer an appeal to His Majesty in Council. The plaintiff instituted the suit asking for a permanent injunction on the defendants, with reference to a plot of land, restraining them from mooring any boat of paddy on the plot carrying on paddy business thereon and also exercising other rights incidental to the said business on it and praying further for a declaration that the defendants have no right to carry on their Gulla business on the said land. The defendants resisted the claim alleging that they had acquired the rights which were disputed on behalf of the plaintiff, under a grant from some predecessor of the plaintiff, but the plaintiff, on the other hand, contended that the rights which his predecessor had conferred were confined only to the banks of a khal called the Jinjira Khal and did not extend to the land in suit. In the plaint the plaintiff valued the disputed rights at Rs. 2000, the injunction at Rs. 100 and the declaration at Rs. 150 and he paid court-fees on the aggregate amount of Rs. 2,250. The suit was laid in the Court of the Subordinate Judge ; that learned Judge decreed it. The defendants appealed to the District Judge on the basis of the plaintiff's valuation aforesaid. The District Judge modified the trial Court's decree in some respects in defendants' favour. The plaintiff preferred a second appeal to this Court which was dismissed. He then makes this application.

For the purposes of the appeal which he intends to prefer and in order to bring the case within para. 1, S. 110 of the Code, the plaintiff has valued the subject-matter of the suit at over Rupees 10,000 on two alternative modes of calculation set out respectively in schedules *A* and *B* to his application. They are as follows : (A) that the Gulla business fetches the defendants an income, which capitalized is well over Rs. 10,000 and that the same would go to the plaintiff if the defendants' right to conduct the said business on the said land is negatived and the plaintiff carries it on there ; (B) that the business which the plaintiff carries on his other lands is interfered with by the defendants' business to an extent, the loss in consequence of which, if capitalized, far exceeds Rs. 10,000; also that the losses which the plaintiff's tenants suffer for the same reason aggregate a like amount. It may be observed here that the mode of calculation stated in Sch. B was never suggested at any previous stage of the suit. The question for consideration is whether the plaintiff is at liberty to go back upon his own valuation as given in the plaint and adopt one of the two valuations indicated in the aforesaid schedules.

Most of the cases cited on behalf of the plaintiff are authorities for a proposition, which cannot be disputed, namely, that a party who has previously made a valuation of his suit or appeal for the purpose of court-fees is not always precluded from adopting for his proposed appeal a higher valuation as representing the actual or market-value of the claim made in the suit. We do not consider it necessary to discuss these cases because they are not cases in which the valuation of the reliefs claimed has to be made, for the purposes of court-fees, at their actual or market-values. The case before us was one in which the plaintiff, though he had a wide discretion in the matter had to value his claim at its actual or market-value. He already valued it in his plaint in a particular way ; and when he has done so he cannot, in our opinion, be allowed to show that such value did not represent the real value. Moreover, by reason of the fact that he valued the suit at Rs. 2,250, he was able to take the defendants through three Courts up to now, one of which Courts the latter could have avoided if the suit had been originally laid at over Rupees 10,000. In such circumstances, we are clearly of opinion that the plaintiff is precluded from showing that his valuation as given in the plaint was not real or from setting up such valuations as he now puts forward in Schs. *A* and *B* to his application. We consider it sufficient to refer to the decisions in 1931 Cal 417 (1), and 1930 Cal 737 (2), and the order in P. A. Appeal No. 62 of 1931 dated 11th January 1932, in support of the view we take.

For the above reason, the plaintiff's first attempt, which was to bring the case within para. 1, S. 110 of the Code must fail. He has next argued that the case fulfils the requirements of para. 2 of that section. But the applicability of this paragraph to the present case has not been endeavoured to make out, in view of the interpretation put upon it by the decision of 1916 Mad 985 (3) which has been approved of by the Judicial Committee in 1930 P C 44 (4). The plaintiff's next attempt has been to establish that the appeal involves some substantial question of law so that even though the requirement as to value is not satisfied a certificate might issue as under S. 109, Cl. (c). The two grounds which are stated in this connexion are first that the defendants are not persons who may have the benefit of the provisions contained in S. 4 Reg. 11 of 1825 ; and second that the grant on which the defendants have succeeded was one in respect of property which was not in existence at its date and might only come into existence in future and was accordingly invalid.

Neither of these contentions, in our opinion, is a substantial one. The defendants' right has been affirmed upon a construction, concurrently maintained by the two Courts below, of the terms of a grant to which no exception of the nature suggested can possibly be taken. Indeed, no such objection appears to have been indicated in any of the Courts up to now. Again, it is not on the law contained in S. 4, Reg. 11 of 1825 that they have succeeded but only upon a right which the plaintiffs predecessor had expressly conveyed in their favour. We see no substance in any of the two grounds aforesaid. The application is dismissed with costs five gold mohurs.

K.S. *Application dismissed.*

1. Mahendra Narain Roy v. Janaki Nath Roy 1931 Cal 417=132 I C 910=58 Cal 66.
2. Radha Narain v. Purna Chandra, 1930 Cal 737=128 I C 108.
3. Subramania Ayyar v. Sollammal, 1916 Mad 985=31 I C 296=39 Mad 843.
4. Mangamma v. Mahalakshmamma, 1930 P C 44=121 I C 513=57 I A 56=53 Mad 167 (PC).

A. I. R. 1934 Calcutta 810

BUCKLAND, AG. C. J.

Lalchand Amonmal—Plaintiff.

v.

M. C. Boid & Co.—Defendant.

O. O. C. Suit No. 869 of 1932, Decided on 17th May 1934.

✓ **Civil P. C. (1908), O. 30—Hindu joint family carrying on business cannot sue as a firm under O. 30—Hindu Law — Joint family.**

A Hindu undivided family carrying on business is not entitled to sue as a firm under O. 30: Civil P. C.: 1924 *Bom* 1551 and 27 *Bom* 157, *Dist.*; *Cal. Appeal No.* 101 *of* 1927, *Foll.*

[P S11 C 2 ; P S12 C 1]

P. N. Sen—for Plaintiff.

W. W. K. Page and *M. S. Chaudhuri*—for Defendant.

Judgment.—The hearing of this suit began on 2nd January last on which day several witnesses were examined on

behalf of the plaintiffs. The learned Advocate-General, who appeared on behalf of the plaintiffs, on 3rd January applied for an adjournment of the hearing in order to make an application to amend the plaint. In allowing that application I delivered a short judgment for reasons which I gave. On 16th January next ensuing an application to amend the plaint was made by the learned Advocate-General, and again I delivered a judgment to which reference also can be made for information as to the earlier history of the suit. The effect of the amendment has been to change to a considerable extent the nature of the suit, which observation is introductory only.

Among the witnesses called on 2nd January was one called Bhramarmal who said he was a partner in the plaintiff firm. No other witness so describing himself was called until today when a young man of the name of Pushraj was put into the witness-box. It occurred to me to inquire whether the business carried on by the plaintiffs was a joint family business or whether the business was a contractual partnership. From what Pushraj said it was clear that it was a joint family business. But he being a youth and probably having less knowledge of the matter than Bhramarmal, a man of more mature years, I directed Bhramarmal to re-enter the witness-box and put to him some questions on the point. The learned Advocate-General then questioned him and he was cross-examined by Mr. Page on behalf of the defendants. On the evidence given by these two witnesses I am satisfied and hold that the business carried on by the plaintiffs is a joint family business and not a contractual partnership. The suit has been brought under O. 30, Civil P, C., in the name of Messrs. Lalchand Amonmal, a firm carrying on business, etc., and the question arises whether that is permissible. The Partnership Act which came into force on 1st October 1932, makes it quite clear that members of a Hindu undivided family carrying on a family business as such are not partners. But that Act does not apply to this suit, though I may quote from S. 5 which states no new principle when it enunciates that the relation of partnership arises from contract and not from status.

I had occasion to consider the point in Suit No. 1207 of 1925 (1), when I decided that a Hindu undivided family carrying on business was not entitled to sue as a firm under O. 30, Civil P. C. On appeal (Appeal No. 101 of 1927) the judgment dismissing the suit was affirmed, but on the merits, and the learned Judges therefore had no occasion to and did not consider this point, which is regrettable, for I have known it arise on several occasions, though to avoid risk, steps have been taken to cure the defect before the hearing. As my former judgment is not reported and I have nothing further to add to what I stated on that occasion I will reproduce the material portion in full :

"A point has been taken on behalf of the defendant company that the suit is not maintainable in the form in which it has been brought. It has been brought by Sivaprosad & Sons as a firm carrying on business in Cawnpore and in Calcutta. That is clearly a suit by a firm instituted under O. 30, Civil P. C. In the course of his evidence the plaintiff said that the partners were himself and his sons, the eldest of whom was about 18 years of age and the others were minors. He said that they were partners by virtue of the fact that they were all members of a joint Hindu Mitakshara family ; he said there was no agreement between them which would be necessary to make contractual partnership. The objection is taken that in these circumstances the suit cannot be brought under O. 30, Civil P. C. This is a question which is not covered by authority and so far as experience goes, it has been touched upon but never decided. O. 30, as is well known, is taken from the rules of the Supreme Court in England and it is in terms of O. 48-A. There can be no question that when O. 48-A was introduced into the rules of the Supreme Court in England, it was not in the mind of anybody that it would or could be applied to Hindu family business, and I think one may say without the slightest fear of contradiction, that the only form of partnership or firm which was present to the minds of those responsible for the rule was a contractual partnership such as is well understood. I have also no doubt that when it was introduced into the Code of Civil Procedure in 1908, it was also in the contemplation of the legislature at that time that it was to such a firm that it would apply. There is nothing in it to suggest that prima facie it is applicable or intended to be applicable to any association or persons other than a contractual partnership firm. The words in the heading : 'Persons carrying on business . . . . . , other than their own' only have reference to R 10 under which a single individual may be sued, though he cannot sue if he carries on business under a name other than his own. The question stated in concrete form is, is a

1. Shiva Prasad & Sons v. Ormerods (India) Ltd., Suit No. 1207 of 1925.

Mitakshara joint family carrying on business as such a firm within the meaning of O. 30 ?

A firm may not be an entity known to the law as a company or a statutory corporation is known to the law, but nevertheless this term 'firm' has been defined by S. 239, Contract Act, which by a definition of the word 'partnership' makes it clear that agreement is necessary and says : 'Persons who have entered into partnership with one another are called collectively a firm.' There may be, and no doubt are, certain elements common to a joint family business and to a partnership firm as so defined but there are also very important distinctions. For instance, a joint family business does not involve agreement at its inception, children are born into it; nor is it dissolved by death as is the case with a contractual partnership. Another point to which my attention has been directed is that a Karta of a joint family business may sue alone in his own name on behalf of the business, which is not permissible in the case of a partnership, for no one partner may sue. Either all may sue in their individual names or they may sue collectively in the name of the firm as prescribed by O. 30.

The fact that a Hindu joint family business is referred to as a firm and called a partnership does not advance matters, it is merely begging the question and it is no argument to say that for that reason it is within O. 30. Reference has been made to the fact that no attempt was made by the defendant company to obtain the names of the 'plaintiff firm.' That is neither here nor there, for as long as the 'plaintiff firm' purported to sue under O. 30 they need only give the names of the father and the sons and this question would not then have arisen. It arose at the time when only it could arise and that was in the course of the cross-examination of the plaintiff when the facts were elicited. It is therefore no answer to say the point is not taken in the written statement. Though not directly in point I have been referred to 1924 Bom 155 (2), but this does not decide the question. 27 Bom 157 (3) to which reference has also been made was decided before the Civil Procedure Code of 1908, for which reason, though the learned Judge's observations as to the essentials of a partnership are of value, it is not authoritative on this point. Though after giving the matter my best consideration it seems to me that a Hindu joint family cannot be considered a firm, nor that the members of it can properly be described as partners within the meaning of O. 30, my decision on the facts is sufficient to dispose of the suit."

For these reasons the plaintiffs, in my judgment, were not entitled to institute the suit under O. 30, Civil P. C., in the name of their so-called firm and it is bound to be dismissed upon that ground. Learned counsel for the plaintiffs was disposed nevertheless to go on with the case and conclude his evidence. Mr. Page on behalf of the defendants applied that unless more evidence was to be called upon this point, which the learned Advocate-General told me that he did not propose to do, the suit should be dismissed forthwith, for, as he rightly observed, it would be sheer waste of time and money to hear the remaining witnesses for the plaintiffs, to allow the defendants' witnesses to be called and to occupy many hours of the time of Court when the suit was bound to fail in the end. I agree that when a fatal point such as this comes to light the only proper course is to dispose of the suit forthwith upon such basis and it will be dismissed with costs.

K.S. *Suit dismissed.*

2. Motilal Jusraj v. Chandmull Hindumal, 1924 Bom 155=77 I C 1055.

3 Vadilal v. Shah Khushal, (1903) 27 Bom 157=4 Bom L R 968.

A. I. R. 1934 Calcutta 812

LORT-WILLIAMS AND NASIM ALI, JJ.

Srigobinda Chowdhuri—Petitioner.

v.

Maharaja Rao Jogendra Narayan Ray and *others*—Opposite Parties.

Civil Rule No. 1408 of 1933, Decided on 20th April 1934, from order of Dist. Judge, Pabna, D/- 13th November 1933.

(a) Interpretation of Statutes — Amending Act—Retrospective effect—No new right but only additional remedy—Remedial provision should be applied to cases prior to amendment—Bengal Patni Regulation, S. 14-A.

Where the addition of words by an Amending Act indicates that the legislature intended to provide an additional remedy and not to create a new right (S. 14-A, Bengal Patni Regulation, giving the defaulting patnidar a right to get the sale set aside on payment of deposit as under O. 21, R. 89, Civil P. C.) and the words are general and it is not specifically mentioned in the Amending Act that the remedy shall not be applicable to cases before the Act comes into operation, the remedial provision ought to be liberally construed and held to be applicable to cases before such Act comes into operation (i. e., to sales held before the amended S. 14-A). : *Colonial Sugar Refining Co.* v. *Irwing* (1905) *A C* 369 ; 1927 *P C* 242 ; 1928 *P C* 128 and 22 *Cal* 767, *Ref to.* [P 814 C 2]

(b) Bengal Patni Regulation, S. 14-A — Application for setting aside need not be signed and verified.

An application for setting aside a sale is not required by law to be signed and verified by the applicant. [P 814 C 2]

(c) Civil P. C. (1908), S. 115—Revision lies for failure to exercise jurisdiction vested by law.

Where a Judge is bound to allow an application and does not do so he fails to exercise jurisdiction vested in him by law and consequently his order is open to revision under S. 115. [P 815 C 1]

Basak, Radha Binode Pal, Apurba Charan Mukherji and *Indu Prokash Chatterjee*—for Petitioner.

H. D. Bose and *Bansari Lal Sarkar*—for Opposite Parties.

Nasim Ali, J.—This is a Rule calling upon the opposite parties to show cause why the order of the District Judge of Pabna refusing the application of the petitioner for setting aside a patni sale under S: 14-A, Patni Regulation, should not be set aside. The facts giving rise to the rule are as follows :

A patni belonging to the petitioner was sold under the Patni Regulation at the instance of the opposite party No. 1, the zamindar, on 15th May 1933 and was purchased by the opposite parties 2 and 3 for Rs. 16,000 out of which Rs. 4,000 was deposited on that day. On 18th May 1933, Bengal Act 4 of 1933 came into operation. By this Act the defaulting patnidar was given the right of getting the patni sale set aside on conditions analogous to those contained in S. 174, Ben. Ten. Act and R. 89, O. 21, Civil P. C. On 22nd May the purchasers deposited the balance of the purchase money. On 13th June 1933 the petitioners applied to the Collector under the new provisions which are now contained in S 14-A, Patni Regulation for setting aside the patni sale. The opposite parties having objected to the petitioner's application, the Collector referred the matter to the District Judge under S. 14 (a), Cl. 5 of the Regulation. The learned District Judge dismissed the petitioner's application on the grounds that the new provisions contained in S. 14-A do not apply to sales held before they came into operation. He also held that the application of the petitioner under S. 14-A was not in order inasmuch as it was not signed and verified by the petitioner. The petitioner thereupon moved this Court and obtained the present rule on the following grounds:

(a) That the Court below has failed to exercise a jurisdiction vested in it by law in dismissing the application for setting aside the sale and in thus refusing to set aside the sale on the ground that S. 14-A of the Patni Regulations as amended by Bengal Act 4 of 1933 had no application to the sale in question.
(b) That in the absence of any law prescribing any particular form of application the Court below erred in holding that the application required signature of the applicant himself or verification by him and was wrong in saying that the same as made was irregular.

The argument on behalf of the petitioner in support of the first ground consists of two parts. The first part is to the effect that the Bengal Act 4 of 1933 simply lays down a rule of procedure and there is therefore no presumption against its retrospective operation. The second part is to the effect that even if the Act touches a right in existence (assuming that the purchaser's right to get complete title to the property on payment of the balance of the purchase money is a right in existence which has been touched), the language used by the legislature, the conditions about the payment of 5 per cent of purchase money as compensation to the purchaser, the scope and object of the Act, indicate that the legislature intended the application of the Act not only to sales held after the new Act came into operation but also to sales held within 30 days from the date when the new Act came into force. These two branches of the contention require separate consideration.

In support of the first branch of the argument reliance was placed upon the decision of this Court in the case of 22 Cal. 767 (1) in which the effect of S. 174, Ben. Ten. Act and S. 310-A, Civil P. C. of 1882 on proceedings in execution pending at the time when those provisions of law came into operation was considered by this Court. It is true that there are some general observations in that case which support the contention of the petitioner. The learned counsel who has appeared to oppose the rule, however, contended that the sale in that case was held after the new provision came into operation and that the actual decision in the case must be taken as confined to sales held after the new Act came into force. In my opinion the general observations made in that case must be read along with the facts of the case in which the decision was given and the point which had to be decided. The actual decision in that case therefore must be taken as confined to sales held after the new Act

(1) 1. Jogodanund Singh v. Amrita Lal Sircar, (1895) 22 Cal 767.

came into operation. In such a case the question whether the vested right of the auction purchaser is interfered with or not by the new provision for setting aside the sale on deposit of the money due does not arise. In support of the second branch of the argument reliance was placed upon the following observations of their Lordships of the Judicial Committee in the case of 1927 P. C. 242 (2), viz.

"The principle which their Lordships must apply in dealing with this matter has been authoritatively enunciated by the Board in the 1905 A C. 369 (3) where it is in effect laid down that while provisions of a statute dealing merely with matters of procedure may properly, unless that construction be tentatively inadmissible, have retrospective effect attributed to it, provisions which touch a right in existence at the passing of the statute will not be applied retrospectively in the absence of express enactment or necessary intendment."

Now by S. 2, Bengal Act, 4 of 1933 the words "unless he makes an application under S. 14-A" were added at the end of S. 14 of the Patni Regulation, 1819. It is not disputed that S. 14 without the words added by the new Act would apply to all sales held either before the Act or after. The addition of the words by the new Act indicates that the legislature intended to provide an additional remedy to all defaulters. By S. 3 of the Act a new section viz., S. 14-A was added to the Patni Regulations. By S. 4 of the Act for the words in S. 15 of the Patni Regulation, viz., "so soon as the entire amount of the purhase money shall have been paid by the purchaser at any sale made under the regulation" the following was substituted namely :

" On the expiry of thirty days from the date of any sale made under this regulation or if there has been a re-sale within thirty days of the original sale if the entire amount of the purchase money has been paid by the purchaser and if no application under S. 14-A to set aside the sale is pending."

It is clear from the sections of the amending Act that the words used are perfectly general. No distinction is made between the sale held before the Act and that held after. If the intention of the legislature was that it should not apply to sales held before the Act it would be necessary to substitute for the wide and general words "sale held under the regulations," all sales under the regulation" some such words as "sales to be held" or "hereafter held." There is nothing in the new provisions which would justify such limitation and there is no rule or presumption which requires that general words should be so limited in their meaning (see in this connexion the judgment of Viscount Haldane in 1928 P. C. 128 (4). Again this new right conferred by S. 14-A on the defaulting Patnidar was created expressly on the condition that the purchaser at the sale must be paid five per cent of the purchase money, which ordinarily would be a sufficient compensation. Turning now to the scope and object of the new Act it appears that before this amending Act, the Patni Regulation contained no provisions which could enable the defaulting Patnidar to have the sale set aside by depositing the arrears of rent even if the property was sold at a very inadequate price. The Patnidar had to suffer this loss as a necessary evil. It was for redressing the evil that S. 14-A was added to the Patni Regulation and as it is a remedial provision it ought to be liberally construed (see in this connexion the observations in 22 Cal. 767 (1) at p. 780). The words used in the Act, the conditions imposed on the defaulting patnidar to pay five per cent of the purchase money as compensation to the purchaser, the object and purpose of the Act, indicate that the Act was intended to apply to all sales held under the Regulation whether the sale was before the Act came into operation or after. The learned Judge was not justified in rejecting the application on the ground that S. 14-A was not applicable to the sale in the present case. The argument in support of the second ground is that there is no provision of law under which the application under S. 14-A must be signed and verified by the applicant. We are of opinion that the application for setting aside the sale is not required by law to be signed and verified by the applicant. The petition was signed by a Pleader who was duly authorised to file the applica-

2. Delhi Cloth and General Mills Co. Ltd. v. Income-tax Commissioner Delhi, 1927 P C 242=106 I C 156=54 I A 421 (P C).

3. Colonial Sugar Refining Co. v. Irwing, (1905) A C 369=74 L J P C 77=21 T L R 513.

4. Municipal Council of Sydney v. Margaret Alexandra Troy, 1928 P C 128=107 I C 455 (P C).

tion. There is therefore no substance in this objection of the opposite parties.

It was contended on behalf of the opposite parties that this Court could not interfere with the order of the District Judge under S. 115, Civil P. C., even if the construction put upon S. 14-A by the District Judge be erroneous. It was contended that such an error would be only an error of law. But if we are right in the view which we have taken about the operation of S. 14-A the District Judge was bound upon the application of the petitioner to set aside the sale under that section and not having done so he failed to exercise jurisdiction vested in him by law and consequently his order is open to revision by this Court. The result therefore is that this rule is made absolute and the order of the District Judge dated 13th November 1933 refusing to set aside the patni under S. 14-A of the Patni Regulation is set aside. We direct that the sale of the Patni be set aside as no other objection was pressed before us. We further direct that out of the money deposited by the petitioner, (a) the purchase money be paid to Government for the purposes specified in the second clause of S. 17; (b) a sum of money equal to the amount on account of which the sale has been made together with interest and all charges incurred in bringing the Patni to sale be paid to the zamindar opposite party No. 1; and (c) a sum of money equal to five per cent of the purchase money be paid to the purchaser at the Patni sale. We also direct that the purchase money deposited by the purchaser be refunded to them. We further order that the Receiver appointed in this case of the defaulting patni, be discharged, subject to passing his accounts in the lower Court. In view of the facts and circumstances of the case, we make no order as to costs either in this Court or in the Court below.

Lort-Williams, J.—I agree.

R.K. *Rule made absolute.*

A. I. R. 1934 Calcutta 815

M. N. MUKHERJI, AG. C. J. AND
S. K. GHOSE, J.

Jitendra Nath De and *another*—Appellants.

v.

Nagendra Nath De—Respondent.

Appeal No. 188 of 1933, Decided on 27th July 1934, from original order of 2nd Court Sub-Judge, Hooghly, D/- 12th December 1932.

Arbitration—Private award — Distinction between private award and award made under order of Court stated—Private award is compulsorily registrable under Registration Act (1908), S. 17 (1) (b) as amended by S. 10 of T. P. Act, Supplement Act of 1929.

An award made by arbitrators under orders of the Court has no force until a decree is passed on it. A private award, if it is valid, is operative even though neither party has sought to enforce it by a regular suit. A private award therefore falls within the class of documents specified in S. 17 (1) (b), Registration Act, whereas an award of the other class does not. By the amendment of S. 17, Registration Act by S. 10 of T. P. Supplementary Act 1929, the exception contained in S. 17 (2) (6) having been removed, a private award if it satisfies the requirement as to value, is compulsorily registrable: 18 *Cal* 414; 33 *Cal* 881 and 1924 *Cal* 72, *Ref.*

[P 816 C 1]

Rupendra Coomar Mitter and *Apurbadhan Mukherjee*—for Appellants.

Satcowripati Roy and *Bireswar Chatterjee*—for Respondents.

Judgment.—This appeal has been taken by the plaintiffs from an order refusing to file an award. The plaintiff's case was that there was a reference to arbitrators and an arbitration and award made without the intervention of the Court, and they applied to the Court that the award be filed in Court. The Judge held that the award not being registered was not admissible in evidence, in view of S. 49, Registration Act, and dismissed the suit.

The award is a private award. Prior to the amendment of S. 17, Registration Act by S. 10, Transfer of Property (Amendment) Supplementary Act, 1929, S. 17 (2) (vi) contained an exception as regards "any award," and so private award, though falling within S. 17 (1) (b), was excepted from the category of documents compulsorily registrable. The appellant's contention is that the effect of the words "and any award" being deleted by amendment was not to make the registration of private awards compulsory but to place private awards on the same footing as awards of arbitra-

tors made through the intervention of Courts. It is said that both classes of awards belong to one and same class of documents, as neither, without a decree passed on it, purports or operates to create, declare, assign, limit or extinguish whether in present or in future any right, title or interest in immovable property. The answer to this argument is that whereas an award made by arbitrators under orders of the Court has no force until a decree is passed on it a private award, if it is valid, is operative even though neither party has sought to enforce it by a regular suit. 18 Cal. 414 (1); 33 Cal. 881 (2) and 1924 Cal. 72 (3). A private award therefore falls within the class of documents specified in S. 17 (1) (b), Registration Act, whereas an award of the other class does not. By the amendment the exception having been removed the award in the present case, satisfying as it does the requirement as to value, is compulsorily registrable. S. 49 of the Act would rule it out if it is sought to use it as evidence of a transaction affecting the property, which is the purpose for which it is intended to be used in the present case 1933 All. 59 (4). The appeal is dismissed with costs two gold mohurs.

K.S. *Appeal dismissed.*

1. Muhammad Newaz Khan v. Alam Khan, (1891) 18 Cal 414=18 I A 73=6 Sar 26 (PC).
2. Bhajahari Saha Banikya v. Bihari Lal, (1906) 33 Cal 881=4 C L J 162.
3. Baidyanath v. Panchanan 1924 Cal, 72=72 I C 128.
4. Bachchan Lal v. Narottam Dutt, 1933 All 59=143 I C 423.

A. I. R. 1934 Calcutta 816

COSTELLO AND LORT-WILLIAMS, JJ.

Mihirendra Kishore Dutt and *others*—Appellants.

v.

Brahmanbaria Loan Co. Ltd. and *another*—Respondents.

Appeal No. 110 of 1933, Decided on 1st May 1934, from original order of Ameer Ali, J., D/- 22nd August 1933

Companies Act (1913), S. 153—Court cannot suo motu impose any condition or modification on scheme of arrangement between company and its creditors in absence of provision in it empowering some one to assent to any modification and consent of persons entering into the arrangement.

It is usual for the scheme of arrangement between a company and its creditors to contain a provision empowering some one, be it a liquidator or some other officer of the company, to assent to any such modification as the Court may think fit to impose. In the absence of any such person it is not open to the Court suo motu to impose on a creditor any condition which will operate by way of modification of the scheme, especially in absence of the consent of the persons who have entered into the arrangement: 1932 *Rang* 154; *Re Canning Jarrah Timber Company Ltd.* (1900) and 1 *Ch* 708, *Ref.* [P 817 C 2; P 818 C 1]

W. W. K. Page—for Appellants.

S. N. Banerjee, N. C. Chatterjee and *S. K. Dutt*—for Respondents.

S. B. Dutt—for Comilla Union Bank.

Costello, J.—This is an appeal from an order made by Ameer Ali, J., on 22nd August 1933. By that order he gave sanction to a scheme of arrangement put forward by the Brahmanberia Loan Co., Ltd. which scheme of arrangement had been arrived at between the company and a body of creditors of that company at a meeting held on 25th June 1933, which had been convened under an order of this Court, made on 9th May 1933 under the provisions of Sub-S. (1) S. 153, Companies Act. That sub-section provides:

"Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the Court, may, on the application in a summary way of the company or of any creditor or member of the company or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be called, held and conducted in such a manner as the Court directs."

The section then proceeds to provide in sub-S. (2):

"If a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members, as the case may be, present either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors, or on all the members or class of members, as the case may be, and also on the company, or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company."

In the present instance the company with which we are concerned, are not in the course of being wound up and consequently there is no liquidator. It appears from the petition on which the present proceedings were founded, that the company became very much involved financially and it was obviously desirable that some arrangement should be arrived at between the company and a

very considerable number of its creditors. The petition is dated 5th July 1933 and it sets out in effect the history of the company and certain of its operations, and indicates how it came about that there was necessity for an arrangement between the company and its creditors. The scheme as passed in the meeting of 25th June 1933, was not exactly the scheme which had originally been proposed. Certain alterations were made and it was the scheme as ultimately settled, which came before the Court for sanction. The scheme was opposed by certain creditors including the present appellant Mihirendra Kishore Dutt and certain of his relatives.

The matter came before Ameer Ali, J. on 14th August 1933 and on that occasion the company was represented by counsel and the opposing creditors were represented and there was also represented a secured creditor, the Comilla Union Bank. It appears that the matter was discussed before the learned Judge, and, in the result, he thought fit to refuse the application for the sanction of the scheme. The order made was in these terms : "Application refused. Mr. Sen's client will add costs to claim." That is to say, the opposing creditors were to be allowed to bear costs which they already had against the company. It appears that the learned Judge must have been in some doubt, to say the least of it, as to the propriety of the order which he made on 14th August, because four days later he gave a direction that the matter was to appear in his List "next Tuesday," that is to say, on 22nd August. On that day, the learned Judge made the order which is now complained of. That order is in these terms :

"Scheme sanctioned, subject to a time limit of twelve years and intended to operate Vis-a-Vis the class of creditors as the depositors, which is to include any persons who filed suits on their deposits, provided there is no security and execution not having been completed by sale. Mr. Sen's clients' costs of the application to be added to his claim. Mr. Dutt's client will get his costs of this application."

Mr. Dutt's client was a secured creditor, the Comilla Union Bank. It is to be seen therefore that the learned Judge not only changed his mind with regard to the question whether the scheme should be sanctioned in any circumstances whatever, but gave sanction with the addition of a condition and a modificat on which is entirely outside the arrangement arrived at between the company and its creditors at the meeting of 25th June. The appeal has been brought on the basis that it was not competent for the learned Judge of his own motion to impose any condition of the kind, and that indeed it was not competent for him to impose any sort of modification at all. Mr. Page started his argument by quoting a passage in Palmer's Company Precedents, Fourteenth edition, Part I which appears at p. 1236. That passage is in these words :

"The scheme of arrangement usually contains a clause empowering the company or its liquidator to assent to any modifications or conditions approved or imposed by the Court, and the clause is sometimes qualified, e. g. by adding the words "and by the trustees for the debenture holders."

The paragraph then continues thus :

"In the absence of any such clause, it is more than doubtful whether the Court can sanction a modified scheme or impose conditions which must operate by way of modification."

Mr. Page has pointed out to us that it is usual for the scheme to contain a provision empowering some one, be he a liquidator or some other officer of the company, to assent to any such modification as the Court may think fit to impose. Mr. Page has argued, and we think rightly, that in the absence of any such person it is not open to the Court suo motu to impose on the applicant any condition which will operate by way of modification of the scheme. Mr. Banerjee sought to rely upon a decision of the Rangoon High Court in 1932 Rang. 154 (1). Mr. Banerjee was disposed to argue that that case is an authority for saying that the Court, when asked to sanction a scheme under S. 153, has power to impose, at any rate, some minor modifications, or some comparatively unimportant term as a condition for the grant of sanction. We find however at p. 449 of the report, that the Chief Justice of Burma says with regard to the duty of the Court when asked to grant sanction under S. 153 :

"It is certainly not the function of the Court to substitute its own scheme for the scheme presented to it for sanction, and if the Court is of opinion that unless some radical amendment is effected, or the scheme is fundamentally al-

1. Dawson v. Hormasji, 1932 Rang 154=140 I C 133=10 Rang 438.

tered, it ought not to be sanctioned, it is the duty of the Court to reject the same."

In this particular instance, the Court thought fit to suggest some alteration with regard to the interest which has to be paid, and so made that alteration to the conditions in the scheme which was before him. But we find in the preceding paragraph that the liquidator of the company with whom the matter was concerned, petitioned the Court to sanction the scheme "with such modifications, if any, which the Court might think right to impose." That fact provides a key, if I may call it, to the answer to the contention put forward by Mr. Bannerjee, because I find that the form which is usual in cases of this kind is to be found at p. 1251 of Palmer's Company Precedents, the volume to which I have already referred. It contains a clause in these terms:

"The directors may give effect to any modification of the scheme which the Court may approve or impose as a condition of giving its sanction to this scheme."

In the present instance, there was before the Court no one who was empowered to assent to a modification of the scheme, either on behalf of the company or on behalf of the creditors, and it had apparently never been in the contemplation of any of the parties to the arrangement, that the question might arise as to the Court thinking it desirable that there should be some conditions attached to the granting of the sanction or some modification of the scheme. Those who were responsible for putting forward the petition to the Court, did not include in it any such provision as that to which I have just referred as being, generally speaking, a part of the common form which is used in cases of this kind. I have no doubt that the law is that in the absence of any such provision and certainly in the absence of any consent on the part of the persons who have entered into the arrangement, it is not open to the Court to impose conditions or modifications of its own. That view of the matter seems to be supported by the case in 1 Ch. 708 (2). In that case there was a petition for the sanction of the Court, to a scheme of arrangement for reconstructing the company. The scheme provided for the formation of a new company and the substitution for the existing debenture liability of a different debenture liability of the new company. When the matter came before the Court in the first instance, Cozens-Hardy, J. refused to sanction the arrangement and in so doing he said with regard to a part of the scheme:

"That is an arrangement which as at present advised I think illegal and improper on the part of the liquidator, and I certainly cannot sanction it."

The matter went to the Court of Appeal and in the course of the argument there, the Master of the Rolls said this:

"If the liquidator is willing to undertake to pay the unsecured creditors in full and not to act upon the underwriting agreements, we will hear the respondent."

Thereupon the liquidator indicated that he was ready to assent to what was asked of him. In giving judgment of the Court the Master of the Rolls said:

"With the modifications which have been discussed and which are now assented to by the liquidator I think we may sanction the proposed scheme."

In my opinion, it is clear from that case that the Court was only in a position to sanction the scheme with the modification, because there was some one present in Court, who was empowered to assent to the alteration which the Court thought desirable should be made. I am of opinion that in the present instance in the absence of assent of any of the parties, especially on the part of the creditors who were unrepresented in Court, the learned Judge was wrong in giving sanction to the modification shown in the order made on 22nd August 1933. This appeal is therefore allowed and the order of 22nd August 1933 is set aside. The appellants will get costs against the Bramanberia Loan Co. Ltd. The costs of the Comilla Union Bank will be added to their claim.

Lort-Williams, J.—I agree.

G.A. *Appeal allowed.*

2. Re Canning Jarrah Timber Co. Ltd. (1900) 1 Ch 708=69 L J Ch 416=7 Manson 439=82 L T 409.

A. I. R. 1934 Calcutta 818

JACK AND KHUNDKAR, JJ.

Bhagabat Prasanna Shah Shankanadhi—Petitioner.

v.

Rai Revati Mohan Das Bahadur and *others*—Opposite Parties.

Civil Rule No. 445 of 1934, Decided on 14th May 1934.

(a) Civil P. C. (1908), S. 136—Writ issued by High Court to sheriff for arrest of person and directing him to transfer it to District Judge for execution — Arrest by District Judge is not ultra vires or without jurisdiction.

Where the High Court issues a writ to the Sheriff directing a person's arrest for disobedience of the order of injunction and directing him under the provisions of S. 136, Civil P. C., to transfer it to the District Judge for execution and the latter duly executes the writ by arresting the person, the District Judge acts in the lawful exercise of his powers and hence the order is not ultra vires. [P 820 C 1]

(b) Civil P. C. (1908), O. 39, R. 1 (2)—Detention in civil prison should not exceed six months.

Under sub-R. (2) of O. 39, R. 1, the detention in the civil prison must be for a term not exceeding six months but may extend to that term unless in the meantime the Court directs his release. [P 820 C 1]

Atul Chandra Gupta and *Bhupendra Kishore Bose*—for Petitioner.

Sarat Chandra Basak and *Rajendra ChandraGuha*—for Opposite Parties.

Order.—This rule is directed against an order passed by the learned District Judge of Dacca, directing that the petitioner Bhagabat Prosanna Saha be arrested and sent in custody to the Sheriff of Calcutta in execution of a writ issued by Panckridge, J., sitting on the original side of the Court to the Sheriff of Calcutta with orders directing its transfer for execution to the Court of the District Judge of Dacca, under S. 136, Civil P. C. On behalf of the petition it is urged that the order was made as a punishment for contempt and not being one made under the provisions of the Civil Procedure Code but in exercise of the inherent jurisdiction of the Court, S. 136 of the Code had no application and the warrant could not be executed outside the territorial limits of the ordinary Original Jurisdiction of the Court which does not extend to the moffusil. The order directing the execution of the warrant in the District of Dacca was therefore without jurisdictien and the order directing the arrest of the petitioner and his despatch in custody to the Sheriff of Calcutta is therefore illegal and should be set aside.

It is true that the terms of the writ to the Sheriff lent some support to the contention that the order was one under the inherent jurisdiction of this Court inasmuch as it commences with the words

" whereas the defendant committed contempt of the order of the High Court in its ordinary original jurisdiction dated 2nd August 1933."

but when the rest of the order and the proceedings are referred to it is clear that the original order was really an order of injunction under O. 39, R. 1, sub-R. (1) and the subsequent order for arrest was made under sub-R. (2), R. 1 of that order and was lawfully executed by the District Judge under the provisions of S. 136, Civil P. C. O. 39, R. 1 sub-R. (1) so far as it applies to this case runs as follows:

" Where it is proved by affidavit or otherwise that any property in dispute is in danger of being wasted, damaged or alienated by any party to the suit, the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging alienation or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders."

In this case in execution of a mortgage decree the Court appointed a receiver under the provisions of O. 40, R. 1 to take possession of the properties charged in the mortgage and to administer them so as to discharge the decree. The premises in question are No. 40, Madan Mohan Bysak Road, Dacca. The receiver was obstructed in taking possession of these premises by the petitioner whereupon he petitioned the Court for an injunction directing the petitioner not to prevent him taking vacant possession of the premises stating that otherwise there would be irreparable loss and damage to the mortgagee as the petitioner was not keeping the premises in repair or paying the municipal rates and the mortgagor was losing the rents to which he was entitled. After hearing the parties an order of injunction was duly served on the petitioner but he continued to obstruct the receiver in taking possession whereupon the latter applied for his arrest and detention for disobeying the order of injunction. The Court after further hearing the parties issued a writ to the Sheriff directing his arrest for disobedience to the order of injunction and directing him under the provisions of S. 136, Civil P. C., to transfer it to the District Judge of Dacca for execution. The latter duly executed the writ by arresting the petitioner but released him on bail to appear before this Court and enable

him to make this application against the order.

It is clear that this Court in its original jurisdiction was entitled to make the order of injunction and to transfer it for execution to the District Judge of Dacca and that the latter acted in the lawful exercise of his powers in arresting the petitioner. The circumstances show that the order was made under the provisions of the Civil Procedure Code and not in the exercise of the inherent jurisdiction of the High Court and this was therefore not ultra vires or without jurisdiction. We are not here concerned with the propriety of the original order of injunction but only with the legality of the order on the District Judge and his action in executing it. As regards the original order we would only say that under sub R (2), O. 39, R. 1, the detention in the civil prison must be for a term not exceeding six months but may extend to that term unless in the meantime the Court directs his release. The rule is discharged. The petitioner must now surrender to his bail bond and the order for arrest will take effect. There will be no order as to costs. Let this order be communicated to the lower Court without delay.

K.S. *Rule discharged.*

A. I. R. 1934 Calcutta 820

JACK AND KHUNDKAR, JJ.

Imadul Huq—Judgment-debtor—Appellant.

v.

Moni Mohan Basu and *another*—Respondents.

Appeal No. 206 of 1933, Decided on 23rd May 1934, from appellate order of Dist. Judge, Khulna, D/- 6th March 1933.

Civil P. C. (1908), O. 21, R. 18—*A* assigning his decree against *B* to *C*—*C* applying for execution—*B*'s decree against *A* for a larger amount pending—*B* is entitled to set off as against *C*.

A obtained a decree against *B* and assigned it to *C* on 12th August 1930. *C* applied for execution on 27th April 1931. *B* had obtained a decree against *A* for larger amount prior to *A*'s decree and execution of that decree was commenced on 18th July 1930 and sale took place on 15th December 1930. An application was made to set aside sale on 14th June 1931, and sale was s t aside on 26th August 1931. Second sale took place on 18th April 1932. In execution of the decree assigned to *C* an objection under S. 47 was raised by *B* on 11th July 1931 that as a cross decree for larger sum was pending against *A*, *C*'s decree should not be executed :

Held : that at the time when the objection under S. 47 was filed there was an application to set aside the sale and before this objection was disposed of the sale had been set aside and therefore the execution case against *A* was pending simultaneously with execution against *C*. In these circumstances the conditions requisite for application of O. 21, R. 18 were present in the case. There were two decrees pending for execution in the same Court at the same time. Under the circumstances *B* was entitled to set off [P 821 C 1, 2]

Abdul Hussain—for Appellant.

Surendra Nath Basu (*Sr*)—for Respondents.

Judgment. — This is an appeal against an order of the District Judge of Khulna setting aside the dismissal of an execution case and directing the Court of first instance to proceed with the case. The application for execution was filed by the purchaser of the decree under O. 21, R. 16. This judgment-debtor filed an objection under S. 47, Civil P. C., and contended that the purchase was a sham and paper transaction and the purchaser had no right to put the decree into execution because the judgment-debtor had got a cross-decree for a larger sum against the transferee decree holder. The trial Court held that under the provisions of S. 49 and O. 21, R. 18, Civil P. C., a decree for a less amount could not be executed even by a purchaser of the decree. He also mentioned that on the evidence he was not satisfied that the alleged purchase by the applicant was a bona fide one for consideration. The learned District Judge has held that :

" Order 21, R 18 merely lays down the manner of disposal of two execution cases arising out of cross-decrees for the payment of two different sums of money ; and it does not furnish any law for the dismissal of an execution case arising out of a money decree, if a cross-decree of a higher amount might be existing against the applicant and is under execution from before for the whole amount."

As in this case, he held, the two decrees were not under execution in the same Court; at the same time it was not a case of set off and therefore the decree for the small amount which was under consideration should be executed. He also states that he is unable to uphold the finding of the Court of first instance that the asignee of the decree was not a bona fide purchaser for consideration having regard to the manner in which it has been arrived at without a proper

discussion of the evidence on the point. Accordingly he set aside the order of dismissal of the execution case.

The decree in question is that in the execution case No. 88 the sale of the decree took place on 12th August 1930. The execution case was registered on 27th April 1931 and the objection under S. 47 with which we are dealing was filed on 11th July 1931. The execution case for a larger amount, namely, case No. 224 was started on 18th July 1930, the date of the original decree having been 25th November 1924 (the other decree being dated 1st June 1925) and in execution of the decree the sale took place on 15th December 1930. An application was made to set aside the sale on 14th June 1931 and on 26th August 1931 the sale was set aside. On 18th April 1932 the second sale took place on 15th December 1932 the sale of lot No. 1 was confirmed and on 20th January 1933 a writ for the delivery of possession was issued. It is to be noted that the decree in execution Case No. 88 was in existence at the time when the execution case No. 224 was started. It is clear from the record that the assignor of the decree in execution case No 88 was fully aware at the time when he assigned the decree of the execution case pending against him and it was open to him in that case to put forward a prayer for set off. It is true that it was the duty of the decree holder to mention in his application for execution the fact that there was a cross-decree against him but there does not seem to be any reason why when the Court became aware of the fact that there were two execution cases pending before it at the same time there should not be a set off under O. 21, R 18. Under Cl. 2 of that rule, the rule applies in the case of an assignee and though at the time the execution case was filed by assignee the sale in execution of the decree in case No. 224 had not been set aside still at the time when the objection under S. 47 was filed there was an application to set aside the sale and before this objection was disposed of the sale had been set aside and therefore the execution case No. 224 was pending; simultaneously with case No. 88. In these circumstances the conditions requisite for the application of O 21, R. 18 were present in the case ; there were two decrees pending for execution in the same Court at the same time. Under the circumstances the decree-holder in the case No. 224 was entitled to set off.

As to the bona fides of the assignment the probabilities are entirely against the assignor. The assignor was perfectly aware at the time of the assignment that this judgment debtor had a decree for a much larger amount pending against him for execution and instead of claiming set off he made the assignment to the assignee. I think there is no reason to question the finding of the trial Court that the assignment was not bona fide.

Under the circumstances the objection under S. 47 should be allowed and the order of the trial Court should be restored. We make no order as to costs of this appeal.

G.B. *Order accordingly.*

A. I. R. 1934 Calcutta 821

S. K. GHOSE, J.

Troilokya Nath Ghose—Petitioner.

v.

Jajneswar Pal and *others* — Opposite Parties.

Civil Rule No. 175 of 1934, Decided on 12th June 1934, from decision of 2nd Court Munsif, Narail, in Misc. Case No. 242 of 1933.

(a) Evidence Act (1908), S 92—Deed purported to be a lease executed by occupancy tenant and registered under S. 48-H Landlord is not debarred from showing that real transaction was not a lease but a sale.

Where a tenant of an occupancy holding executed a lease by means of a patta which was registered under S 48-H :

Held : the landlord was not precluded by S. 92, Evidence Act, from giving evidence to show that the real transaction was not a lease but a sale, the landlord not being a party to the deed. [P 822 C 1]

(b) Bengal Tenancy Act (1885), S. 26-F—Occupancy tenant executing a lease and registering it under S 48-H — Landlord is not entitled to apply under S. 26 F on the ground that real transaction is sale and not lease.

Where the tenant of an occupancy holding executed a lease by patta registered under S. 48-H :

Held : the document being a lease it will not be open to the petitioner to treat it as a transfer by sale and to apply for retransfer under S. 26-F. [P 822 C 1]

Sures Chandra Sen—for Petitioner.

Hemendra Chandra Sen—for Opposite Parties

Judgment. — The petitioner in this Rule is a cosharer landlord of an occu-

pancy holding of which opposite party 3 is a tenant. The holding comprises a homestead and some tenanted lands. It appears that the opposite party 3 Fatik Chandra Pal executed a lease by a Patta in favour of opposite parties 1 and 2. This was registered under S. 48-H, Ben. Ten. Act. Thereupon, on receipt of a notice, the petitioner filed an application under S. 26-F, Ben. Ten. Act, alleging that the aforesaid lease was merely a colourable transaction, the real transaction being an out and out sale. The learned Munsif held that under S. 92, Evidence Act. the petitioner was not entitled to give evidence to show that the transaction purported to be a lease and was in reality not an out and out sale, and further that the lease being registered under S. 48-H, the petitioner was not entitled to apply to re-purchase under S. 26-F. Against that decision the present Rule has been obtained.

Since the petitioner was no party to the Patta, S. 92, Evidence Act. is not a bar to his giving evidence to show that the real transaction was not a lease. But the real point is whether on this plea he is entitled to apply under S. 26-F. As between the parties to the transaction it was a lease which was duly registered under S. 48-H. So far as the opposite party 3 is concerned, he still stands in the position of a tenant vis-a-vis the petitioner and his cosharer landlords. They are still entitled to sue him for rent. If there has been an abandonment, that is a different matter. But the document being a lease it will not be open to the petitioner to treat it as a transfer by sale and to apply for re-transfer under S. 26-F, Ben. Ten. Act. The Rule is discharged with costs; hearing fee one gold mohur.

G.B. *Rule discharged.*

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* A. I. R. 1934 Calcutta 822

M. C. GHOSE, J.

Baruram Kalowar --- Auction-purchaser—Petitioner.

v.

Upendra Nath Das and *others*—Opposite Parties.

Civil Rule No. 95 of 1934, Decided on 7th June 1934, from decision of Munsif, 2nd Court, Howrah, in T. Ex. Case No. 5 of 1932.

*** Civil P. C. (1908), O. 21, Rr. 90 and 92 and O. 34. R 5 –Application under R. 90 to set aside sale refused — Court holding sale has to confirm it—Till then judgment-debtor can take action under O. 34, R. 5 although confirmation is delayed by his action.**

Under O. 21, R. 92 after an application under R. 90 is disallowed the Court has to make an order confirming the sale, and until the sale is confirmed the judgment-debtor can take action under O. 34, R. 5 even though he has by his own action delayed the confirmation for many years.

[P 823 C 1, 2]

Rupendra K. Mitra and *Kshetra Mohan Chatterjee*—for Petitioner.

Kali Kinkar Chakravarti and *Girindra Nath Ganguli*—for Opposite Parties.

Judgment.—This is a petition by an auction purchaser against an order of the Munsif of Howrah who allowed the opposite parties to pay the decretal amount under O. 34, R. 5 and thereafter set aside the sale. The facts in short are that the property in question belonged to one Debidin Kalwar and on account of arrears of municipal rates the Chairman of the Howrah Municipality attached the property and sold it in auction, arrears of rates being the first charge on the property. The sale was held on 16th June 1932. Thereafter on 22nd July 1932 opposite party 1 Upendra Nath Das who had lent money to Debidin on a mortgage of this property made a petition under O. 21, R. 90 to set aside the sale alleging fraud and material irregularity. The learned Munsif on hearing the parties set aside the sale. In appeal the District Judge by his order dated 18th September 1933 dismissed the application under O. 21, R. 90. That date was the last working date before the civil Court long vacation. The Court re-opened on 23rd October. The record was received by the Munsif from the District Court on 25th October and on that date opposite party 1 made an application under O. 34, R. 5 to set aside the sale upon payment of the necessary amount. The petitioner opposed that application. Upon hearing both parties the Court by its order dated 28th November 1933 allowed the application of the opposite party on receipt of the necessary amount and the sale was set aside. It is urged by the learned advocate appearing for the petitioner that the order of the District Judge dated 18th September 1933 whereby he dismissed the application under O. 21, R. 90 and stated that the sale would stand is equivalent to confirmation of sale and that a further

confirmation by the Court below was not necessary. This does not appear to be a correct argument having regard to the wording of O. 21, R. 92 which states inter alia that after an application under R. 90 is disallowed the Court shall make an order confirming the sale. "Court" here means the "Court which held the sale." In my opinion, the Court below was correct in holding that after the District Judge had passed the order disallowing the application under R. 90 it was the duty of the Munsif who had held the sale to confirm the sale without any delay, and until the Munsif confirmed the sale the opposite party could take action under O. 34, R. 5.

It was urged for the petitioner that if the Munsif omitted to confirm the sale the auction purchaser should not suffer by the default of the Court. But in this case the Court did not make any default. The order was passed on 18th September which was the last date before the civil Court vacation. The Court re-opened on 23rd October and the record was received on 25th October. Before 25th October the Munsif was not in a position to confirm the sale and on that very date opposite party 1 made an application under O. 34, R. 5. The Munsif therefore had no option but to allow the opposite party to deposit the money as provided by R. 5. It is true that the deposit was made by the opposite party more than a year and four months after the sale. It is urged that it is a gross hardship upon the auction purchaser to set aside the sale after a year and four months without giving him adequate compensation. Under R. 5 as it stood before the amendment the defendant could pay the requisite amount in Court on or before the date fixed for the sale or he could pay the amount within 30 days after the sale under O. 21, R. 89, but after 30 days from the date of the sale he could not deposit the money. After the amendment however the judgment-debtor may under R. 4 (2) apply for the postponement of the final decree and thereby delay the execution and after the final decree is made and the sale has been held he may deposit the money at any time before the confirmation of the sale even though the judgment-debtor by his own action prevents the confirmation of the sale for a long period. Under R. 5 as it stands, if the judgment-debtor by his manoeuvres prevents confirmation for a year and four months or even for a longer period he may thereafter before the sale is confirmed apply under R. 5 paying all the requisite amounts and demand the sale to be set aside and the auction purchaser will get his money together with compensation at the rate of 5 per cent. As to the hardship produced by such action on the part of the judgment-debtor the remedy lies in the amendment of R. 5. But so long as R. 5 stands the judgment-debtor may apply at any time before the confirmation of the sale even though he has by his own action delayed the confirmation for many years. The Rule is discharged with;costs hearing fee two gold mohurs.

G.A. *Rule discharged.*

A. I. R. 1934 Calcutta 823

MUKERJI AND S. K. GHOSE, J.

Sailendra Nath Das and *another*—Appellants.

v.

Saroj Kumar Das and *others* — Respondents.

Appeal No. 1 of 1932 and 221 of 1928, Decided on 7th May 1934, for leave to appeal to His Majesty in Privy Council.

(a) Civil P. C. (1908), O. 45, R. 13 and S. 151—High Court has power to stay proceedings in suit.

Under O. 45, R. 13 High Court has power to stay further proceedings in the suit as distinguished from proceedings in execution: 13 *C W N* 690 and 42 *All* 170, *Appr.* [P 824 C 1]

Apart from O. 45, R. 13 there is abundant inherent power in the High Court to stay proceedings in a suit in a suitable case: 34 *C W N* 631, *Rel on.* [P 824 C 1]

(b) Civil P. C. (1908), S. 151—High Court has power to stay further proceedings in suit in a suitable case — No irreparable injury likely to be caused—Interference shall be refused.

Where the Court is not satisfied that any irreparable injury will result from non-interference and on the other hand the Court thinks that it is desirable from several points of view that such proceedings should be allowed to take their own course, interference will be refused. [P 824 C 1]

Amarendra Nath Bose and *Satyendra Nath Ghose*—for Appellant.

Radhikaranjan Guha — for Respondents.

Judgment.—As regards the power of this Court under O. 45, R. 13 of the Code to stay further proceedings in the suit as distinguished from proceedings

in execution, we are not prepared to dissent from the view taken in the case of 1 I C 812 (1). That decision has been followed in 1919 All. 14 (2), and though referred to in other cases does not appear to have been ever dissented from. But it is now well settled that apart from the atoresaid provision of the law there is abundant inherent power in this Court to stay such proceedings in a suitable case. One of the latest cases in which such inherent power has been recognised is the case of 1931 Cal. 79 (3). And indeed from what the Judicial Committee have said on more occasions than one as regards the advisability on the part of this Court to deal with matters of this description, at least in the first instance, it would seem that such power has been assumed. On the merits, however, we are not inclined to take the view that expediency or ends of justice requires any order for stay being made. We are not satisfied that any irreparable injury will result from our non-interference, and on the other hand think that it is desirable from several points of view that such proceedings should be allowed to take their own course. The application is dismissed with costs three gold mohurs.

G.B *Application dismissed.*

1. Laliteswar Singh v. Bhabeswar Singh, (1909) 1 I C 812.
2. Ram Narain v. Harnam Das, (1919) All 14 =54 I C 561=42 All 170.
3. Sarat Kumar Roy v. Official Assignee Bengal, 1931 Cal 79=129 I C 833.

* A. I. R. 1934 Calcutta 824

MITTER AND PATTERSON, JJ.

Gourhari Subhasubdar and *others*—Defendants—Appellants.

v.

Shyama Sundari Subhasundar and *another*—Respondents.

Appeal No 95 of 1930, Decided on 22nd May 1934, from original decree of Sub Judge, Second Addl. Court, Dacca, D/ 28th January 1930.

*** (a) Hindu Law — Dayabhaga — Joint family—Previous partition alleged—Burden is on him who alleges partition.**

Where there was admittedly a joint family and a partition is set up the burden of proof is on him who sets up the partition of establishing that there has been a disruption of the joint family. The fact that there has been an admission that one brother has separated from the rest will not make any change in the rule regarding the burden of proof in a case governed by Davabhaga School. [P 825 C 2; P 826 C 1]

(b) Civil P. C. (1908), S 100—Finding of fact—Finding should not be interfered with especially where issue is simple and depends upon credibility of witnesses.

Generally speaking it is undesirable to interfere with the findings of fact of the trial Judge who sees and hears the witness and has an opportunity of noting their demeanour, and especially in cases where the issue is a simple one and depends on the credit which attached to one or other of conflicting witnesses: 1915 *PC* 1, *Foll.* [P 826 C 2]

(c) Interpretation—Pleadings — Statement in, must be taken as a whole.

Any statement in the pleading must be taken as a whole and it is not permissible for the Court to dissect that pleading. [P 825 C 1, 2]

Ramesh Chandra Sen and *Paresh Chandra Sen*—for Appellants.

Jatindra Mohan Chaudhury and *Amarendra Mohan Mitra*—for Respondents.

Mitter, J.—This is an appeal by defendants 1, 2 and 4, and is directed against a preliminary decree for partition passed by the Subordinate Judge of Dacca on 28th January 1930. The property which forms the subject-matter of the partition suit belonged to one Keru Subhasundar who died in 1319 B. S. leaving behind him five sons Gaurhari, defendant 1, Hari Charan, defendant 2, Abhoy, who is now dead, the husband of the plaintiff, Naba Kishore, defendant 3, and Nagarbashi, defendant 4 as well as his widow who is now dead. Keru rose to a position of affluence from a very humble position and left fairly considerable properties. The plaintiff who demanded a partition from the other cosharers did not find any response to her demands and has instituted the present suit for partition of immovable properties which were left by her father in-law Keru. The substantial defence to the suit, which was made by defendants 1, 2 and 4 who filed a joint written defence is that there had been a previous partition amongst all the five sons of Keru in 1321 B. S. As a result of that partition the mother who under the Hindu Law was entitled to a share was given only 1½ pakhis of land and that in 1325 B. S. that property of the mother was also partitioned amongst the five brothers when there was a sort of re-adjustment. The Subordinate Judge has negatived this defence. Amongst other defences to the suit *it* is necessary to

notice the defence that some of the properties were self acquired properties of defendants 1, 2 and 4 In particular it is said that the properties which formed Dags Nos. 2327 and 2328 of the Cadastral Survey were really acquired by some of the answering defendants under a deed of gift and that these were not joint properties which could form the subject of the partition suit.

It was also said with regard to another plot, namely plot No. 684, that this was originally family property but it subsequently passed out of the family and was afterwards purchased with their own funds by defendants 1, 2 and 4. With regard to some other plots, namely plots Nos. 1493, 1495, 1393 and 412 the defence relies on its self-acquisition by the answering defendants. The main question which has been in controversy before us in the present appeal is as to whether the suit should not be dismissed on the ground that there had already been a previous and amicable partition as alleged by the defendants. The plaintiff's husband and the other defendants admittedly formed at one time members of the joint family governed by the Dayabhag School of the Hindu law and any one setting up a previous partition must prove that there had been such a partition. In other words the burden of proof is on himself of establishing that there has been a disruption of the joint family. It has however been contended on behalf of the appellants who are defendants 1, 2 and 4 that the Subordinate Judge has committed an error in law in casting the onus on the defendants of establishing this previous amicable partition as by reason of the pleadings in the plaint there has been an admission on behalf of the plaintiff that at least one of the brothers had separated from the rest.

The pleadings if properly looked into only state this: that one of the brothers, defendant 2, proposed to have his share in the immovable property and the money lending business amicably partitioned and that the plaintiff also proposed to have her share in the immovable and the money lending business amicably made over to her; but this was not done and defendant 2 took some lands out of the joint immovable properties without the consent of the plaintiff. It is an ordinary rule that any statement in the pleading must be taken as a whole and it is not permissible for the Court to dissect that pleading. In effect the plaintiff, while admitting that there had been a separation of some lands with reference to defendant 2, states that there has been no legal partition or a partition which really binds her. In these circumstances it appears to us that the Subordinate Judge has rightly cast the onus on the defendants of establishing the amicable partition alleged by them. Even on the footing that there has been an admission that one brother has separated from the rest it does not appear to us' as at present inclined, that that would make any change in the rule regarding the burden of proof. But we may state that it is not necessary to finally decide the question as our decision will depend on the weight to be attached to the evidence which has been given on both sides. As Mr. Sen appearing for the appellants argued the question of onus at considerable length we might say a few words with reference to that question as it appears to us at the present moment, and that is on the assumption that one of the brothers has separated from the rest.

It has been argued that the effect of the separation of one of the brothers from the rest in a family governed by the Dayabhaga School of the Hindu law is that there is a virtual separation of all. A reference has been made to the very early case in Hyde's Reports which is quoted in Shyama Charan Sircar's "kayastha-darpan" Edn. 2, p. 222, which lends support to this contention. But there is a later case which takes an opposite view. That it is the case of 9 Cal. 817 (1). The strongst case on which reliance has been placed on behalf of the appellants on the question of onus is a decision of their Lordships of the Judicial Committee of the Privy Council in the case of 30 Cal. 725 (2). It is to be noticed, however that that was a case under the Mitakshara system of the Hindu Law and Lord Davey, while delivering the judgment of their Lordships of the

1. Upendra Narain Mythi v. Gopee Nath Bera, (1883) 9 Cal 817=12 C L R 356
2. Balabux Ladhuram v. Rukhma Bai, (1903) 30 Cal 725=30 I A 130=8 Sar 470 (P C)

Judicial Committee, points out that under that system where for the purpose of a partition it is sufficient to show that there has been an intention to separate; the separation of one of the co-parceners would amount to a virtual separation of all. It is best to reproduce here what Lord Davey said in connexion with the point now in controversy:

"It appears to their Lordships, said Lord Davey, that there is no presumption, when one co-parcener separates from the others that the latter remained united. In many cases it may be necessary in order to ascertain the share of the outgoing member, to fix the shares which the other co-parceners are or would be entitled to, and in this sense the separation of one is said to be a virtual separation of all."

These observations apply with a peculiar force to the constitution of a joint family governed by the Mitakshara system of the Hindu law, where mere intention to separate, which intention is given effect to by one of the members, is enough to constitute separation. That is not the rule under the Bengal system of the Hindu law where in addition to a mere intention to separate there must be a division of the property by metes and bounds in order to effectuate a partition. The other cases referred to by Mr. Sen are 1923 P. C. 136 (3) and 1931 P. C. 154 (4). They are all cases which follow the decision of the case referred to above and reported in 30 Cal. 725 (2) and are all cases under the Mitakshara system of the Hindu law as modified by Mayukha and Smriti Chandrika which prevail in Bombay and Madras. As at present advised I am inclined to think that these decisions cannot be of any assistance with regard to the rule of the presumption of jointness as obtained in the Bengal school. But as I have already stated it is not necessary to express any final opinion on this question which may require reconsideration when occasion demands. Here evidence has been taken on both sides with reference to the alleged previous amicable partition. (Their Lordships then discussed the evidence and proceeded.)

We have not got the same advantage with reference to this matter as the Subordinate Judge had, and the issue is also a simple one; and we ought not lightly to depart from the view taken by the Subordinate Judge, as we are constantly reminded of the remarks made by their Lordships of the Judicial Committee in the case of 1915 P. C. 1 (5) that generally speaking it is undesirable to interfere with the findings of fact of the trial Judge who sees and hears the witnesses and has an opportunity of noting their demeanour and especially in cases where the issue is a simple one and depends on the credit which attached to one or other of conflicting witnesses. It is also to be noticed that defendant 3 who is one of the brothers supports the plaintiff in the case which she has presented to the Court. Reliance has been placed on a number of documents of the nature of bonds which go to show, according to the contention of the appellants, that Abhoy, the husband of the plaintiff, had a separate money-lending business : vide Ex. K to N and S). It is true that on the face of these documents it appears that a loan was given either by the plaintiff or by her husband. But some of these documents show money was received by Nagarbashi, one of the sons of Keru, from some of the debtors, and that he has himself written those bonds. Ex. N goes to show that it was Nagarbashi himself who had advanced those loans. In these circumstances it is very difficult to say that this was not the money of the joint family seeing, as we have already said, that the defendants have failed to establish the partition of the immovable properties. We do not see any reason why we should dissent from the conclusion of the Subordinate Judge that bonds and other such documents used to be taken by one of the members with the money of the joint family.

It is also remarkable that the defendants have not produced their account books to prove that they had funds separate from the joint family funds. An inference unfavourable to the case of the defendants should be drawn from these circumstances. We are therefore of opinion that the defendants have

3. Jatti v. Banwari Lal, 1923 P C 136=74 I C 462=50 I A 192=4 Lah 350 (P C).
4. Bal Krishna v. Ram Krishna, 1931 P C 154=132 I C 733=58 I A 220=53 Cal 300 (P C).

5. Bombay Cotton Manufacturing Co. Ltd. v. Motilal Shivlal, 1915 P C 1=29 I C 229=42 I A 110=39 Bom 386 (P C).

failed to discharge the burden of showing that there has been a separation of funds; and even if the burden were not on them to prove this we are not satisfied from the evidence on behalf of the plaintiff and defendant 3 that there has been such a partition as would disentitle the plaintiff to maintain the present suit. With regard to some of the properties to which reference will be made presently we are of opinion that the plaintiff's suit must fail. It appears that defendants 1 and 4 obtained the properties which form Dags Nos. 2327 and 2328 under a deed of gift which is to be found at p. 13, part 2, and which has been marked as Ex. P. This was a deed of gift in favour of these two persons who are expressly named as donees. It is a separate source of acquisition. There is nothing in the document to show that the gift was made out of the joint fund and for the members of the joint family. We are therefore of opinion that this part of the plaintiff's suit concerning plots 2327 and 2328 must be dismissed. With regard to plot 684 it appears that this property was purchased by Keru from one Manoda, the reversionary heir of Baikuntha Pattar. Manoda subsequently brought a suit to set aside the sale to Keru and the reversionary having succeeded, this property passed out of the joint family.

This property was afterwards purchased by defendants 1, 2 and 4 which fact is supported by Exs. C (1) printed at p. 42 of the second part of the paper book and Ex. G printed at p. 41 of the second part of the paper book. Each of these deeds on the face of it stated that the money which formed the consideration of these two purchasers was furnished by defendants 1, 2 and 4. As this was the ancestral property and as originally it was shown that it was subsequently purchased by one or two members of the family it is to be presumed that this was really intended for the individual members of the family. I think, therefore, with regard to Dag No. 684 the plaintiff's suit must be dismissed. With reference to plots 1493, 1433, 1393 and 412 the defendants have failed to establish their self acquisition in the absence of books of accounts to show the existence of a separate fund. The result therefore is that this appeal is allowed to this extent, namely, that the plaintiff's suit is dismissed with reference to Cadastral Survey Dags Nos. 2327, 2328 and 684. This appeal is dismissed with regard to the question of the partition of all other plots. As the success of the parties is divided we think that the costs should be in proportion to their success in all Courts. The respondents will have 6/7ths of the costs incurred by them both in this Court and also in the Court below, and the appellants will have 1/7th of the total costs incurred by them in this Court and in the Courts below. We assess the hearing fee at seven gold mohurs.

G.B. *Appeal partly allowed.*

A. I. R. 1934 Calcutta 827

JACK AND KHUNDKAR, JJ.

Madhu Sudan Shaha—Petitioner.

v.

Ram Pershad Chimanlal, Firm and *others*—Opposite Parties.

Civil Rule No. 1568 of 1933, Decided on 6th June 1934.

Civil P. C. (1908), Ss. 47 and 151 and O. 22, R. 58—Previous auction purchaser of the property re-attached in execution of another decree is not representative of judgment-debtor under S. 47—He cannot object to subsequent sale under S. 7—High Court will not interfere under S. 151—O. 22, R. 58 does not apply.

A purchased some land of *B* in execution of a rent decree against *B*. Sale was confirmed and possession obtained by *A*. *C* got a decree against *B* and attached a share of land purchased by *A*, *A* objected to the sale of this share on the ground that the judgment-debtor had no saleable interest, the land having been already purchased by *A* :

Held : that O. 21, R. 58 had obviously no application as it refers to objection to attachment. The auction purchaser in execution of a money decree is a representative of the judgment-debtor in another case, the property having been attached in execution of the decree in that case previous to this decree. Though a wide meaning is to be attached to the term representative in S. 47 the auction purchaser cannot be regarded as a representative of the judgment-debtor unless his interest is affected by the decree and in the present case the interest of the petitioner judgment-debtor did not appear to be affected by the decree and therefore he was not entitled to maintain his application under S. 47 : 1924 *Mad* 889; 9 *I C* 194 and 1920 *Mad* 324, *Ref.*

Held further : that the circumstances of the case did not call for the exercise of powers under S. 151. [P 828 C 2; P 829 C 1]

Abinash Chandra Ghose— for Petitioner.

Rupendra Kumar Mitter and *Bijan Behari Mitter*--for Opposite Parties.

Jack, J.—On 21st September 1932 the petitioner purchased 1 Bigha 4 Cottas of land on which were tin sheds and a godown in Mouza Panjagram. The purchase was made at an auction sale in execution of a rent decree against Opposite Party 2 and his cosharers, The sale was subsequently confirmed and the petitioner obtained possession through Court and has since been in possession of the property.

Opposite Party 1 had also got a decree against Opposite Party 2 and in execution of his decree had attached on 12th June 1931 a four annas share of the same property, and in execution of his decree this share of the property was sold on 18th June 1932 ; an application was made to set aside this sale and it was set aside on 29th July 1933. Thereafter proceedings were taken for resale and 23rd October 1933 was fixed for the sale. On that date the petitioner applied to the learned Subordinate Judge for exemption of the property from sale on the ground that the judgment-debtor had no saleable interest, the property having already been purchased by him on 21st September 1932. His petition was however rejected by the learned District Judge without going into the merits of the application on the ground that there was no provision in the Code of Civil Procedure empowering the Court to entertain such an application. It is against this order that the petitioner has come up to this Court in revision.

In coming to this decision the learned Judge was following the ruling, 9 I C 194 (1) in which it was held that neither under O. 22, R. 58 nor under S. 47, Civil P. C., could the petitioner apply to prevent the sale of his property. Now O. 21, R. 58 had obviously no application as it refers to objection to attachment. The question on which this case depends is whether the auction purchaser in execution of a money decree is a representative of the judgment-debtor in another case, the property having been attached in execution of the decree in that case previous to his decree.

Under S. 63, Civil P. C., the Court which shall determine any claim where properties are under attachment in execution of more decree than one is the Court of the highest grade, or where the Courts are of the same grade the Court under whose decree the property was first attached. But by the proviso in Cl. D nothing in the section shall be deemed to invalidate any proceeding taken by a Court executing one of such decrees. Therefore in the present case the sale in execution of the decree in the Second Munsif's Court is valid. That being the case the auction purchaser became the owner of the property before the sale in execution of Opposite Party 1. The auction purchaser is therefore not affected by the second sale as he was not a party in the suit and the only way in which Opposite Party 1 can attack him is by showing that his purchase was a collusive and fraudulent transaction. The Court below decided following the decision of 9 I C 194 (1), that the petitioner was not a representative of the judgment-debtor so as, to enable him to apply under S. 47 for a declaration that the property he had purchased was not liable to sale in execution of the other decree. This decision appears to be correct for the authorities seem to show that though a wide meaning is to be attached to the term representative in S. 47, Civil P. C., the auction purchaser cannot be regarded as a representative of the judgment-debtor unless his interest is affected by the decree. In the present case the interest of the petitioner judgment debtor does not appear to be affected by the decree and therefore he is not entitled to maintain his application under S. 47, Civil P C. He is in possession of the property and it will be for the Opposite Party 1 to establish his claim to the property as against the petitioner by separate proceedings.

Reference has been made to the case of 1924 Mad 889 (2) where it appears to have been held in a similar case that a purchaser in an execution of a decree by an inferior Court can bring to the notice of the superior Court the fact of his purchase as a representative of the judgment-debtor for stopping the sale in execution of a decree of the superior Court. The learned Judges dissented from the decision in the case of 9 I C 194 (1). In that case it was held that a purchaser was certainly a

1. Mahadeo Lal v. Dinkar Prasad, (1911) 9 I C 194.

2. Srinivasa Chariar v. Appavoo Reddy, 1924 Mad 889=84 I C 265.

representative of the judgment-debtor even though he was a Court auction-purchaser and as such representative he was entitled under S. 47, Civil P. C., to apply to the Subordinate Judge to stop the sale of the property on the ground that the title to it had passed to him. The learned Judges referred to the Full Bench Case of 1920 Mad 324 (3) in support of the decision. In that Full Bench case it was held by Oldfield, J., that an auction-purchaser is a representative of the judgment-debtor for the purpose of an enquiry relating to a subsequent execution of a distinct decree against the judgment debtor. In the same case however it was held by the Officiating Chief Justice that

"whether the auction-purchaser...is to be regarded as the representative of the judgment-debtor or the decree holder depends upon the nature of the questions raised and who the contesting party is."

The other learned Judge Seshagiri Ayyar, J., held that

"if the points for decision in an application before the executing Court relate to the rival rights of the decree-holder and of the judgment-debtor and also relate to execution, discharge or satisfaction of the decree it should be dealt with in execution and not by separate suit."

Applying these principles to the present case it is clear that the present application is not maintainable under S. 47 Civil P. C. It was suggested for the petitioner that this is a case in which the inherent powers of the Court should be exercised in favour of the petitioner inasmuch as, under O. 21, R. 64, the property was not liable to sale as it no longer belonged to the judgment-debtors. However, we do not think that the circumstances of the present case call for the exercise of our powers under S. 151, Civil P. C. The rule must accordingly be discharged.

Khundkar J.—I agree. On behalf of the petitioner, argument was advanced that the sale on 21st September 1932 at which the petitioner purchased the property and which was subsequently confirmed effectively divested opposite party No. 2 of his entire interest in the property, so that it was no longer available under O. 21, R 64, which requires not only that the property in question should be under attachment but also that it should be liable to sale. In the present case, it is argued that the property was not liable to sale inasmuch as it did not satisfy the language of S. 60 which clearly specifies as liable to sale only such property as belongs to the judgment-debtor or over which the judgment-debtor has a disposing power. According to the petitioner, he is further fortified in his claim to relief by the provisions of S. 63 (2) and reliance is placed on the case of 1924 Cal 168 (4). This reasoning, as I apprehended it, is that to permit the sale to opposite party 1 to be confirmed would have the effect of invalidating a proceeding already taken by a Court executing one of two decrees, viz., the earlier sale of the 21st September 1932 in which the petitioner himself purchased the property.

On these grounds it was contended that the learned Subordinate Judge had power under S. 151 to stop the subsequent sale, and that his refusal to do so in the circumstances of this case amounted to a failure to exercise jurisdiction, which this Court acting under S. 115 should correct by prohibiting confirmation of that sale. Reference was made to the case of 33 Cal 927 (5) in support of the proposition that the learned Subordinate Judge had power under S. 151 to stay his hand in the matter of the sale to opposite party 1, a step which, in the circumstances of the case, was called for in the interests of justice. The observations contained in that judgment can however have no application to the special facts of this case, inasmuch as the concrete question which arises directly for determination here has been concluded by the decision in 9 I C 194 (1). Adopting the view taken in that case, I am satisfied that in the proceedings before him, the learned Subordinate Judge had no jurisdiction to exempt the property from sale on the petitioner's application, and that accordingly his refusal to do so is not capable of revision.

In my judgment the case of 1924 Cal 168 (4) is no authority to the contrary since in that case the question arose in a suit brought to establish the plaintiff's title and not, as in the present case, on the objection of an auction-

3. Veyindramutha Pillai v. Maya Nandan 1920 Mad 324 = 54 I C 209=43 Mad 107 (FB).

4. Girish Chandra v. Sri Krishna De 1924 Cal 168=75 I C 325.

5. Hukum Chand Boid v. Kamala Nanda Singh (1906) 33 Cal 927=3 C L J 67.

purchaser in an execution proceeding brought by another decree-holder. The validity of the sale in which the petitioner purchased the property has been challenged in the course of the argument addressed to us on behalf of opposite party 1. The attachment obtained by the latter was of an earlier date, and our attention has been invited to certain features of the execution proceedings in support of the suggestion that the sale to the petitioner was a collusive transaction. It is manifest therefore that at the present moment the real question at issue between the parties is whether the petitioner's title can prevail over that of opposite party 1. As the petitioner is now in possession, this question should in my judgment be left to be determined in such proceedings as may be suitably taken by the opposite party 1 to establish his rights against the petitioner.

G.B. *Rule discharged.*

A. I. R. 1934 Calcutta 830

S. K. GHOSE, J.

Brojendra Kumar Banerjee and *others* —Petitioners.

v.

Symannessa Bibi—Opposite Party.

Civil Rule No. 131 of 1934, Decided on 11th June 1934.

Bengal Tenancy Act (1885), S. 26 (c) and S. 26 (F) (1)—Cosharer landlords on whom notice under S. 26 (c) is not served can apply for pre-emption within reasonable time from knowledge of sale.

Cosharer landlords who have not received notice of the transfer under S. 26 (c) are not bound by the period of limitation of two months from the service of notice which is mentioned in sub-S. (1) of S. 26-F. Such landlords may apply for pre-emption within a reasonable time of their knowledge of the transfer: 1932 *Cal* 289 and 1934 *Cal* 662, *Ref.* [P 830 C 2]

Prokash Chandra Pakrashi—for Petitioners.

Abdul Hossain—for Opposite Party.

Judgment.—This rule arises out of an application under S. 26-F, Ben. Ten. Act. The petitioners are cosharer landlords of a Sikimi Taluk and the opposite parties Nos. 2, 3, 4 and 5 are other cosharer landlords. The pposite party No. 6 sold the land to opposite party 1 and a notice under S. 26-C of the Act was served upon the petitioners on 27th April 1933. On 26th June following, the petitioners filed the application under S. 26-F, Ben. Ten. Act, making the aforesaid purchaser as also the aforesaid cosharer landlords parties and claiming to exercise the right of pre-emption. Opposite party 1 appeared and filed an objection stating inter alia that the petitioners and oppositie parties 2, 3, 4 and 5 were not the entire body of landlords. On 12th September 1933, the learned Munsiff passed an order in the course of which he stated that the petitioners had been misled by opposite party 1 inasmuch as the notice of transfer itself did not mention the names of other persons who were now alleged to be cosharer landlords. The Munsiff however directed the petitioners to have those other persons added as parties and granted time till 23rd October 1933. On 16th September, the petitioners filed an application for an order upon the opposite party 1 for supplying the names of the other persons who had to be made opposite parties. This application was rejected. On 23rd October following the petitioners filed another application for time in order to enable them to make the amendment by way of addition of parties. The learned Munsiff held that any adjournment would take it beyond the period of limitation. In that view he rejected the application. On 24th October, the application for pre-emption was also rejected. Against these orders the present rule has been obtained.

It will appear that the whole trouble has arisen because opposite party 1 now alleged that certain persons who were not made parties in the notice of transfer are cosharer landlords, while it is the case for the petitioners that all the cosharer landlords are already on record. It is necessary that in a matter under S. 26-F, all the cosharer landlords should be brought before the Court. But at the same time those cosharers landlords who did not receive notice of the transfer are not bound by the period of limitation of two months of the service of notice which is mentioned in sub-S. (1) of the S. 26-F. With regard to such landlords it has been held that they may apply for pre-emption within a reasonable time of their knowledge of the transfer: see the case of 1932 Cal. 289 (1) which is followed in the case of 1934 Cal. 662 (2). Now all that the

1. Suryya Kumar v. Munshi Noabali, 1932 Cal 289=136 I C 871=59 Cal 15.
2. Baikuntha Chandra Saha v. Samsul Huq. 1934 Cal 662.

petitioners want is time in order to enable them to make certain other persons parties and no question of limitation arises. The lower Court has not gone into the question as to whether all the cosharer landlords are on the record as alleged by the petitioners. In any case, the lower Court exercised its jurisdiction wrongly in rejecting the petitions for time on the ground of limitation.

The orders of 23rd and 24th October must therefore be reversed. The matter would be remanded to the lower Court to allow the petitioners an opportunity to amend their petition by way of addition of parties. When that is done the Court will determine whether all the cosharer landlords have been brought on the record and then proceed to determine the application finally. The rule is made absolute with costs, hearing fee one gold mohur.

G.B. *Rule made absolute.*

A. I. R. 1934 Calcutta 831

JACK, J.

Ambika Dassya—Defendant — Appellant.

v.

Bejoy Chand Mohatap — Plaintiff—Respondent.

Appeal No. 1526 of 1931, Decided on 21st May 1934, against decree of Dist. Judge, Bankura, D/- 16th April 1931.

Bengal Tenancy Act (1885), S. 52 (1) (a)—Tenant losing use of his holding owing to deposit of sand is entitled to abatement of rent.

Section 52 (1) (a) recognizes that diluvion is not the only way in which land may be lost to the tenure or holding, and once it has been found that the use of any land has been as much lost to the tenant as it would have been in the case of diluvion, it is for the landlord to show that there are circumstances which would disentitle the tenant to obtain abatement of rent. Where the land on account of which abatement was claimed was covered with sand two cubits deep.

Held: that it must be taken that there had been a reduction of area to the extent covered by sand to a depth of three feet and on this ground the tenant had a right to abatement of rent under S. 52 (b): (1864) *W. R. Act* 10, *Rule* 42, *Ref.* [P 832 C 2]

Bankim Chandra Mukerji and *Purna Chandra Chatterji*—for Appellant.

Rupendra Coomar Mitra—for Respondent.

Judgment.—This appeal has arisen out of a suit for recovery of arrears of rent from 1332 to 1335 B. S. at Rs. 22-11-9 with interest and cess at 6 pies per rupee till 1333 B. S. and then at Rs. 3-7-9 per year from 1334 B. S. according to the valuation roll. The defendant contends that a large part of the suit lands has been permanently rendered useless by a deposit of sand and accordingly the defendant by a solenama in a rent suit brought against his tenant reduced the jama. The defendant claims that his jama should also be reduced proportionately. The abatement of rent as claimed by the defendant was allowed by the first Court, but in the appellate Court the suit was decreed in full. The learned District Judge held that S. 38, Ben. Ten. Act, did not apply to tenure holders and also that a tenant is not entitled to abatement of rent on the ground of natural justice. The learned District Judge appears to have overlooked the provisions of S. 52, Cl. (b), Ben. Ten. Act, which lays down that:

"Every tenant shall be entitled to a reduction of rent in respect of any deficiency proved by measurement to exist in the area of his tenure or holding as compared with the area for which rent has been previously paid by him."

In this case the evidence is that the land on account of which tenant claims abatement is covered with sand two cubits deep. This has been proved by measurement and is not disputed. In these circumstances it must be taken that there has been a reduction of area to the extent covered by sand to a depth of three feet and on this ground, the tenant has a right to abatement of rent. The right to abatement where the land is so covered by sand as to be wholly useless is recognized by Sir Barnes Peacock in (1864) W. R. Act 10, Rule 42 (1). The title to the rent is founded on the presumption that the tenant enjoys the use of the land during the contract and if he loses the use of the land owing to no default on his part it is only reasonable that he should not suffer. The landlord cannot complain for if the land had been in his possession he would have suffered equally.

In other cases the law recognizes the tenant's right to relief where he has been dispossessed through no fault of his own, for instance, in the case of diluvion; and in principle there seems to be little to distinguish the cases; if instead of an encroachment by a few

1. Syed Hyder Ali v. Omrit Choudhury, (1864) W R Act 10, Rule 42.

inches of water there is an encroachment (owing to floods or some other cause) of a few feet of sand rendering the land permanently useless for agricultural purposes, is the tenant on the same principle not entitled to an abatement of rent? True the sand might be removed at considerable expense, but the diluviated land might also in many cases be reclaimed and that does not disentitle the tenant to abatement. I have no doubt that in Bihar where gaps have been made in the land by earthquake the tenant will be held to be entitled to abatement although there has been no alteration in the boundaries of the land let out to the tenant. Cl. (a), S. 52 (1) recognizes that diluvion is not the only way in which land may be lost to the tenure or holding, and, once it has been found in such cases that the use of the land has been as much lost to the tenant as it would have been in the case of diluvion, it is for the landlord to show that there are circumstances which would disentitle the tenant to obtain relief. No such circumstances have been established in this csse.

In the result, this appeal is allowed, the decree of the lower appellate Court is set aside and that of the Court of first instance in its entirety restored. The appellant is entitled to bear costs of the lower appellate Court. I make no order as to costs in this Court. Leave to prefer a further appeal under the Letters Patent has been asked for and is refused.

G.B. *Appeal allowed.*

A. I. R. 1934 Calcutta 832

M. C. GHOSE, J.

Kartick Chandra Manna—Petitioner.

v.

Nibaran Chandra Ghosh and *others*—Opposite Parties.

Civil Revn. No. 23 of 1934, Decided on 7th June 1934.

Bengal Tenancy Act, (1885), S. 171—"Any person whose interests are affected" does not include purchaser of judgment-debtor's interests.

"Any person whose interests have been affected by the sale" does not include the judgment-debtors or one of the judgment-debtors. The purchaser of the right, title and interest of judgment debtor at Court auction, in execution of a rent decree against the judgment-debtor, is the successor in interest of one of the judgment-debtors and is not entitled to the privileges of S. 171: 11 *I C* 501, *Rel on.*

[P 832 C 2]

Apurba Charan Mukherjee and *Monmotha Nath Das Gupta*—for Petitioners.

Sishir Kumar Ghosal and *Bukim Chandra Roy*—for Opposite Parties.

Judgment.—In this case the landlord obtained a rent-decree on 16th November 1932 against a great many tenants. Thereafter on 30th May 1933 opposite party 1, purchased the right, title and interest of one of the judgment-debtors Indra Narain Manna in a Court-sale. Thereafter, opposite party 1 applied to the Court under S. 171, Ben. Ten. Act, to deposit the whole of the decretal amount and hold the tenanted land as a mortgagee in possession. The Court allowed the petition.

It is urged in this Court among other grounds that opposite party 1 who purchased in a Court sale the right, title and interest of one of the judgment-debtors Indra Narain Manna could have no better right than the said Indra Narain who was one of the judgment-debtors in the suit. The position of opposite party 1, in my opinion, is no better than that of the judgment-debtor and the question is whether one of the judgment-debtors can deposit money and get the advantage of S. 171. The judgment-debtor may deposit the money under S. 170 and by doing so he can prevent the sale. S. 170 states:

"The judgment-debtor or any person whose interests are affected by the sale may pay money into Court under this section."

Section 171 provides:

"When any person whose interests have been affected by the sale pays into Court the amount requisite to prevent the sale he will get all the advantages enumerated in the section"

From reading the two Ss. 170 and 171 it would appear that the expression "any person whose interests have been affected by the sale" does not include the judgment-debtors or one of the judgment-debtors. This view is supported by the decision in the case of 11 I. C. 501 (1). As opposite party 1 was the successor in interest of one of the judgment-debtors he is not entitled to the privileges of S. 171.

The Rule is made absolute. Having regard to the circumstances the parties will bear their own costs in this Court.

G.B. *Rule made absolute.*

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1. Asutosh Ghose v. Abinash Chandra, (1911) 11 I C 501.

A. I. R. 1934 Calcutta 833

HENDERSON, J.

Prosanna Ram Ghosh and *others*—Appellants.

v.

Anfar Ali and *others*—Respondents.

Appeal No. 1745 of 1931, Decided on 15th May 1934, from appellate decree of Dist. Judge, Sylhet, D/- 7th January 1931.

Civil P. C. (1908), O. 32, R. 15—Appointment of guardian—Suit under S. 77, Registration Act—Plaintiff alleging defendant's unsoundness—Court ought not to appoint guardian ad litem without inquiring into its necessity—Lunatic dying before proceedings started—Guardian ad litem not appointed—Legal representatives brought on record after the expiry of thirty days from order refusing registration—Suit is not barred by limitation as it could not be held that there was no suit against deceased lunatic.

If a plaintiff alleges that the defendant is of unsound mind the Court must not immediately accept this as well founded and appoint a guardian ad litem. It is only when the Court on inquiry finds that the defendant by reason of unsoundness of mind or mental infirmity is incapable of protecting his interest that it is necessary to appoint guardian ad litem. Where therefore a lunatic defendant dies even before any processes are issued and it is not possible for the Court to start any inquiry regarding his lunacy, no question of appointing a guardian ad litem can arise and the suit against the legal representative is not barred by time on the ground that legally no suit was instituted against deceased lunatic because no guardian ad litem was appointed with the result that the suit must be deemed to have been instituted for the first time when the legal representatives were brought on record, by which time it was barred by limitation. [P 833 C 2]

Nikunja Behari Roy—for Appellants.

Benoyendra Nath Palit—for Respondents.

Judgment.—This appeal is by the defendants. It is directed against the decree passed in Appeal No. 844 of 1929, affirming the decree passed in suit No. 91 of the same year. The contention of the appellants is that the suit was barred by limitation. The appellants are the heirs of one Kularam Ghosh who was the original defendant. The suit was brought under the provisions of S. 77, Registration Act. Registration was refused on 3rd November 1928, the suit was instituted on 1st December 1928, Kularam Ghose died on 15th December 1928, and the present appellants were substituted on 18th January 1929. There is a finding that Kularam Ghose was a lunatic when the suit was filed.

The argument made on behalf of the appellants is that legally no suit was instituted against Kularam at all because no guardian ad litem was appointed with the result that the suit was really instituted when the present appellants were brought on the record on 18th January 1929, by which time it would have been barred by limitation. The learned District Judge overruled this contentions on the authority of the case reported in 30 All 55 (1). That decision followed an earlier one reported in 4 All 37 (2), which has also been followed by the High Court of Lahore: vide the case reported in 1926 Lah 186 (3); no authority to the contrary has been cited before me and I respectfully agree with those decisions. But I am further of opinion that the point did not really arise for decision in view of the provisions of O. 32, R. 15, Civil P. C., which provide for litigation by or against persons of unsound mind. It deals with two distinct classes of cases. Firstly, it provides for persons who have been adjudged as of unsound mind in or in question under the Lunacy Act; this case is not of that character. Secondly, it deals with cases of persons who have not been so adjudged. It seems to have been assumed as a matter of course in the lower Courts that if a plaintiff alleges that the defendant is of unsound mind the Court must immediately accept this as well founded and appoint a guardian ad litem. This is not so. It is only when the Court on inquiry has found that the defendant by reason of unsoundness of mind or mental infirmity is incapable of protecting his interest that it is necessary to appoint a guardian ad litem. In the present case Kularam Ghose died even before any processes were issued and it was not possible for the Court to start an inquiry with regard to his mental condition. The result is that no question of appointing a guardian ad litem ever arose. The appeal is dismissed with costs.

G.A. *Appeal dismissed.*

1. Rup Chand v, Dasodha, (1907) 30 All 55= 1907 A W N 290,
2. Khem Karan v. Har Dayal, (1881) 4 All 37=1881 A W N 129.
3. Ralla Singh v. Bishna, 1926 Lah 186=93 I C 355=7 Lah 102.

A. I. R. 1934 Calcutta 834

M. C. GHOSE, J.

Laduram Hiralal — Plaintiffs—Petitioners.

v.

Secy. of State—Defendant—Opposite Party.

Civil Rule No. 1451 of 1933, Decided on 8th May 1934, from judgment of Small Cause Court Judge, Sealdah, D/- 25th July 1933.

(a) Railways Act (1890), S. 72—Risk Note A—Damages are to be assessed on valuation of destination and not at place of despatch.

The measure of damages is to be assessed on the basis of the valuation at the place of the destination and not at the place where the goods were booked : 1921 *Cal* 315; *Ref.* [P 835 C 2]

(b) Railways — Risk Note A — Goods deteriorated—Delivery refused—Railway Company stopped from selling them even after 2 1/2 months—Degree of deterioration not proved—Claim for value of goods on basis that they are lost would not lie.

A person not only refused to take delivery of damaged goods but he also prevented the Railway Company from selling the goods and realising what might be obtained by selling them : He knew that the goods were liable to progressive damage but objected to their sale even after 2 1/2 months :

Held : that he was not entitled to the value of the goods on the basis that they were totally lost, as he did not prove actually what was the degree of the deterioration. [P 835 C 2]

Abinash Chandra Ghose — for Petitioner.

S. C. Basak and *Rupendra Kumar Mitter*—for Opposite Party.

Judgment. — In this case a Rule issued calling upon the opposite party to show cause why the judgment dated 25th July 1933 and the amended judgment dated 26th August 1933 in the Small Cause Court suit of the Sealdah Court as complained of in the petition should not be modified or why such other or further order should not be passed as to this Court may seem fit and proper. Upon hearing the learned advocates on both sides and upon consideration of the record the facts appear to be as follows : On 13th October 1931 at Kalukhali the plaintiff offered to the Railway Station 63 bales of jute for delivery at Cossipore Road Station near Calcutta. The officers of the Railway found that of these 63 bales, 31 bales were jute of good quality but 32 bales consisted of damaged jute which they declined to book as ordinary goods. They were booked under Risk Note A, being in bad condition, liable to damage, leakage or wastage in transit. The 63 bales however were all put into the same waggon and they arrived in the same waggon at Cossipore on 15th October and the plaintiffs sent their carters, and on the 16th took delivery of 32 bales which were said to be in bad condition and on a subsequent date they sent their men for the 31 bales in good condition. Then it was found that the 31 bales left in the waggon were all in bad condition. Upon this the plaintiffs claimed damages from the Railway Company and the Railway Company inter alia pleaded that the plaintiffs had committed a fraud on the Railway by taking away the good bales on the 16th leaving the damaged bales for which afterwards they claimed damages.

The learned Subordinate Judge who tried the suit under the Small Cause Court procedure found upon consideration of the oral evidence that he was not satisfied that any fraud was committed by the plaintiffs party. It has been urged by Dr. Basak on behalf of the Railway Administration that apart from the oral evidence the circumstances disclose a state of affairs from which one may reasonably conclude that a fraud was committed. The damaged as well as the good bales were put in the same compartment and they arrived in the same compartment at Cossipore and the plaintiffs sent their carters first of all to take delivery of damaged goods omitting to take delivery of the good bales, but leaving them to be taken delivery of on a subsequent date, although they had been booked at the same date and arrived in the same waggon on the same day at Cossipore. The taking of the 32 alleged damaged bales away before claiming the 31 alleged good bales raises a strong presumption that with or without the connivance of the Subordinate Railway Officers at Cossipore the 32 bales which were taken away included all the good bales and afterwards a false claim was lodged claiming that the Railway Company has caused damage in transit to the 31 good bales of jute. The very fact that the transit was completed, in the course of two days would raise a presumption against such damage having occurred. However as there is no cross-objection on behalf of the respondent nothing more need be said on this point.

The Court below after weighing the evidence adduced on the point and with reference to a rate list, Ex. J, filed on the defendant's part considered that the reasonable price might be assessed at Rs. 6 per bale. Calculating at this basis he allowed a decree for Rs. 186. This was on 25th July 1933. Subsequently the plaintiffs filed a written petition under S. 151, Civil P. C., claiming that the trial Court had made a manifest error in thinking that each bale consisted of two maunds whereas each bale consisted of 3½ maunds. The Court accepted the petition and increased the decree to Rs. 325-8-0. In this Court it is urged on behalf of the plaintiffs first that the Court below was wrong to take into account the rates stated in the document Ex. J, filed by the defence, and secondly that the Court committed an error of law in awarding on the basis of the price at the place of booking whereas the damages ought to have been claimed on the basis of the price of jute at the destination, namely in Calcutta.

On the first point as to the admissibility of Ex. J, it appears to be a vernacular document written by a certain person of Kalukhali wherein he gives the rates at which jute was sold by him at different dates at Kalukhali. The paper was proved by a Railway officer who had obtained it from another person. The writer of the document was not examined. It is urged for the respondent that non-examination of the writer was due to an omission on the part of the plaintiffs to object to the document Ex. J. It appears that the document was taken and marked as an exhibit and the plaintiff's party raised no objection to it at all in the trial Court. It is argued that if the plaintiff party had objected to the document the person who had written it might have been produced by the defendant company. The case of 1918 Cal 34 (1) has been quoted in support of the proposition that the mere omission to object to the reception of a document which is absolutely inadmissible does not make it admissible. In this case it cannot be said that Ex. J was a document which was inadmissible. It would have been quite admissible if the person who had written it had been examined. But it was marked on the evidence of a person who had obtained it from the writer. However the document is of little importance as it shows the price of jute at Kalukhali and not at Calcutta.

The learned advocate for the plaintiffs is correct on the second point that the measure of damages is to be assessed on the basis of the valuation at the place of destination and not at the place where the goods were booked : 1921 Cal 315 (2). The learned pleader however urges that in this case the plaintiffs are not entitled to the value of the goods on the basis that the goods have been lost. The goods, according to them, were only deteriorated, not absolutely lost, but the plaintiffs refused to take delivery of them. It is urged by the Government pleader that it was the duty of the plaintiffs to take delivery of the goods and make a claim for damages for the deterioration which was caused. They not only refused to take delivery but they even prevented the Railway Company from selling the goods and realising what might be obtained by selling the goods. This appears from Ex. D written by the plaintiff company on 4th January 1932 wherein they objected to the sale of the goods. If, as is urged by the learned advocate for the plaintiffs, the goods were liable to progressive damage it is difficult to understand why 2½ months after the goods had arrived at Cossipore the plaintiffs were still objecting to the sale of the goods. I agree with the argument of the learned Government Pleader that on the facts of this case the plaintiffs are not entitled to the value of the goods on the basis that they were totally lost. They do not prove actually what was the decree of the deterioration and the very fact that they prevented the Railway Company from selling the goods more than two months after they came to Calcutta would tend to show the mala fides of this case. In the result it does not appear that the plaintiffs can complain of the decree which has been awarded to them by the Court below. The Rule is accordingly discharged with costs.

1. Banwari Lal v. Dwarkanath Missir 1918 Cal 34=52 I C 825.

2. I. G. N. & Ry. Co. v. Eastern Assam Co. Ltd. 1921 Cal 315 = 61 I C 14 = 47 Cal 1027.

Hearing fee is assessed at three gold mohurs.

G.A. *Rule discharged.*

A. I. R. 1934 Calcutta 836

M. C. GHOSE, J.

Emperor

v.

Lakshmi Narain Addy—Accused.

Criminal Ref. No. 33 of 1934, Decided on 16th May 1934.

(a) Bengal Embankment Act (2 of 1882) — Riveris "water course" within Act—Portion between highest and lowest water line is under protection of the Act.

The definition of "water course" is not exhaustive. It only mentions certain items by the word 'includes.' In ordinary language every river is a water course. It is the portion between the highest water line and lowest water line which is under the protection of the Embankment Act. [P 837 C 1]

(b) Bengal Embankment Act (1882), S. 91 —River within operation of Bengal Irrigation Act does not come within S. 91 — Bengal Irrigation Act (1876).

If a river comes within the operation of the Bengal Irrigation Act it cannot at the same time come within the operation of the Bengal Embankment Act having regard to the provisions of S. 91, Bengal Embankment Act. [P 837 C 1]

(c) Bengal Irrigation Act (1876) — Ganges at Hooghli does not come within the Act.

The river Ganges at Hooghli does not come under the Bengal Irrigation Act. [P 837 C 1]

Sudhansu Sekhar Mukherji—for the Crown.

N. K. Basu, Fanindra Nath Sanyal—for Petitioner.

Order. — In this case petitioner Lakshmi Narain Auddy of Joraghat, Chinsurah, has been convicted under S. 76 (b), Bengal Embankment Act 2 of 1882, and sentenced to a fine of Rs. 25, in default to imprisonment for one month. He made a petition under S. 435 to the Sessions Judge and the Sessions Judge has sent a letter of reference recommending that the conviction be set aside on the ground that the trying Magistrate was wrong to hold that the river Ganges came within the prohibited area notified by the Government in its notification No. 28-I of 5th September 1929. Mr. N. K. Basu has appeared in support of the reference.

The grounds taken by Mr. Basu on behalf of the petitioner are (1) as stated by the Sessions Judge, that the notification of 5th September 1929 does not apply to the river Ganges at Hooghli; (2) that the conviction is wrong inasmuch as S. 76 does not apply to this part of the river having regard to the provisions of S. 91, Bengal Embankment Act. That section provides:

"Nothing in this Act shall apply to any embankment land or water-course which is under the operation of any of the following Acts: the Bengal Drainage Act 1880, the Bengal Irrigation Act 1876 and the Bengal Act 5 of 1864."

The facts in short are that in 1930 the petitioner who has a house on the bank of the river Ganges at Hooghli obtained from the Khas Mehal Department a piece of land on the foreshore. The khas mehal offices demarcated the boundary down the slope of the bank up to the point which was leased by the Government to the petitioner and according to the boundary pointed out by the khas mehal officer the petitioner's peon put down shal posts to demarcate the boundary. Afterwards a fencing was erected with high posts at the place and when the river got swollen up in the rainy season the fencing became completely covered with water. At one time when the river was swollen the fencing was as much as 12 feet under water and thereby obstructed navigation. The Collector issued a notice to him to remove the fencing and on his refusal to do so the present prosecution was instituted in June 1932. The original conviction dated 15th December 1932 was set aside by this Court and a retrial was ordered whereupon the present conviction was obtained on 7th August 1933.

The facts which appear clear are that the fencing in question is in the portion of the river between the lowest low water line and the high water line and that it actually caused obstruction to navigation at the place. The question is whether on the grounds urged the conviction can be set aside. The learned advocate Mr. Basu urges that the notification of 5th September 1929 does not apply to the river Ganges at Hooghli. The relevant portion of the notification refers to obstruction or diversion of any water course within the tracts. The learned Sessions Judge thinks that the river itself does not come within the notification inasmuch as the obstruction of the mid-stream between the two lowest low water lines is not prohibited. The reply is that the portion of the river between the two lowest low water lines comes under the Canal Act. It is

the portion between the highest water line and the lowest water line which is under the protection of the Embankment Act. There is no question that the term "water course" includes the river Ganges at Hooghli. The definition of "water course" in the Embankment Act includes a line of drainage, weir, culvert, pipe or other channel, whether natural or artificial for the passage of water. It is to be noted that the definition is not exhaustive. It only mentions certain items by the word "includes." In ordinary language every river is a water course.

It has been strenuously urged that the conviction is illegal in view of S. 91, Bengal Embankment Act. It was pointed out that the Bengal Irrigation Act 1876, was applied by notification to the District of Hooghli. It is urged therefore that S. 91, Bengal Embankment Act, cannot apply to the river Ganges at Hooghli but that the Irrigation Act must apply and that the conviction under the Bengal Embankment Act is therefore illegal. There is no doubt that if the river Ganges at Hooghli comes within the operation of the Bengal Irrigation Act it cannot at the same time come within the operation of the Bengal Embankment Act having regard to the provisions of S. 91, Bengal Embankment Act. But on the perusal of the relevant sections of the Bengal Irrigation Act it appears that the river Ganges at Hooghli does not come under the Bengal Irrigation Act. That Act makes provision for the construction and maintenance of canals for the supply of water therefrom and unless a river is canalised or a canal is dug from it or unless it is notified under S.6 of the Act a river does not come within the operation of the Bengal Irrigation Act. It therefore appears that the river Ganges at Hooghli does not come under the Bengal Irrigation Act. Nor does the area where the obstruction is made come within the operation of the Canal Act.

The last argument made by Mr. Basu was that the prosecution did not prove that the petitioner acted without the previous permission of the Collector. This point appears clear from the evidence of the Deputy Collector who made the complaint that a notice was sent to the petitioner to remove the offending fencing but he declined to do so and thereafter the Collector directed his prosecution. In the result, this reference is rejected, and the conviction and sentence are upheld.

R.K. *Reference rejected.*

A. I. R. 1934 Calcutta 837

BUCKLAND, J.

Susil Chunder Neogy and *others*—Plaintiffs.

v.

Birendrajit Shah—Defendant.

Suit No. 2218 of 1932, Decided on 22nd February 1934.

Landlord and Tenant — Ejectment — Suit for—Notice to quit before tenancy expires is bad in law—T. P. Act, S. 106.

The plaintiff gave notice in writing to the defendant to quit and vacate the premises in suit by 31st October 1932. Each month of the defendant's tenancy expired at midnight on the 1st of the succeeding month.

Held: notice to quit expiring with the last day of a month is bad notice and the suit must be dismissed. [P 837 C 2]

L. P. E. Pugh and *S. B. Dutt*—for Plaintiffs.

M. N. Kanjilal and *H. N. Bhattacharya*—for Defendant.

Judgment.—This is a suit for ejectment. On 24th September 1932 plaintiff gave notice in writing to the defendant to quit and vacate the premises in suit by 31st October 1932. The premises had been let to the defendant for a term of three years from 1st April 1918. According to the decision of the Judicial Committee in 1932 P. C. 279 (1) the tenancy expired at midnight on 1st April 1921. The defendants held over as monthly tenants. Holding over as monthly tenants each month of their tenancy expired at midnight on the 1st of the succeeding month. Consequently a notice to quit expiring with the last day of a month is a bad notice. In these circumstances there is no necessity to consider the form of the notice on the other defence taken whether payment under the order of 6th December last of Rs. 330-8-3 month by month amounted to a waiver. But, quite shortly, though without deciding the case on those grounds, I should say that the notice to quit was good according to the decisions in 4 D. & R. 248 (2) and (1900) 1

1. Benoy Krishna Das v. Salsiccioni, 1932 P C 279=141 I C 514=59 I A 414 (P C).
2. Doe v. Culliford, 4 D & R 248.

Q. B. 23 (3) and that the plaintiff cannot be prejudiced by payments made under an order made by consent as though they were payments of rent out of Court. I cannot conceive that it was ever intended thereby in effect to nullify the whole of the plaintiffs' proceedings. But for reasons already stated the suit will be dismissed with costs.

R.K. *Suit dismissed.*

3. Wride v. Dyer, (1900) 1 Q B 23= 69 L J Q B 17=81 L T 453=48 W R 73=16 T L R 23.

A. I. R. 1934 Calcutta 838

LORT-WILLIAMS AND KHUNDKAR, JJ.

Nur Ahmad and *others*—Accused—Petitioners.

v.

Jogesh Chandra Sen—Opposite Party.

Criminal Revn. No. 465 of 1934, Decided on 9th August 1934.

(a) Bengal Municipal Act (1884), S. 28 (1)—S. 28 (1) is inapplicable to persons dealing with electoral roll in coure of official duty.

The persons contemplated by the first subsection to S. 28 are persons who fall outside the category of those who have to deal with the electoral roll in the course of their official duty: 1934 *Cal* 498, *Foll.* [P 839 C 2]

(b) Bengal Municipal Act (1884), Ss. 21 (1) and 28 (2)—Members of committee for preparing and publishing Electoral roll are not as such municipal officers or servants within meaning of S. 28 (2).

Members of the committee for preparing and publishing an electoral roll as contemplated by S. 21 (1) are not municipal officers or servants within the meaning of Sub-S. (2) of S. 28. A prosecution for offences under S. 28 is therefore not maintainable against them : 1934 *Cal* 498, *Dist.* [P 840 C 2]

(c) Criminal P. C. (1898), S. 197—Municipal Commissioners—Previous sanction of Local Government is necessary for prosecution of Municipal Commissioner for anything done while acting or purporting to act in discharge of official duty—Meaning of term 'official duty' discussed.

Section 197 operates as a bar to any prosecution of Municipal Commissioner for anything done while acting or purporting to act in the discharge of their official duty except with the previous sanction of the Local Government.

The term "official duty" need not refer to duty properly attaching to the office from which only the Local Government or some higher authority can remove the officer or by sanction permit his removal. "Official duty" must include occasions when public servants are called upon to perform and do properly and legally perform, duties which do not fall strictly and literally within the tasks appertaining to the particular appointment of office which they may at the moment be holding. The functions of the committee appointed under S. 21 (1), Bengal Municipal Act are therefore covered by the expression "official duty" in S. 197, Criminal P. C. [P 841 C 1,2]

(d) Criminal P. C. (1898), S. 197—S. 197 affords no protection to Municipal Commissioners making false entries in electoral roll after its publication.

Section 197 affords no protection to Municipal Commissioners who are members of the Committee for the preparation and publication of an electoral roll, for making false entries in it after its publication or after such committee ceases to function [P 841 C 2]

(e) Penal Code (1860), Ss. 193 and 465—Fabrication of electoral roll is offence punishable under Ss. 193 and 465.

Procuring by dishonest and fraudulent means an entry in an electoral roll, of the names of persons who were not legally eligible to vote, and wilfully and improperly omitting from the electoral roll the names of persons entitled to vote and fraudulently and dishonestly altering the electoral roll, after its final publication, by inserting certain names therein without lawful authority are offences punlishable under Ss. 193 and 465. [P 842 C 1]

N. K. Basu, *Fazlul Huq*, *Manowar* and *Abdul Kasem Khan*—for Petitioner.

S. N. Banerjee, *Joy Gopal Ghose* and *Anil Kumar Das Gupta*—for Opposite Party.

Khundkar, J.—This is a rule obtained at the instance of five persons of whom petitioner 1 Moulavi Nur Ahmad is the Chairman of the Chittagong Municipality; petitioner 2 Babu Mohendra Chandra Das is a Commissioner of the Chittagong Municipality; petitioner 3 Moulavi Mohammad Nasir is also a Commissioner of that Municipality; petitioner 4 Moulavi Hefazatur Rahman is a Tax Daroga of that Municipality and petitioner 5 Munshi Ashraf Ali is a clerk of that Municipality. It appears that under the provisions of S. 21, Bengal Act 15 of 1932 as amended by Act 9 of 1933, the petitioners 1 to 3 were appointed as a Committee for the purpose of preparing and publishing an electoral roll of persons qualified to vote. An electoral roll was prepared by the petitioners 1 to 3, assisted, it is alleged, by the petitioners 4 and 5, and was published as the final electoral roll on 14th February 1934. On 20th February 1934 a petition of complaint which bore the date 14th February 1934 was presented by Babu Joges Chandra Sen, a Muktear, and a Municipal voter, in the Court of a Magistrate Mr. B. K. Mukherjee. The petition contained allegations against a number of persons including the petitioners and prayed for summonses against them. The allega-

tions which it is necessary to consider for the purposes of this rule may conveniently be referred to here. In para. 5 of the petition of complaint it was alleged that the accused persons, acting in concert, had by improper, dishonest and fraudulent means, procured the entry in the finally published electoral roll, of the names of persons who were not legally eligible to vote, and had wilfully and improperly omitted from the electoral roll the names of certain other persons. In para. 6 of the petition it was alleged, that the petitioners before us had fraudulently and dishonestly altered the electoral roll, after its final publication, by inserting certain names therein without lawful authority.

The Magistrate Mr. B. K. Mukherjee directed another Magistrate Moulavi Salamatulla Choudhury to hold an inquiry into the matter and to make a report. On 27th April 1934 the Magistrate after perusing the report submitted by Maulavi Salamatulla Choudhury, and after hearing the parties, recorded an order to the effect that he was of opinion that a prima facie case of offences under S. 28, Bengal Municipal Act and Ss. 193 and 465, I. P. C., had been disclosed, and ordered summonses to issue accordingly. It is against that order that this rule is directed, and we are invited by Mr. N. K. Basu appearing for the petitioners 1 to 3, and by Mr. Fazlul Huq, appearing for petitioners 4 and 5, to quash the proceedings for reasons which may be briefly enumerated. Firstly, on behalf of all the petitioners, it was argued that S. 28, sub-S. 1, Bengal Municipal Act, has no application to the facts alleged. Secondly, on behalf of the petitioners 1 to 3 it was argued that they are not Municipal Officers, servants or polling officers and are therefore not hit by S. 28, sub-S. 2 of the Act. In support of the first and second arguments reliance was placed upon the case of 1934 Cal 498 (1), and the case of Cr. Revn. Nos. 418 and 457 of 1934 (2) decided by Guha and Bartley, JJ., on 8th June 1934.

Thirdly, it was argued also on behalf of the petitioners 1 to 3, that they were public servants not removable from their offices save by or with the sanction of the Local Government, that the acts alleged against them if committed at all purported to have been done in the discharge of their official duty, and that, therefore by reason of S. 197, Criminal P. C., no prosecution for a criminal offence was maintainable against them without the previous sanction of the Local Government, which had not in this case been obtained. Fourthly, it was argued on behalf of all the petitioners, that the allegations made against them did not disclose offences under S. 193, or S. 465, I. P. C. Lastly—and this argument was advanced on behalf of petitioners 4 and 5 only, that they must have acted in what they did, under orders of the petitioners 1 to 3, and in concert with them—that if the proceedings against the letter deserved to be quashed, the proceedings against the petitioners 4 and 5 could not be separately treated. This question would depend upon the facts which the prosecution are able to prove, and it might as well be stated here that we are not in a position to decide the question whether charges can be framed against these petitioners or not. It would be convenient to deal with the contentions above mentioned seriatim.

The first argument which is on behalf of all the petitioners must prevail. In our judgment, the language of S. 28 of Act indicates with reasonable clearness that the persons contemplated by the sub-S. 1 are persons who fall outside the category of those who have to deal with the electoral roll in the course of their official duty. This view is in consonance with the interpretation put upon this sub-section in the case of 1934 Cal. 498 (1). Persons who deal with the electoral roll in the course of their official duty are embraced in the ambit of sub-S. 2, which opens with the words "every municipal officer or servant or polling officer." This leads up to the second contention advanced in support of the Rule. It was argued, that though the preparation and publication of the electoral roll was the business of petitioners 1 to 3, they are not hit by the penal provision of S. 28 (2), Bengal Municipal Act, inasmuch as they are not within the strict meaning of those terms, muni-

1. Hem Chandra Das v. Subodh Chandra Das Gupta, 1934 Cal 498=61 Cal 361.
2. Satya Charan Mukherjee v. Krishna Mohan Banerjee, Cri Revn Nos. 418 and 457 of 1934.

cipal officers, municipal servants, or polling officers. Before we examine this contention further, we are constrained to observe that no support for it is furnished either by the case of 1934 Cal. 498 (1) or by the case of (Cr. Revn. Nos. 418 and 457 of 1934 (2) decided by Guha and Bartley, JJ., on 8th June 1934. From the opening paragraph of the judgment in the former case it does not appear that the three petitioners therein were Commissioners of the Municipality. What is stated is that two of them were pleaders, and one a talukdar and merchant, and that they were appointed by a committee consisting of the Chairman and two Commisssoners, under O. 4 of the orders issued under Notification No. 5717-M, dated 1st December 1932, as the revising authority to revise the preliminary electoral roll. That rule, we are informed, is no longer in force. This being so, the ruling in that case that a member of the revising authority was not a municipal officer or servant is of no assistance to the petitioners before us. As regards the second case relied upon, perusal of the judgment shows, that so far as the present argument regarding the applicability of of S. 28 (2) is concerned. it merely adopted the view expressed in the earlier case. That the petitioners in the former case were three persons appointed as a revising authority by a committee consisting of the chairman and two commissioners, and were not, as far as can be gathered, commissioners themselves, was a circumstance to which the attention of the Court which decided the second case, does not seem to have been invited. For this reason we are not prepared to regard it as an authority in the special facts of the present case for the argument here under examination.

Whether petitioners 1 to 3 come within the meaning of the expressions "municipal officer or servant of polling officer," is a question which must be determined upon the language of the statute itself. The words are not defined, but our attention has been invited by Mr. Basu to S. 22 (1) (e) and Ss. 66, 67 and 540, Bengal Municipal Act. S. 22 (1) provides that a person shall not be eligible ;or election or appointment as a commissioner if such person labours under certain disqualifications. One of these is described in Cl. (e) which runs as follows: "Is a municipal officer or servant or holds any office of profit under the commissioners." Mr. Basu's argument is, that as the committee provided for in S. 21 (2) must consist of the chairman and two commissioners who do not cease to be commissioners of the municipality by reason of their becoming members of such committee, the office of municipal officer or servant must necessarily be deemed to exclude the office which a person enjoys as member of the committee in question. It is difficult to see how this argument can be negatived, and in our judgment there is further security for it in the language of Ss. 66, 67 and 540. S. 66 makes provision for the appointment of subordinate officers, and sub-S. (1) of the section is as follows:

> "The Commissioners at a meeting may, subject to the provisions of this Act and the rules made thereunder from time to time determine what officers and what servants of the Commissioners are necessary for the Municipality, and may fix the salaries and allowances to be paid and granted to such officers and servants."

The officers and servants here contemplated are clearly regarded as the officers and servants of the commissioners. S. 67 provides for the appointment of officers of a superior order and mentions a secretary, an engineer, a health officer, and one or more sanitary inspectors. Here again it is the Commissioners who are, on a requisition by the Local Government, to appoint the officers mentioned. S. 540 enumerates the categories of persons connected with municipal administration who are to be deemed to be public servants, and the opening words of the section are:

> "Every commissioner, every municipal officer and servant, every person employed for the collection of any municipal rate, tax, or fee and every person authorized by the chairman or the commissioners at a meeting or otherwise to do any act under this Act or any rule or bye-law made thereunder shall be deemed to be a public servant within the meaning of S. 21, I. P. C. (Act 45 of 1860)."

Effect must therefore be given to this contention of petitioners 1 to 3 and we hold that the members of the committee contemplated by S. 21 (1) are not municipal officers or servants within the meaning of sub-S. (2), S. 28. It is nobody's case that they are polling officers. A prosecution for offences under S. 28, Bengal Municipal Act, is therefore not maintainable against petitioners 1 to 3.

The next argument divides itself into three branches, which may for convenience, be separately considered. Firstly, it is contended that though not municipal officers or servants or polling officers, petitioners 1 to 3 are nevertheless public servants. This proposition emerges with reasonable clearness from S. 540 of the Act already referred to, as also from S. 21, Cl. 11, I. P. C., and from the illustration thereunder. Secondly, it is said that these petitioners are not removable from their office as commissioners save by or with the sanction of the Local Government. That this must be so is equally clear from the provisions of Ss. 61, 62 and 63 of the Act. Mr. Banerjee who appeared to show cause, attempted to meet this point by maintaining, that these petitioners were not removable in the manner provided for in those sections from their positions in the committee appointed under S. 21 (1), and that if they were removable from the committee at all, it could only the by the commissioners at a meeting, and in support of this he referred us to S. 17, Bengal Act 3 of 1897 (The Bengal General Clauses Act). Be that as it may, it is not to be denied that the members of the committee in question must be commissioners to begin with, and commissioners they certainly remain while exercising the functions of the committee. The third branch of the argument is that in discharging the duties of the committee, the members thereof act or purport to act in the discharge of their official duty. The relevant words of S. 197, Criminal P. C., are as follows:

"When any person who is a Judge within the meaning of S. 19, I. P. C., or when any Magistrate, or when any public servant who is not removable from his office save by or with the sanction of the Local Government or some higher authority is accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction of the Local Government."

Mr. Banerji's contention is that 'official duty' must refer to duty properly attaching to the office from which only the Local Government or some higher authority can remove the officer or by sanction permit his removal. After anxious consideration we are not prepared to give effect to such contention. It would, in our judgment, to a large extent defeat the immunity from irresponsible, frivolous or vexatious prosecutions which the section extends to public servants were we to interpret the words 'official duty' in this narrow sense, for there are occasions when public servants are called upon to perform, and do properly and legally perform, duties which do not fall strictly and literally within the tasks appertaining to the particular appointment of office which they may at the moment be holding. In our judgment, the functions of the committee appointed under S. 21 (1), Bengal Municipal Act, are covered by the expression 'official duty' in S. 197, Criminal P. C., and as no person could be appointed to such a committee unless he was in the first instance a commissioner, an office from which his removal could be effected only by or with the sanction of the Local Government, we are clearly of opinion that S. 197 operates as a bar to any prosecution of petitioners 1 to 3 for anything done while acting or purporting to act in the discharge of their official duty except with the previous sanction of the Local Government.

Regard being now had to all that has been before stated, the conclusion to which we are led as regards petitioners 1 to 3 is that no charge under S. 28, Bengal Municipal Act, is maintainable against them, and that in so far as offences under Ss. 193 and 465, I. P. C., are concerned, the sanction of the Local Government is necessary before a prosecution can be proceeded with in respect of anything done or purporting to be done by them while acting as aforesaid. The acts to which these observations apply are those alleged in para. 5 of the petition of complaint referred to above. As regards the acts alleged in para. 6 of that petition other considerations arise. It is conceded by Mr. Basu that petitioners 1 to 3 ceased to function as the committee in question upon the final publication of the electoral roll. The acts complained of in para. 6 of the petition, were acts said to have been done after the final publication of the electoral roll and had no reference to anything done by them while acting or purporting to act as aforesaid, and therefore do not attract the protection given by S. 197, Criminal P. C. Mr. Basu sought to contend, that making of entries at that stage, was something which the petitioners were purporting to

do as members of the committee. This, in our judgment, is to do violence to language. A person who makes a document with the intention of making it appear, that it was made by some other person, or by the maker in some other capacity, may be pretending to be that other person, or pretending to act in that other capacity, but that is not, in our clear opinion, the connotation of the word 'purport'.

It remains now, so far as all the petitioners are concerned, to consider the argument that the petition of complaint does not disclose offences under Ss. 193 or S. 465, I. P. C. It is said, that the fabrication alleged does not fall within the meaning of the expression 'to fabricate false evidence' in S. 192, I. P. C., for there is nothing to show that the intention was that the document in question, that is, the electoral roll, should ever be used in any judicial proceeding. We are not prepared at this stage to give effect to this argument. One of the purposes to which an electoral roll may very well be put, is the furnishing of evidence in any dispute concerning the legality of an election which may come up for decision in a Court of law. It is as yet too early to say that the prosecution will be unable to call any evidence to establish such an intention. As regards the charge under S. 465, I. P. C., Mr. Basu contended that the acts complained of did not amount to the offence of forgery defined in S. 463, I. P. C. His argument, as we apprehend it, was that these acts were not done with intent to cause damage or injury to the public or to any person. In our judgment, the allegations contained in the petition of complaint do amount, if true, to the charge of an act done with intent to cause injury to the public, or to some person or persons. Injury, which is defined in S. 44, I. P. C. "denotes any harm whatever illegally caused to any person in body, mind. reputation or property" and is sufficiently wide to cover some at least of the consequences which might follow upon the fabrication alleged in the complaint.

In the result, we are not prepared to hold that no offences under S. 193 or S. 465 have been disclosed in the allegations made against all the petitioners. As regards petitioners 1 to 3 we would repeat, that for the reasons already stated, no prosecution for offences under S. 28, Bengal Municipal Act, is maintainable, and no prosecution for any acts which these petitioners did while acting or purporting to act in the discharge of their official duty, is maintainable in the absence of the previous sanction of the Local Government, and the rule so far as all these charges against them are concerned must be made absolute. As regards petitioners 4 and 5 the fact that they acted under the orders of petitioners 1 to 3, or in concert with them, affords them no immunity from prosecution, and for this no previous sanction of the Local Government is necessary in their case. It is further apparent that they come within the contemplation of S. 28 (2) by the penal provision of which they may be affected. The rule is discharged against petitioners 4 and 5. As regards petitioners 1 to 3, the rule is made absolute in so far as it affects offences under S. 28, Bengal Municipal Act, and the offences alleged to have been committed by them while acting or purporting to act as aforesaid before the electoral roll was finally published, and it is discharged to the extent of the charges under Ss. 193 and 465, I. P. C., adumbrated in para. 6 of the petition of complaint. The proceedings against these three petitioners for all the offences alleged to have been committed by them before the electoral roll was finally published, and for offences under S. 28, Bengal Act 15 of 1932, as amended by Act 9 of 1933, are hereby quashed. The proceedings against petitioners 4 and 5, and the proceedings for offences under Ss. 193 and 465, I. P. C., against petitioners 1 to 3 which are alleged to have been committed by them after the final publication of the electoral roll will proceed to be heard according to law.

Lort-Williams, J.—I agree.

R.K. *Rule partly discharged.*

A. I. R. 1934 Calcutta 842

COSTELLO AND LORT-WILLIAMS, JJ.

Bibhuti Bhusan Mozumdar—Plaintiff—Appellant.

v.

Majibar Rahaman and *others*—Defendants—Respondents.

Appeal No. 121 of 1933, Decided on 10th May 1934.

Civil P. C. (1908), O. 34, R. 12 — Calcutta Municipal Act (1923), S. 205 — House in Calcutta sold by Original Side Registrar in execution of mortgage decree — Arrears of taxes due to Calcutta Municipality outstanding — No mention of arrears in proclamation of sale — Purchaser is not liable to pay — They should be paid out of purchase money and balance only should be paid to mortgagee.

A house in Calcutta was sold in execution of a mortgage decree by the Registrar, High Court, original side. The sale proclamation as usual mentioned that the purchaser was not liable to pay the "outgoings" previous to the date of the payment of the purchase money. It however did not contain the outstanding rates and taxes due to the corporation. At or before the sale notice was given about the statutory charge in regard to the rates and taxes. The corporation however at the time of the sale represented that their arrears should be paid out of the sale proceeds :

Held : that inspite of S. 205, which created the arrears of rates a first charge upon the premises, the purchaser was not liable to pay the arrears. They were payable to the corporation out of the purchase money in the Registrar's hand and the mortgagee was entitled only to the balance. [P 844 C 2]

A. Sen—for Appellant.

L. P. E. Pugh and *P. N. Chatterjee*—for Respondents.

Lort-Williams, J.—This is an appeal against an order made by Ameer Ali, J., in a mortgage suit. The preliminary decree in the suit was made on 7th May 1930, and the Registrar reported that Rs. 5,110 odd was due to the plaintiff. In the final decree, made on 14th December 1931, it was ordered inter alia that the premises be sold; and in pursuance of these two decrees, the property was sold on 3rd February 1933, and purchased by one Haji Abdur Rahim for Rs. 6,450. The sale was subsequently confirmed, and after payment of the commission of the Registrar and the Accountant-General, there is now lying in Court standing to the credit of the suit a sum of Rs. 6,151 odd. The plaintiff's dues amount now to Rs. 6,530 odd, and apart from his costs, which have not yet been taxed, the money in Court will not be sufficient to meet his claim, and he has given up his costs up to the preliminary decree. That being the position, the plaintiff asked for payment out to him of the sum lying in Court.

The purchaser, in answer to his petition, urged that there was a sum of Rs. 1749 odd owing to the corporation of Calcutta for consolidated rates, that this sum ought to be paid out of the sum lying in Court, and the balance only be paid to the plaintiff. His contention was, that under the conditions of sale it was provided that the purchaser should not be liable to pay the outgoings previous to the date of payment of the purchase money, and that the rents and outgoings should be apportioned where necessary. This condition is usual, and is included in the form of conditions of sale in Appendix J., Form No. 1 of the Rules and Orders of the High Court on the original side.

It is not disputed that consolidated rates. and other similar Municipal rates, are included in such a term as "outgoings" when used with reference to premises such as these. But it is provided by S. 205, Calcutta Municipal Act 1923, that the consolidated rates shall, subject to certain conditions, be a first charge upon the premises, and it is contended by the plaintiff that the expression "outgoings" cannot be held to cover such a charge.

It should be noted in passing that the notification of sale, published by the Registrar, gave full particulars of the property to be sold, and mentioned specifically that it was subject to a lease for 25 years commencing from 1st December 1919, at a monthly rent of Rs. 30, the lessee to pay the whole of the Municipal tax. But no mention was made of this charge, or of any other encumbrance, although our Rules provide, in Ch. 27, R. 9, which deals with sales by the Registrar, that where a property is to be sold subject to an encumbrance, the nature and amount of such encumbrance shall be stated.

Against this, the plaintiff argues that, at the sale, a representative of the corporation read out a letter, a copy of which appears at p. 10 of the Paper Book, in which the Officiating Law Officer of the corporation said:

"With reference to the sale of the premises, I beg to state that the sums mentioned below are due to the corporation in respect of the consolidated rates in respect thereof I submit that the dues of the corporation should be paid out of the proceeds of the sale of the property. I beg to notify the claim of the corporation to the intending purchasers at the time of the sale."

These dues included the amount of a decree with regard to which an application was being made for attachment of the premises, the amount of another decree declaring the amount to be a charge on the premises and an amount

due upon certain Bustee Rate Bills. It will be noted that nothing was said in that letter about any statutory charge which the corporation had over the property in respect of rates, and although every one must be presumed to know the law, including, presumably, the Calcutta Municipal Act, no notice of this encumbrance was given either at or before the sale.

That being the position, Ameer Ali, J., decided in favour of the purchaser, that the sums due to the corporation must first be deducted from the sum lying in Court, and that the balance only must be paid to the plaintiff. In our opinion, the learned Judge's decision was right, and he approached the question from the right angle. The crucial point is what was sold. It seems clear that the property was sold subject to a condition that the purchaser should not be liable to pay for outgoings prior to the date of payment of the purchase money, and, secondly, that he purchased it free from any encumbrance or charge. It would be strange indeed if after he had purchased the property upon that condition, he found himself liable to pay for those very outgoings in another form, by reason of the statutory charge which existed in favour of the corporation. Still stranger would it be if, after he had bought the property on the faith of a notification of sale which made no mention of any prior mortgage or charge of any kind, but did make specific mention of the fact that the property was subject to a lease, he found that what he had purchased was subject to a statutory charge in favour of the corporation.

It appears from what the learned Judge says in his judgment, that the usual practice is either for the Registrar or for some representative of the corporation to mention at sales held by the Registrar any claim which the corporation may have for rates of taxes in respect of the premises, and, so far as we can ascertain, the usual practice for some years has been for the Registrar to pay out of the purchase money any such sum due to the corporation. It may be that the Registrar and the corporation have regarded this procedure and practice as equivalent substantially to carrying out the provisions of O. 34, R. 12, Civil P. C., which provides that **when any property is sold which is subject to a prior mortgage, the Court may, with the consent of the prior mortgagee, direct that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold.**

It is clear that this property was sold subject to a clean title being given, free from any prior mortgage or charge; and until the mortgagee is in a position to give such a title, he is not entitled to the purchase money. He cannot give any such title until this first charge in favour of the corporation has been disposed of. Consequently, the money in Court cannot be paid out to him unless and until this claim has been settled, and I can see no objection to its being settled in accordance with the usual practice, that is to say by payment to the corporation by the Registrar out of the purchase money.

But we desire to observe that the rules, conditions and forms provided in Ch. 27 of the Rules of this Court for sales by the Registrar, are not sufficiently clear or explicit, especially upon the points which we have had to consider in this appeal, and we think that these rules and forms of conditions of sale ought to be amended, in order to remove any doubt about such matters, and similar doubts which may arise upon sales by the Registrar.

At first sight it appeared to us, that the effect of the learned Judge's decision was that some hardship would be suffered by the mortgagee. But on further consideration it becomes apparent that this is not really so. The true position is that the mortgagor has wasted the mortgagee's security by failing to pay the rates as they became due, and by thus causing a first charge to be imposed upon the property in priority to the rights of the mortgagee. The mortgagee ought to have been more active in protecting his rights. The result is that this appeal must be dismissed with costs.

Costello, J.—I agree.

R.K. *Appeal dismissed.*

A. I. R. 1934 Calcutta 845

HENDERSON, J.

Nurul Anwar and others—Plaintiffs and Defendants—Appellants.

v.

Sm. Golenoor Bibi and *others*—Defendants—Respondents.

Appeal No. 1286 and Civil Revn. No. 53 of 1933, Decided on 25th May 1934, from appellate decree of 2nd Court Sub-Judge, Hooghly, D/- 22nd May 1933.

Civil P. C. (1908), O. 32, R. 7—Some defendants minors—Reference to arbitration—Court not noting sanction to agreement—Award made and decree passed -Suit by minors to set aside decree—Decree held should be set aside only so far as minors were concerned but should be maintained as to other parties.

A suit was instituted in which some defendants were minors. There was a reference to arbitration. The minors were represented by a pleader guardian. The natural guardians then got the pleader discharged and themselves represented the minors. They assented to the reference. The Court did not expressly note on the record sanction to this agreement. Eventually an award was made and a decree passed in accordance with the award. The minors then instituted a suit in which they asked for various reliefs.

Held: that although the agreement was void so far as the minors were concerned, it was merely voidable in the case of the other parties. The minors had no cause of action whatever so far as the other parties to the decree were concerned. The decree in the former suit should be set aside against the minors only and maintained as regards other parties. [P 845 C 2]

Brojo Lal Chakravarty, *Urumkramdas Chakravarty* and *Profulla Kumar Sarcar*—for Appellants.

Bhupendra Chandra Guha for *Rupendra Kumar Mitter* and *Abdul Ali*—for Respondents.

Judgment.—This appeal is only concerned with one small point but it will be necessary to set out the facts at some length. There was a certain suit, No. 549 of 1925, instituted in the Munsif's Court at Uluberia in which the present plaintiffs were defendants. There was a reference to arbitration. The present plaintiffs were minors and were represented by a pleader guardian. The natural guardians then got the pleader discharged and themselves represented the minors. They assented to the reference which was therefore complete. The learned Munsif did not expressly note on the record his sanction to this agreement. Eventually an award was made and a decree passed in accordance with the award. The minors then instituted the present suit in which they asked for various reliefs. As usual in these cases, various allegations were made against the natural guardians. The learned Munsif took one view of the conduct of these ladies whereas the learned Subordinate Judge took another. The learned Munsif was rather doubtful whether in fact they knew anything about the case at all but he was at any rate satisfied that they did not understand what they were doing. The learned Subordinate Judge, on the other hand, was quite satisfied that these ladies knew what they were doing, that they assented to the agreement and that the agreement was a perfectly sensible one. He was also satisfied that the award was a fair one. But, be this as it may, the agreement was void so far as the minors were concerned because the provisions of O. 32, R. 7, Civil P. C., were not complied with. The learned Subordinate Judge thought that the Court gave an oral sanction to the agreement but at any rate came to the finding that the provisions of O. 32, R. 7 were not complied with and that the agreement was void so far as the minors were concerned.

The Munsif passed a decree in which he set aside the award and the decree passed in Title Suit No. 549 in toto. Defendants 1 and 2 then appealed. Although the learned Subordinate Judge was against them so far as the minors were concerned he modified the decree and directed that the decree passed in Suit No. 549 should be set aside against the minors only and maintained so far as the other parties to the suit were concerned. The present appeal has been filed by the minors, who appear to have had no interest whatever in it, and a large number of pro forma defendants. Defendants 1 and 2 have filed cross objections asking that the whole suit be dismissed. The only point taken in the appeal is that the decree of the Munsif should be restored. Although the agreement is void so far as the minors are concerned, it is merely voidable in the case of the other parties. The minors have no cause of action whatever so far as the other parties to the decree are concerned. It may be that they have been set up by the defendants who have joined them in this appeal; but I have no means of knowing that and for aught

I know to the contrary the other parties to the decree may have no desire to set it aside; at any rate, they have taken no steps to do so, and if they did take such steps they would have to face difficulties with regard to the maintainability of the suit. The learned Subordinate Judge has given the plaintiffs all the reliefs to which they could possibly be entitled on that cause of action and there is nothing wrong in his decree.

The cross-objection is pressed on the ground that the suit was not maintainable and was also unnecessary. I have no doubt that the decree passed against the minors is void whether it is set aside or not, but that is not sufficient. The plaintiffs do not merely ask for a declaration; they also ask for an injunction. If the suit is dismissed and an attempt is made to execute the decree against them they will not be able to show that, in fact, it was void on the ground that the provisions of O. 32, R. 7 were not complied with. It is therefore impossible to say that the suit was unnecessary or was not maintainable. The result is that the appeal is dismissed. As I am not at all satisfied that the minors have any interest in it, the costs of the respondents will be paid by the defendants appellants. The cross-objection is also dismissed with costs. The Rule is discharged with costs but without any hearing fee.

R.K. *Appeal and cross-objections dismissed.*

A. I. R. 1934 Calcutta 846

JACK AND KHUNDKAR, JJ.

Damodar Saha — Plaintiff—Appellant.

v.

Aswini Kumar Saha and *another*—Defendants—Respondents.

Appeal No. 378 of 1932, Decided on 30th April 1934, from original order of Third Court Sub Judge, 24-Parganas, D/- 30th May 1932.

(a) Civil P. C. (1908), O. 23, R. 3 and O. 43, R. 1—Appeal against order under O. 23, R. 3 is competent even if decree passed in terms of compromise is not appealed against.

An appeal against an order under O. 23, R. 3 recording a compromise is competent even if the decree passed in accordance therewith is not appealed against, although it would be more correct to appeal against the decree too: 1929 *Cal* 689, *Ref.*; 1926 *Cal* 412, *Diss.*; 1933 *Cal* 72, *Foll.* [P 846 C 2]

(b) Civil P. C. (1908), O. 23, R. 3—Court cannot order compromise to be recorded under O. 23, R. 3, where suit is not completely adjusted.

Where in an application to record the compromise, the defendants seek to introduce a fresh condition, they are not entitled to have the compromise recorded by the Court under O. 23, R. 3, as the suit is not really completely adjusted when the draft compromise is filed. [P 847 C 1]

Radha Binode Pal, Anil Chandra Roy Chowdhuri and *Diptindra Mohan Ghose*—for Appellant.

Hiralal Chakravarti and *Shyama Das Bhattacharji*—for Respondents.

Judgment.—This is an appeal against an order of the lower Court directing that the plaintiff-appellant's suit be disposed of in terms of the draft solenama. A preliminary point has been raised that there having been no appeal against the decree the appeal against the order for the compromise to be recorded is incompetent. In support of this the case of 1926 Cal. 412 (1), has been relied on. On the other hand in the case of 1933 Cal. 72 (2), it has been held that an appeal lies, their Lordships holding that the decision in the former case is no longer good law in view of the Full Bench decision in 1929 Cal. 689 (3), in which it has been held that an appeal against a preliminary decree lies although there has been no appeal against the final decree. It is true that the Full Bench case distinctly refers to preliminary decrees and not to interlocutory orders but the same principle applies in the case of an order under O. 23, R. 3, for the decree is involved in the order and indeed might be made at the same time, the wording of the Rule being that

" the Court shall order such agreement, compromise or satisfaction to be recorded and shall pass a decree in accordance therewith."

When therefore O. 43, R. 1, expressly lays down that an order under O. 23, R. 3 is appealable it would be obviously absurd to hold that the right of appeal is lost because tbe decree involved in the order has been passed. No doubt it would be more correct to appeal against the decree at the same time but in fact if the order is set aside the

1. Bengal Coal Co. v. Apcar Collieries Ltd., 1926 Cal 412=87 I C 248.
2. Provabati Debya v. Sorojini Devi, 1933 Cal 72=142 I C 95.
3. Taleb Ali v. Abdul Aziz, 1929 Cal 689=123 I C 305 (FB).

decree must go with it. The preliminary objection therefore fails.

On the merits it is clear from the order sheet that there was no concluded adjustment of the suit on 27th April 1932, when a draft petition of compromise was filed. On that date the parties applied for 15 days' time to file the petition of compromise. The suit was then adjourned to 12th May 1932. On that date on a joint petition of the parties the case was adjourned to 26th May 1932 for hearing, the order being that the parties must file their petition of compromise in the meantime, otherwise they must come ready on the date fixed. On 26th May 1932, the plaintiff was ready to proceed with the suit but defendants put in a petition for enforcing the draft solenama. On the 28th the plaintiff put in an objection and on the 30th the Court passed the order for recording the compromise under O. 33, R. 3 against which this appeal has been filed. In the defendants' petition of 26th May, para. 8, the defendants having offered alternative terms states:

"If the plaintiffs do not agree to the aforesaid settlement then according to the draft solenama these defendants are willing to sell the said land on stating the same to be in the benami of their mother; but if in consequence thereof the title of the said land be bad or if the plaintiff suffers any loss these defendants will not be liable in any way."

It is thus clear that while applying to enforce the alleged adjustment the defendants want to introduce a fresh condition. Had the parties completely adjusted their dispute on 27th April, there was no reason to apply for an adjournment for 15 days to file the petition of compromise and since, in their application to record the compromise the defendants seek to introduce a fresh condition, they were not in the circumstances entitled to have the compromise recorded by the Court under O. 23, R. 3, for it is clear that the suit was not really completely adjusted when the draft compromise was filed or at any subsequent time. The order under O. 23, R. 3, is accordingly set aside and the suit will proceed according to law. The appellant will get his costs of this appeal, hearing-fee one gold mohur.

R.K. *Appeal allowed.*

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* A. I. R. 1934 Calcutta 847

S. K. GHOSE AND KHUNDKAR, JJ.

Ilu and *others*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 464 of 1934, Decided on 28th August 1934.

(a) Criminal P. C. (1898), S. 307—Judge should appreciate the evidence and form his own opinion whether reference should be made.

Section 307 places a powerful weapon in the hands of the Judge in the Moffusil, and it is not available to a Judge of the High Court sitting in Session, to prevent miscarriage of justice on account of a wrong verdict on the part of the jury, and, in view of its provision it is necessary that the trial Judge should for himself appreciate the evidence and form his own opinion on the case so as to see whether it is necessary for the ends of justice to make a reference against the verdict. [P 849 C 1]

*** (b) Criminal P. C. (1898), S. 297—Judge should not give merely a summary of evidence—He should appreciate evidence and give to jury all shades and probabilities of the case.**

For the purposes of proper and intelligent summing up it is necessary that the Judge should appreciate the evidence properly. The expression "summing up the evidence of the prosecution and defence" under S. 297 does not mean that a Judge should give merely a summary of the evidence. He must marshall the evidence so as to bring out the lights and the shades, the probabilities and the improbabilities so as to give proper assistance to the jury who are required to decide which view of the facts is true. [P 849 C 1]

(c) Criminal P. C. (1898), S. 297—Misdirection to jury—High Court should see whether it was reasonably probable that but for misdirection jury would not have returned the verdict.

On a question of misdirection as to evidence High Court has to see whether it is reasonably probable that the jury would not have returned the verdict but for the misdirection complained of : 1933 *P C* 218 *Applied*. [P 849 C 1]

L. P. Pugh, H. Suhrawardy and *A. S.M. Akram*—for Appellants.

A. K. Basu and *Nirmal Chandra Chakravarti*—for the Crown.

Judgment.—The abovenamed four appellants were tried by the learned Assistant Sessions Judge of Hughly sitting with a jury on charges under S. 344 and 366, I. P. C. The jury returned a unanimous verdict of guilty and the learned Judge agreeing has convicted them as above and sentenced the appellant Abdul Latif to undergo rigorous imprisonment for 5 years and each of the other appellants to undergo rigorous imprisonment for four years and six months. The case for the prosecution shortly stated is as follows. The

appellants are residents of Bagnan P. S. Polba in the District of Hughly. One Kusum Bala Dasi, a woman aged 16 or 17 years who is P. W. 2 in the case was living at the time of the occurrence in the house of her brother Gokul P. W. 10. Her husband Keshab P. W. 8 was also living with her in the same house but at the time of the occurrence he was away. One day in Agrahayan 1339 B.S. at about 10 A. M. Kusum carried some food to the field where Gokul was working. While returning the woman was way-laid by these four appellants who gagged her and carried her off by force to the house of the appellant Abdul Latif.

There it was alleged, she was kept wrongfully confined for about 8 months and during this time Abdul Latif had sexual intercourse with her. In Sraban 1340 B. S. she was taken by these appellants to Syeduddin Ahmed S. I. Jogachia in the District of Howrah and in the thana she was wrongfully confined for about 10 days. The Secretary of the Arya Samaj, Calcutta, got information about the matter and deputed his durwan Joy Narain Singh, P. W. 1, to make inquiries. He went to Jogachia dressed as a hawker and had an interview with the woman in the thana house of the Sub Inspector Jogachia. Then he made more inquiries and ultimately filed a petition of complaint on 9th August 1933. The husband Keshab also filed a petition of complaint on 31st August. Meanwhile it appears, in April 1933, that is to say during the period of the alleged confinement in Abdul Latif's house the woman's brother Gokul was arrested on a charge of dacoity and subsequently he was tried and convicted in a proceeding under S. 110. Criminal P. C., in consequence of which he was sent to jail. On 27th April Suresh Roy, Sub-Inspector of Poiba P. S., who is Court witness 2, held an investigation in connexion with the dacoity case and examined the girl whom he found living in a chalaghar in the Musalman quarter. It appears that later there was an information brought to the police that the girl had attempted to commit suicide and also that she had been abducted.

It may be that Gokul said this to a police officer while in jail. At any rate, there is no doubt that Bhababhim Singh, A S. I., Dadpur outpost, under Polba P. S. came to the village and recorded the statement of the girl on 17th June which is Ex. 4, and he submitted a report on 18th June following which is Ex. 3. In that statement the girl is reported to have said that she has separated from her husband and brother and was living in her own hut on the bank of Bhairabipara tank and according to the A. S. I. she was there living as a prostitute. On the complaint filed by Joy Narayan P. W. 1, a warrant for the production of the girl was issued and she was brought from Jogachia thana. It was reported by the Circle Inspector, Court witness, that the girl told him that she had come to Jogachia Thana to work as a maidservant. The defence is that there is a daladali in the village and that the case is the outcome of enmity, the men of the party of Mir Alani having instituted the case through the agency af Joy Narayan Singh. Mr. Pugh for the appellants has contended that the learned Judge's charge to the jury is open to serious objection because it is meagre and inadequate, there being no proper sifting of the evidence, which again is inherently improbable and full of material inconsis tencies. Mr. Basu appearing for the Crown has contended that the jury having believed the evidence the matter is concluded and it is not open to this Court to interfere in appeal. Mr. Pugh has further drawn attention to a passage in the order of the learned Judge by which he sentenced the accused and it is as follows :

"The accused after the delivery of the verdict asks me to refer the case to the Hon'ble High Court under S. 307, Criminal P. C. But in view of the petition filed to day by the P. P. regarding the charge and the unanimous verdict of the jury, I do not think that it is necessary for the the ends of justice to submit the case to the Hon'ble High Court."

Mr. Pugh has contended that the learned Judge apparently realised the weakness of the prosecution evidence and thought that the jury would acquit, and that he would have referred the case to this Court under S. 307, Criminal P. C., had he not been influenced by the attitude of the Public Prosecutor. This action on the part of the Public Prosecutor in filing a petition has been repudiated by Mr. Basu in this Court and it is not clear what reason there was for the filing of such a

petition when the jury had returned an unanimous verdict of guilty. But it lends colour to Mr. Pugh's argument that the Judge was at first in favour of making a reference against the verdict of guilty. With regard to that it must be said that it was the duty of the Judge to make up his own mind about the case. It must be remembered that S. 307, Criminal P. C., places a powerful weapon in the hands of the Judge in the Moffasil, and it is not available to a Judge of this Court sitting in Session to prevent miscarriage of justice on account of a wrong verdict on the part of the jury, and in view of its provision it is necessary that the trial Judge should for himself appreciate the evidence and form his own opinion on the case so as to see whether it is necessary for the ends of justice to make a reference against the verdict. But not only for the purposes of this section, but likewise for the purposes of proper and intelligent summing up it is necessary that the Judge 'should appreciate the evidence properly. This Court has pointed out more than once that the expression "summing up the evidence of the prosecution and defence" under S. 297, Criminal P. C., does not mean that a Judge should give merely a summary of the evidence. He must marshall the evidence so as to bring out the lights and the shades, the probabilities and the improbabilities, so as to give proper assistance to the jury who are required to decide which view of the facts is true. On a question of misdirection as to evidence this Court has to see whether it is reasonably probable that the jury would not have returned the verdict but for the misdirection complained of. In the case of 1933 P. C. 218 (1) Lord Atkin said as follows:

"Nor are their Lordships satisfied that in any case the jury must have returned a verdict of guilty. It is true that there was evidence against the accused but a close scrutiny of the evidence fails to satisfy them that upon a proper direction the jury might not reasonably have come to the conclusion that the guilt of the accused was not established beyond a reasonable doubt."

In that case the trial Court had omitted to give a direction on certain elementary principle of law, but where the misdirection has been as to evidence the argument applies with equal force, and it is for consideration whether on proper direction and having all the circumstances before them the jury as reasonable men would have found that the charge was proved. Now in the present case there are certain features which are probably beyond controversy and which may at first sight favour the prosecution. It is pointed out by Mr. Basu for the Crown that it is not worthy that the complaint was instituted at the instance of a third party, the Arjya Samaj. Next, there is no doubt that the girl was actually found in the thana. Further there is no doubt that sometime before that the girl was found living at her village, but away from her own people and the house of her brother. On the other hand these features, apparently favourable to the prosecution, are counterbalanced by others which the learned Judge failed to point out. The circumstances indicate that the Secretary of the Arjya Samaj might have been misled because the prosecution was really the work of the Durwan, P. W. 9, who was seen associating with some Mohammedans, specially Nasirul Huq, at the latters' house. The jury might have felt some sympathy for the Arjya Samaj, but the learned Judge omitted to warn the jury that they must not be actuated by any sentimental consideration. It appears that news was brought to the Secretary of the Arjya Samaj by two upcountry men, but these have not been produced. Then as regards the finding of the girl in the thana the question is whether the circumstances connected therewith are inconsistent with the defence case, namely that the girl was living there voluntarily. There is no discussion of this in the charge. According to the prosecution case she had been questioned by two police officers while she was living in the village. To them she did not divulge the truth. But nearly nine months after the occurrence while she was still in the hands of the Sub-Inspector, who was in the thana at the time, she chose to divulge the story to a passing hawker.

The learned Judge does not discuss the evidence at all from the point of view of probability. If it is true that for eight or nine months the girl was

1 .Basil Rauged Lawrences v. The King, 1933 P C 218=1933 Cr C 1302=145 I C 209=34 Cr L J 886.

living in the house of Latif, the question for the jury was whether that would be consistent with her story of abduction and wrongful confinement, but this is not brought out by the learned Judge in his charge. Then, as mentioned already, there is the evidence of three police officers, all Hindus, who took part in the investigation while the girl was alleged to have been kept under wrongful confinement. The girl admits the interviews with the two police officers. The learned Judge ought to have placed before the jury the statement made by the girl on 27th April, 17th June and 9th August respectively before the Sub-Inspector of Kolba, the Assistant Sub-Inspector of Dadpur and the Circle Inspector. These are quite inconsistent with the prosecution case. Mr. Basu for the Crown has contended that very likely these police officers had been gained over by the accused party and they were carrying on a sort of bogus investigation in order to meet the defence case. This is far fetched, but it was no doubt for the jury to decide and the learned Judge never put it to them. The three Hindu police officers were examined as Court witnesses because the prosecution were under the impression that it was their duty to examine only those witnesses who would support the prosecution case and not necessarily those would tell the truth. However they were examined and the girl's sister-in-law Nisoda was also examined as a Court witness. The learned Judge told the jury that if they believed these witnesses the prosecution would fall to the ground and he left it at that. He did not discuss what reasons there were for believing or for disbelieving, having regard to the probabilities or otherwise and the inconsistencies in the evidence.

The girl's sister-in-law Nisoda is entirely hostile to the prosecution case. She supports the defence and in fact she brought a criminal charge of rape against the complainant Joy Narain. The husband who subsequently filed a petition of complaint tells a story which also is not consistent with probability. He says that he was sent by the accused Purna to his native village where he lived for 8 months, a most docile act on his part. The question is whether he had abandoned the girl for the time, but the learned Judge did not invite the jury to consider the probabilities on this point. Then as regards the girl herself, leaving aside the question as to whether the so called Court witnesses should be believed or not, the learned Judge did not examine her evidence in detail to show how far the evidence was probable or consistent. To us it seems that her evidence bristles with improbabilities and inconsistences. It is noteworthy that in the petition of complaint filed by Joy Narain and also in the petition filed by the husband no case of abduction by force or wrongful confinement in the house of Abdul Latif was alleged. No doubt P. W. 1 was not an eye witness but his evidence is that he had ascertained the facts from the girl herself and from her brother Jugal.

The latter is alleged to be an eye-witness to the occurrence and so is a Mahommedan, P. W. 3, who however admits that he did not tell any one of the occurrence, but the learned Judge did not point this out to the jury. Then again the brother of P. W. 10 says that he laid an information of the occurrence at Poba Thana, but the Daroga refused to record it as if he had already been gained over to the side of the accused. He further says that he complained to the Magaistrate about the abduction of his wife, and this complaint was also ignored. This was never pointed out to the jury. Thus with regard to the summing up of the evidence the charge of the learned Judge is quite colourless and he gives no advice as to credibility. On the contrary, the record discloses that some inadmissible evidence had been introduced. For instance, one witness deposes to other incidents of alleged abduction on the part of the accused but the learned Judge never took care to warn the jury that this evidence as to the bad character of the accused, which might have been let in through the ineptitude of the defence, must be left out of consideration. Again P. W. 4 speaks of the beating of Gokul which is hearsay, but it was let in and the learned Judge did not warn the jury on this point.

The husband in his complaint mentioned S. 498, I. P. C., as one of the offences complained of. But this charge apparently was not persisted in and

although, as mentioned already, the prosecution started out with a case of enticement, in the evidence, a case of abduction and forcible confinement was sought to be made out. In his summing up what the learned Judge did was to give to the jury a string of points, but he did not express any opinion either way nor did he discuss the evidence in detail. The result is that the jury got no assistance. Furthermore the learned Judge did not take care to discuss the evidence as against each accused separately, although no case has been made out even on this evidence under S. 344, I. P. C., against all the accused. Our conclusion is that the learned Judge did not place the evidence properly before the jury and that his charge was vitiated by serious misdirection. Having regard to the state of the evidence we do not think that there should be a retrial of the case. The result is that we allow the appeal, set aside the conviction of and the sentence passed on the appellants, acquit them of the offences under Ss. 344 and 366, I. P. C., and direct that they be forthwith set at liberty. The appellants will be discharged from their bail bonds.

G.B. *Accused acquitted.*

A. I. R. 1934 Calcutta 851

NASIM Ali, J.

Bhola Nath Chattopdhyay—Plaintiff—Appellant.

v.

Mrityunjay Chattopdhyay and *others*—Defendants—Respondents

Appeal No. 2068 of 1931, Decided on 15th May 1934, against decree of Addl. Sub-Judge, Bankura, D/- 12th March 1931.

(a) Deed—Construction—Boundaries specified and definite — Land within boundaries alone is transferred — Area must be deemed to be approximately given.

Where the boundaries are vague and indefinite the area should prevail but where the boundaries are specified and definite, the land that is conveyed must be the land within those specified boundaries and the area must be taken as having been given approximately. The recitals about area in the body of the document cannot be read as divorced from what is stated in the boundaries. [P 851 C 2]

(b) Admission — They ordinarily are binding on parties unless explained away.

An admission is no doubt a very good piece of evidence and under ordinary circumstances it would be taken as binding upon a party unless the party who makes the admission can explain it away, e. g. the document was executed by a pardanashin lady. [P 852 C 1]

Nripendra Chandra Das—for Appellant.

Abinash Chandra Ghose for *Durga Das Roy*—for Respondents.

Judgment.—This is an appeal by the plaintiff in a suit for confirmation of possession after establishment of title. The plaintiff's case is that the suit land appertained to a tenancy which he held under the superior landlord at a Jama of Rs. 9-5-0 and that the defendants are threatening to dispossess him from the disputed land on the basis of an erroneous entry in the record of rights. The defence of the defendants 1 and 2 is that the disputed land is not a part of the plaintiff's tenancy and that even if it be so, the plaintiff cannot claim any title to this property, as he has not purchased the same. The Courts below have found that the Kobala, on the basis of which the plaintiff claims the dispute land, does not include the disputed land and in that view they have concurred in dismissing the suit. Hence the present appeal by the plaintiff.

The first point urged in support of the appeal is that the Courts below erred in law in holding that in order to determine whether the disputed land is a part of the land purchased by the plaintiff, the boundaries given in the Kobala must prevail over the area. It is urged that the area mentioned in the Kobala is three bighas but the actual area which now admittedly belongs to the plaintiff is much less than three bighas. There can be no doubt that where the boundaries are vague and indefinite the area should prevail but where, as in the present case, the boundaries are specified and definite, the land that is conveyed must be the land within those specified boundaries and the are a must be taken as having been given approximately. The plaintiff must show therefore that the disputed strip of land is included within the boundaries given in this Kobala. In view of the concurrent finding of the Courts below that the disputed strip of land is not included within those boundaries the plaintiff cannot claim title to the disputed land simply because the area mentioned in the Kobala is in excess

of the area mentioned within those boundaries.

The second point urged in support of the appeal is that the Courts below were not right in disposing of the suit without coming to any finding as to whether the disputed land is a part of the tenancy belonging to the plaintiff's vendor. It is urged that by the Kobala the plaintiff has acquired the right title and interest of his vendor in the jama and consequently, if it is found that the disputed land is a part of the jama which belonged to the vendor, the plaintiff would be entitled to get it even though it is not included within the boundaries mentioned in the Kobala. I am unable to give effect to this contention. The plaintiff wants his title declared on the basis of his Kobala. The Kobala no doubt mentions a certain area but that must be read subject to what is stated in the boundaries. The recitals in the body of the document cannot be read as divorced from what is stated in the boundaries. Reading the document as a whole therefore it is clear that plaintiff purchased, the right, title and interest of his vendor to a certain piece of land which is included within the boundaries mentioned in the schedule to the Kobala. In this view of the matter the Courts below were right in not entering into the question as to whether this is really a part of the tenancy belonging to the plaintiff's vendor or not. Even if it be assumed that it was a part of the tenancy belonging to the plaintiff's vendor, the plaintiff cannot claim any title to this land until and unless he shows that he has actually purchased it.

The last point urged in support of the appeal is that in locating the boundaries the Courts below have not given proper effect to the admission contained in the document executed by the mother of the defendants 1 and 2 while they were minors. It appears from the judgment of the lower appellate Court that it has considered this admission but in view of the fact that the document was executed by a pardanashin lady the lower appellate Court did not consider this admission as binding or conclusive. An admission is no doubt a very good piece of evidence and under ordinary circumstances it would be taken as binding upon a party unless the party who makes the admission can explain it away. But in view of the fact that this admission was made in a document executed by a pardanashin lady the lower appellate Court was of opinion that it was not binding on her. In this view of the matter this contention also fails. The appeal is accordingly dismissed with costs.

R.K. *Appeal dismissed.*

A. I. R. 1934 Calcutta 852

NASIM ALI, J.

Ram Charan Sutradhar and *another* —Appellants.

v.

Radha Charan Das and *others* — Respondents.

Appeal No. 2478 of 1931, Decided on 7th June 1934, from appellate decree of First Court Addl. Sub-Judge, Tippera, D/- 25th May 1931.

Bengal Tenancy Act (as amended by Eastern Bengal and Assam Tenancy Amendment Act of 1908), S. 22 — Raiyati rights purchased by landlord—Under-raiyat automatically becomes raiyat.

After the auction-purchase of the raiyati by the landlord, the under-raiyats cease to be under-raiyats and they are automatically raised to the status of raiyats: 90 *I C* 816, *Rel on* and 1916 *Cal* 343, *Dist.* [P 853 C 1]

Chandra Sekhar Sen and *Satish Chandra Sen*—for Appellants.

Benode Lal Ghose—for Respondents.

Judgment.—This is an appeal on behalf of the plaintiffs in a suit for possession. The plaintiffs' case was that one Ananda Mohan Sutradhar was a raiyat under Madan Mohan Sutradhar, the predecessor of the plaintiff; that the raiyati-holding was purchased by the landlord in execution of a rent decree; that before the auction sale the predecessors of the first party defendants held the disputed lands as an under-raiyat for a period of nine years. It was further alleged by the plaintiffs that as the period of nine years had expired the plaintiffs were entitled to recover khas possession. The defence of the defendant was that after the auction purchase of the raiyati right the defendants ceased to be under-raiyats and that they were automatically raised to the status of raiyats. The Courts below have concurrently dismissed the plaintiffs' suit. Hence the present appeal by the plaintiffs. The learned advocate for the appellant however urges that the lower appellate Court was in error in holding that the first party defendants were

raiyats. It was contendedby the learned advocate that by the sale of the raiyati under which the defendants held, the occupancy right only ceased to exist but the raiyati continued. In support of this contention certain decisions of this Court were placed before me. There cannot be any doubt that this was the law as it stood before the amendment of 1908. By the Eastern Bengal and Assam Tenancy Amendment Act of 1908 the original S. 221 was amended. The effect of the amendment is that if the purchaser is the landlord he shall have no right to hold the land as a tenant but shall hold it as a permanent tenure-holder or proprietor as the case may be. The amendment makes it absolutely clear that not only the occupancy right shall cease to exist but that the raiyati itself will disappear. This view is supported by a decision of this Court in the case of 90 I. C. 816 (1). This case also lays down that if the raiyati ceases to exist, then the tenants who held as under-raiyats before the auction-purchase cannot be said to be holding under raiyats and consequently they cannot be said as under-raiyats as defined in the Bengal Tenancy Act. In my judgment the lower appellate Court is right in holding that the defendants are not under-raiyats and consequently are not liable to be evicted. It was however urged by Mr. Sen that the decision in the case of 1916 Cal. 343 (2) is against this view. It however appears that the point which has been raised in the present appeal was not specifically raised and decided in that appeal. On the other hand the point for decision in the present case was expressly raised and decided in the case reported in 90 I. C. 816 (1) referred to above. The view taken by the lower appellate Court appears to me to be supported by the terms of the section.

The result therefore is that this appeal is dismissed. But in the circumstances of this case there will be no order for costs in this appeal. Leave to appeal under S. 15 of the Letters Patent has been asked for in this case. The leave is refused.

R.K. *Order accordingly.*

1. Hochanuddi v. Abdul Hakim Mridha, (1925) 90 I C 816.
2. Eakuf Ali v. Meajan, 1916 Cal 343=29 I C 686=43 Cal 164.

* A. I. R. 1934 Calcutta 853

S. K. GHOSE AND KHUNDKAR, JJ.

Kasimudden and *others*--Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 353 of 1934, Decided on 24th August 1934.

*** (a) Criminal P. C. (1898), Ss. 298 and 299—Jury asked to accept the voluntary nature of confession and consider its truth from its voluntary nature—Serious misdirection is caused—Voluntary nature of the confession as regards its truth should be left to jury for decision—Cr. P. C. (1898), S. 297.**

As regards a confession the question may arise as to whether it was voluntary and also whether it was true. Neither is a question of law; both are questions of fact. But the point that initially arises is whether the confession is admissible in law and in order to decide that point it is necessary to decide prima facie whether the confession was voluntary. In other words to the extent of the admissibility of the confession, the Judge has to decide whether the confession is voluntary. Now these two questions of fact, namely, whether the confession is voluntary and whether it is true are in a sense entirely separate from each other. A confession that is voluntary is not necessarily true and vice versa. But when the question arises not of admissibility but, of proof, that is to say, proof of the truth of the confession, it is not surprising to find having regard to the course of human conduct, that the two qustions are mixed up; the truth of the confession may to a certain extent be inferred from its voluntariness. Therefore, if the Judge has to decide the question of voluntariness in its bearing on admissibility there is no reason why the jury should not consider the question of voluntariness in its bearing on the truth of the confession. Proof according to the law of evidence is a matter of reasonable belief amounting to moral certainty and the jury are supposed to be reasonable men and they are therefore expected to take reason naturally. To ask the jury to accept the voluntariness of a statement as decided and then to consider its truth, quite apart from the question of its voluntariness, is to ask them to attain a mental detachment which is unpracticial and perhaps impossible. Moreover such a process of reasoning would be faulty and prejudical to the accused and would amount to to serious misdirection. It does not mean however that if a confession is once admitted and from subsequent evidence it transpires that the confession is defective according to law and therefore not admissible, then it is not open to the Judge to withdraw the confession from the jury : 1925 *Cal* 887, *Appr*; 1934 *Cal* 636 and 1929 *Cal* 726, *Ref.*

[P 855 C 2; P 856 C 1, P 857 C 1]

(b) Evidence Act (1872), S. 30—Confession of co-accused must be corroborated—Confession of co-accused retracted—In summing up to jury, Judge treating it as evidence against all accused—There is serious misdirection—Criminal P. C. (1898), S. 297.

No doubt under S. 30, Evidence Act, the confession of an accused person may be taken into consideration, as against other co-accused but

this is not tantamount to saying that such confession is to take the place of proof. On the other hand, it must be remembered that the confession of a co-accused is even worse in value than the sworn testimony of an accomplice and, if it is necessary that the latter testimony should be corroborated independently both, as to the crime and as to the criminal, it it still more necessary that the confession of a co-accused should be so corroborated and when that confession is retracted it has no value at all as against the co-accused. [P 858 C 1]

Where the Judge drew the attention of the jury to the fact that in the retracted confession the confessing accused had named the co-accused and in his summary of the evidence the Judge treated this as evidence against each of accused :

Held : a serious misdirection was caused : 38 *Cal* 559, *Ref.* [P 857 C 2 P 858 C 1]

T. P. Das and *Himansu Chandra Choudhuri*—for Appellants.

Rahim—for the Crown.

S. K. Ghose, J.—The five appellants were placed on their trial with one Jamir Dai before the Assistant Sessions Judge of Dinajpur, Mr. S. S. R. Hattiangadi, and a jury on a charge under S. 395, I. P. C. The jury brought in an unanimous verdict of guilty as against these appellants. The learned Judge agreeing with that verdict has convicted the appellants as aforesaid and sentenced each of them to rigorous imprisonment for five years. The prosecution case shortly stated is that on 21st November 1933 there was a dacoity in the house of one Mobarak Ali. The dacoits, about 10 to 15 in number, forced their way into the house, assaulted the inmates, and took away ornaments and money. Some of the appellants were recognised as being among the dacoits. One Jamardi, husband of the sister of Mobarak, went to the thana and lodged the first information. Thereupon the police investigated and recovered some articles, alleged to have been stolen, from some of the appellants and one of them Kasimuddin made a confession which he retracted at the trial. The defence is a denial.

I may say here that we had some trouble over this simple case because the learned advocate appearing for the appellants thought fit to address us on the merits of the case without taking care to provide himself with a copy of the record, so that he was not in a position to refer us to those portions of the evidence on which he relied in his argument. The Crown however was represented by Mr. Rahim and we have examined the record for ourselves. The evidence as set forth in the charge to the jury may be divided into three classes, namely (1) the retracted confession of Kasimuddin, (2) the evidence as to the recognition of some of the appellants (by the inmates) and (3) the finding of the stolen property. For the present, we may leave aside the confession and the evidence as to the alleged recognition and take up the case of those accused with whom stolen property is alleged to have been found. These are appellants Samiruddin and Asimuddin. The occurrence had taken place on 22nd November. On 9th December following the houses of these appellants were searched and two gold Koris Ex. 23 and a gold Mache Ex. 24 were found in the house of Samiruddin, and a gold beshar Ex. 22 and a pair of silver arboukis Ex. 25 were found in the house of Asimuddin. The learned Judge while dealing with this part of this case set out the evidence, which is quite simple, fully and fairly. He at first drew the attention of the jury to the evidence as to the finding of these articles which in fact is not denied. Then he drew attention to the evidence as to the identification of the articles by Mobarak Ali, his mother, and his sister.

The first two identified all the four articles. The sister identified only two. Then the learned Judge also drew the attention of the jury to the circumstances under which the identification was made, namely, that there was a test identification carried out in the presence of the President of the Union Board. The sister stated that she saw her mother identifying the ornaments through a window, but the learned Judge was quite justified in drawing the attention of the jury to the fact that this sister herself did not identify all the four articles. Samiruddin claimed the two articles found in his house as belonging to his aunt and Asimuddin claimed the articles found in his house as belonging to his wife. But there is no evidence in support of this defence. The entire evidence was thus fairly placed before the jury and the learned Judge stated quite correctly that unless the accused could satisfactorily explain the possession of the articles the jury would be entitled to infer that these two accused were either among the

dacoits or had received the properties knowing that they had been stolen in the course of the dacoity. The jury believing the evidence returned a verdict of guilty. In the circumstances, we see no reason to interfere with the conviction of the appellants Samiruddin and Asimuddin.

Then as to the appellants Satku and Ujir the only evidence is that they were recognised at the time of the dacoity by Mobarak and his sister. For the present, we leave aside the confession of Kasimuddin. On this point the learned Judge no doubt drew the attention of jury to the first information report in which it was stated that Mobarak Ali had recognized one of the dacoits, but that he did not mention his name and stated that he would do so afterwards. But the learnd Judge did not properly draw the attention of the jury to the probabilities upon this point. The first information report further stated that from the appearance of the dacoits and from their conversation they seemed to belong to this part of the country as if the inmates of the house were not very sure as to their identity. Then their evidence is to the effect that the dacoits wore galpatta and turbans and it was for the jury to consider whether in these circumstances, as also having regard to other circumstances at the time of the dacoity, it was at all possible for the inmates to recognize the appellants correctly. In this state of the evidence we do not think that the learned Judge placed the matter properly before the jury and the omission to do so amounts to a misdirection. Therefore, the two appellants Satku and Ujir are entitled to acquittal.

Then comes the case of Kasimuddin and the only evidence against him is his retracted confession. On this point the learned Judge spoke as follows :

There is also one point about the law relating to confessions which I must place before you. In order to decide a question of law, viz., the admissibility of the confession it is necessary to decide a question of fact, viz., whether the confession was voluntary or extorted. All questions of fact which are necessary for the decision of a question of law are for me to decide, and so it is for me to decide whether the confession in the present case is voluntary. I have decided that it was voluntary, that warning was duly given to the accused as required by law, that enough time was given to him to ensure that the confession was really voluntary and that he made it of his own accord without any inducement. You should take all these points as settled and then decide what value should be attached to the confession and whether the accused was telling the truth when he made it."

We consider that the learned Judge was not happy in this part of his charge and that in saying that he had decided that the confession was voluntary, that the confessing accused had made it without any inducement, and that the jury should take all these points as settled, he committed a serious misdirection inasmuch as he withdrew from the jury an issue of fact relating to the truth of the confession. The duties of a Judge and a jury are prescribed in Ss. 298 and 299, Criminal P. C. Briefly the position is that all question of fact are for the jury and all questions of law are for the Judge. By Cl. (a) to sub-S. (1), S. 298 the Judge has to decide the admissibility of the evidence and in order to enable him to do so he has to decide the necessary question of fact. This would appear from Ill. (a) to S. 298 which runs as follows :

" It is proposed to prove a statement made by a person not being the witness in the case, on the ground that circumstances are proved which render evidence of such statement admissible. It is for the Judge, and not for the jury to decide whether the existence of those circumstances has been proved."

As regards a confession the question may arise as to whether it was voluntary and also whether it was true. Neither is a question of law ; both are questions of fact. But the point that initially arises is whether the confession is admissible in law and in order to decide that point it is necessary to decide prima facie whether the confession was voluntary. In other words to the extent of the admissibility of the confession, the Judge has to decide whether the confession is voluntary. Now these two questions of fact, namely, whether the confession is voluntary and whether it is true, are in a sense entirely separate from each other. A confession that is voluntary is not necessarily true and vice versa. But when we come to the question not of admissibility but of proof, that is to say, proof of the truth of the confession, it is not surprising to find, having regard to the course of human conduct, that the two questions are mixed up, the truth of the confession may to a certain extent be inferred from its voluntariness. Therefore if the Judge has to decide the question of

voluntariness in its bearing on admissibility, there is no reason why the jury should not consider the question of voluntariness in its bearing on the truth of the confession. Proof according to the law of evidence is a matter of reasonable belief amounting to moral certainty and the jury are supposed to be reasonable men and they are, therefore expected to take reason naturally. To ask the jury to accept the voluntariness of a statement as decided and then to consider its truth quite apart from the question of its voluntariness is to ask them to attain a mental detachment which is unpractical and perhaps impossible.

Moreover, such a process of reasoning would be faulty and prejudicial to the accused. By way of illustration we may refer to certain common classes of cases, for instance, where the accused makes a confession, and in the course of it says "I was not going to tell, but the police compelled me," or where the evidence shows that the confession was made in the presence of a police officer. In such cases it is certainly the duty of the Judge to withdraw the confession on the ground that it was not voluntarily made. But take another class of cases, also common, where the accused confesses prima facie voluntarily and then at the time of the trial retracts and alleges torture and tutoring and says : "All that is false. I know nothing. I was tutored by the police," and the police officer deposes and denies the alleged tutoring. In such a case the truth of the confession is mixed up with its voluntariness, and it would be quite correct for the Judge to admit the confession for the consideration of the jury and leave it to the jury to decide whether the police officer should be believed or not.

It has been said that the study of the principles of evidence falls into two distinct parts. One is admissibility and the other is proof in the general sense. These matters have been the subject of consideration by text-book writers and I may refer to Wigmore on Evidence, Edition 2, Arts. 12, 29, 487, 2550 and 861. The following passage may be quoted. After pointing out that so far as admissibility in law depends on some incidental question of fact it is for the Judge to determine before he admits the evidence to the jury, the learned author says :

"No doubt the Judge after admitting evidence leaves to the jury to give it what weight they think fit, for they are the triers of the credibility and persuasive sufficiency of all evidence which is admitted for their consideration. But to hand the evidence to them to be rejected or accepted according to some legal definition and not according to its intrinsic value on their mind is to commit a grave blunder."

Again :

"when a confession is ruled to be admissible, the same evidence and all other circumstances affecting the weight of the confession may be introduced for the jury's ultimate consideration."

The distinction between "admissibility" and "proof" is also brought out in Wigmore's "Principles of Judicial Proof." There the learned author points out that

"the procedural rules for admissibility are merely a preliminary aid to the main activity, viz., the persuasion of the tribunal's mind to a correct conclusion by safe materials. This main process is that for which the jury are there, and on which the Counsel's duty is focussed : see p. 4, Edn. 2."

For a detailed analysis of the confessional psychology it may be interesting to refer to Ch. 23 of this book where at p. 506 the learned author remarks :

"A consequence affecting the valuation of testimony is that in an ordinary case a confession made voluntarily by a normal person shortly upon arrest is likely to be true."

It may be worth while referring to another text book of authority, namely, Taylor on Evidence, Edn. 2, p. 27 :

"In all these cases however after the evidence has been finally admitted, its credibility and weight are entirely questions for the jury, who are at liberty to consider all the circumstances of the case, including those already proved before the Judge, and to give the evidence such credit only as, upon the whole, they may think it deserves. The Judge merely decides whether there is, prima facie, any reason for presenting it at all to the jury, and his decision on this point, if erroneous, may be reviewed at the trial."

Again at p. 865 while dealing with the question of confession the learned author remarks as follows :

"Indeed all reflecting men are now generally agreed that deliberate and voluntary confessions of guilt, if clearly proved, are among the most effectual proofs in the law, their value depending on the sound presumption that a rational being will not make admissions prejudicial to his interest and safety unless when urged by the promptings of truth and conscience. Such confessions therefore so made by a prisoner to any person, at any time, and in any place, are at common law receivable in evidence while the degree of credit due to them must be estimated by the jury according to the particular circumstances of the case."

It in needless to add that these remarks in the text books are fortified by reference to authorities. Mr. Rahim for the Crown has drawn our attention to Taylor on Evidence at p. 25 and to certain English cases mentioned there in, namely 7 Ex 421 (1) and 12 L J Ex 287 (2). These cases however were decided on the question of admissibility. I have already stated and this is also supported by the aforesaid references that the decision as to the admissibility must be upon a prima facie rule of evidence. I do not mean by this that if a confession is once admitted and from subsequent evidence it transpires that the confession is defective according to law and therefore not admissible, then it is not open to the Judge to withdraw the confession from the jury. It is so open and it would be his duty to withdraw it and I have no quarrel with the remarks of Guha and Nasim Ali, JJ., in 38 C W N 659 (3) at p. 664, where the learned Judges observe :

"We are of opinion that before a Judge places the confession of the accused before the jury for their consideration as evidence in the case, he should carefully consider all the circumstances disclosed in the evidence and come to a decision whether these circumstances do justify a well founded conjecture which may be sufficient for excluding it from evidence."

But what I mean is that admisibility itself is a prima facie consideration. It is only for the purpose of letting in evidence for the consideration of the jury, and when once it is let in then comes the question of proof. In the case of 1929 Cal 726 (4) the only evidence against the appellant was his own confession which was subsequently retracted. My learned brother Khundkar, J., who was then at the Bar, appearing for the Crown contended that the Judge had to be satisfied with the voluntary character of the confession before admitting it in evidence but that this would also possibly be a question for the jury to investigate into its truth and he fortified this latter proposition by a reference to an unreported decision of Newbould and B. B. Ghose, JJ., (see p. 650 of 57 Cal). With great respect I entirely agree with the proposition thus stated. But the decision in that case to which I was a party was on the question of admissibility alone, and so it did not deal with the other point, whether the jury were entitled to consider the question of voluntarines in so far as it related to the proof of truth. On the other hand, in the case of 13 W R Cr 42 (5) where the confessions were only one link in the chain of evidence, Norman, C. J., remarked as follows :

"If a prisoner has confessed before a Magistrate the attention of the jury should be drawn to the question whether there was any reason to suppose that the confession was made under any undue influence, and if there is no reason to suppose anything of the kind, the jury should be told so and advised that they may act upon it."

This proposition is considered more recently by Mukherji, J., in 1925 Cal 887 (6). There he points out that a free and voluntary statement is some guarantee of its truth, and that where the consideration of the question as to whether a confession is voluntary or not is taken away entirely from the jury, it amounts to a serious omission sufficient to vitiate the verdict. This is a proposition with which I respectfully agree. In 1925 Cal 587 (7) the same learned Judge was dealing with the question of admissibility. In the present case the learned Judge was in error in entirely withdrawing from the jury the consideration of the question whether the confession of Kasimuddin was voluntary or not. Had the jury been directed to consider this question in its bearing on the truth of the confession they would have seen that the so-called corroboration was of no material value. If the confession was a tutored one, the sort of corroboration that was sought to be proved in the case was of such a nature as could also be tutored since. It did not touch the identity of the criminal with reference to the crime.

Then there is another serious misdirection in the charge and that is that the learned Judge drew the attention of the jury to the fact that in the retracted confession the confessing accused had named the co-accused. In his sum-

1. Cleave v. Jones, (1852) 7 Ex 421=21 L J Ex 105.
2. Bartlett v. Smith, (1843) 12 LJ Ex 287=11 M & W 483=7 Jur 448.
3. Nayab Shana v. Emperor, 1934 Cal 636=1934 Cr C 929=61 Cal 399=38 C W N 659.
4. Khirode Mandal v. Emperor, 1929 Cal 726=1929 Cr C 362=125 I C 730=57 Cal 649.
5. Queen v. Shahabut Sheikh, (1870) 13 W R Cr 42.
6. Sheikh Abdul v. Emperor, 1925 Cal 887=85 I C 830=26 Cr L J 606.
7. Emperor v. Panchkari Dutt, 1925 Cal 587=86 I C 414=26 Cr L J 782=52 Cal 67.

mary of the evidence the learned Judge treated this as evidence against each of the accused. No doubt under S. 30 Evidence Act, the confession of an accused person may be taken into consideration, but this is not tantamount to saying that such confession is to take the place of proof. On the other hand, it must be remembered that the confession of a co-accused is even worse in value than the sworn testimony of an accomplice and, if it is necessary that the latter testimony should be corroborated independently both as to the crime and as to the criminal it is still more necessary that the confession of a co-accused should be so corroborated, and when that confession is retracted it has no value at all as against the co-accused. This is a proposition which has been laid down in more than one decision of this Court and it will be sufficient to refer to 38 Cal 559 (8). The learned Judge committed a serious error in not mentioning this to the jury. Therefore the confession has to be left out of account and, as against the appellant Kasimuddin there is no other evidence, he is entitled to acquittal. The result is that the appeal of Samiruddin and Asimuddin stands dismissed. The appeals of the other three appellants are allowed. In the case of each of them the conviction and the sentence are set aside and they are directed to be set at liberty.

Khundkar, J.—I agree.

G.B. *Order accordingly.*

8. Emperor v. Noni Gopal, (1911) 38 Cal 559= 10 I C 582.

A. I. R. 1934 Calcutta 858

PATTERSON AND KHUNDKAR, JJ.

Sawal Ram Agarwala and *another*—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Nos. 460 and 461 of 1934, Decided on 30th August 1934.

(a) Bengal Food Adulteration Act (1919), Ss. 6 and 5 — S. 6 is not to be read with S. 5.

Section 6 is entirely distinct and self contained section, and ought to be interpreted as it stands without the help of S. 5. All that the prosecution is required to establish, in order to secure a conviction based on S. 6 read with S. 21, is that the samples of mustard oil which were admittedly in the shop and which were admittedly sold were not derived exclusively from mustard seed. [P 858 C 2]

(b) Bengal Food Adulteration Act (1919), S. 14 and 11—Sanitary Inspector not having jurisdiction submitting samples for analysis —Report of the Analyst does not become inadmissible if S. 11 is complied with.

Even if the Sanitary Inspector who submits the samples to the Analyst is not authorized to exercise those powers in that particular place, samples submitted must be deemed to have been submitted for analysis under the Act, and the special rule of evidence contained in S. 14 under which the Public Analyst's certificate is made admissible in evidence without formal proof will apply. It is immaterial whether the Sanitary Inspector, be he regarded as an official or as a private individual, obtained possession of the samples in strict accordance with the provisions of the Act or not. What is important is that the safeguards which the Act lays down in S. 11 should be complied with. [P 859 C 1, 2]

Santosh K. Basu and *Parimal Mukherji*—for Petitioner.

Anil Chandra Roy Choudhury — for the Crown.

Patterson, J.—The facts of the case to which these two rules relate have been fully set forth in the judgment of the appellate Court and I do not think it necessary to recapitulate them here. The convictions against which these rules are directed are under S. 6 read with S. 21, Bengal Food Adulteration Act of 1919, and relate to two samples of mustard oil which were purchased by the Sanitary Inspector of the district of Rangpur from a shop situated within the Municipal limits of Gaibandha. S. 6 prohibits the sale of mustard oil which is not derived exclusively from mustard seed, but it was contended on behalf of the petitioners that this section should be read with S. 5, which would have the effect of introducing other considerations. I am not prepared to accept this contention. S. 6 is in my opinion an entirely distinct and self contained section, and ought to be interpreted as it stands. Its provisions are clear and all that the prosecution is required to establish in order to secure a conviction based on S. 6 read with S. 21 is that the two samples of mustard oil which were admittedly in the shop of petitioner 1 and which were admittedly sold to the Sanitary Inspector by petitioner 2, were not derived exclusively from mustard seed. This the prosecution has sought to do by tendering in evidence the report of the Public Analyst of the district of Rangpore.

The admissibility of this report has been questioned on the ground that the samples in question were not obtained

under any section of the Act, inasmuch as the Sanitary Inspector who purchased those samples had no jurisdiction within the limits of the Gaibandha Municipality. The trial and the appeal proceeded on the footing that the Sanitary Inspector had in fact no official status within the Municipality, and the prosecution case in the Courts below was that he ought to be regarded as having made the purchases in his private capacity, that is to say under S. 9 of the Act. In this Court it has however been discovered that, by R. 3 of the Rules framed under the Act and published under Bengal Local Self-Government Notification No. 1977 P. H. dated 24th July 1930, the Sanitary Officers of the District Board have been empowered under Ss. 10 and 12 of the Act in all Municipalities which have no Sanitary Officers of their own, provided the District Board concerned gives its consent to their being so employed. It may be that this rule has the effect of empowering the Sanitary Inspector to make the purchases in question but as his power to do so had all along been questioned by the defence, it was for the prosecution to prove that he had that power.

This the prosecution has not attempted to do, and unless and until it is proved that the Gaibandha Municipality has no Sanitary Officer of its own, and that the District Board of Rangpore has consented to the employment of its Sanitary Inspector in discharging the functions of Health Officer within the limits of that Municipality, it cannot be assumed that the Sanitary Inspector is in possession of the powers in question, and for the purposes of the present proceedings it must be held that he had not got those powers. A further contention raised on behalf of the petitioner in this connection is that by reason of the Sanitary Inspector not having been proved to possess the power referred to above, it cannot be held that the samples of mustard oil which he admittedly submitted to the District Analyst of Rangpore were submitted for analysis under the Act, and that the special rule of evidence contained in S. 14 under which the Public Analyst's certificate is made admissible in evidence without formal proofs has no application. I am not prepared to accept this contention. It seems to me to be immaterial whether the Sanitary Inspector be he regarded as an official or as a private individual, obtained possession of the samples in strict accordance with the provisions of the Act or not. What is important is that the safeguards which the Act lays down in S. 11 should be complied with, and this appears to have been done. I therefore hold that the samples in question were submitted for analysis under the Act and that the report of the Public Analyst is admissible in evidence.

That report shows that the saponification and iodine values were 176·7 and 106·35 respectively in one case, and 176·65 and 106·70 respectively in another case, whereas the rules framed by Government under Ss. 4 and 20 of the Act lay down that the saponification and iodine values should not exceed ·75 and 104 respectively. The excess in saponification and iodine values indicated above rules a presumption under S. 4, and under the rules framed under S. 20, that the mustard oil in question is not genuine by reason of the addition thereto of extraneous oil. The excess both in respect of saponification value and iodine value is however small, and the Public Analyst is of opinion that the adulteration (by which he apparently means merely the addition of extraneous oil), is slight, and this being so, it cannot be said that the presumption is a strong one. Having regard moreover, to the fact that the samples were very small in bulk, the possibility of even slight errors in analysis leading to incorrect results is not one which can be completely ignored. The fact that in the United Provinces the maximum saponification and iodine values have been fixed at a higher figure also indicates that in the opinion of the authorities in those provinces a larger margin of error should be allowed for than has been allowed for in this province. Having regard however to the differences between the Act and Rules which are in force in the United Provinces, and the Act and Rules which are in force in this province, and especially to the fact that in the United Provinces no attempt appears to have been made to lay down by statute that mustard oil shall be derived exclusively from mustard seed, as has been done in this province, I am not disposed, so far as the cases are con-

cerned, to attach any very great importance to the difference in standards referred to above.

The cumulative effect of these considerations is that the statutory presumption referred to above is a very slight one and that probably very little evidence, if direct evidence were available, would be required to displace it. Now it appears that, at the instance of the petitioners, the Director of Public Health was asked to report on the two triplicate samples of mustard oil which had been left in their custody under the provisions of S. 2. His report was however merely to the effect that the mustard oil contained in the two samples was slightly adulterated, no reasons being given in support of that opinion. The petitioners pressed for a detailed report from the Director of Public Health, but they were unable to obtain one. The Director of Public Health finally sending a reply to the effect that the further information required by the petitioners was irrelevant, it is true that some of the additional information which the petitioners sought to obtain from the Director of Public Health was irrelevant, but it was certainly reasonable on their part to expect him to state what were the saponification and iodine values respectively according to the analysis made by him or under his supervision, and whether in his opinion that result led to the conclusion that the samples of oil sent to him contained extraneous oil which had been added to the mustard oil.

A number of samples taken from other tins of mustard oil in the possession of the petitioners were also sent to the Director for report, and in respect of those samples he submitted a fairly detailed report giving the saponification and iodine values, and stating his opinion with regard to each sample. Now in respect of several of these samples, although both the saponification and iodine values were in excess of the maxima prescribed by Government, the Director of Public Health gave as his opinion that these samples approximated to the standard of the Act, and might be given the benefit of the doubt. It has been contended on behalf of the petitioners that if the Director had been compelled to submit a further report on the lines indicated above, he might have expressed an opinion with regard to the two samples with which we are now concerned, to the effect that they too might be given the benefit of the doubt in view of the fact that the excess both in respect of the saponification value and the iodine value was slight.

It is also possible that the saponification value and the iodine value, as ascertained by him, would have differed from the saponification and iodine values as ascertained by the Public Analyst of Rangpore. It is impossible to say anything very definite, but I do feel that the petitioners have a real grievance, inasmuch as the only means which the Act provides for rebutting a presumption arising under S. 4 is to have the triplicate samples sent to the Director of Public Health with a view to eliciting an independent opinion and inasmuch as their repeated requests for further details from the Director of Public Health were not complied with. In the appellate Court too the petitioners made an attempt to obtain further information from the Director of Public Health by calling him as a witness, but this request was also refused. It might well be that if the Director of Public Health had furnished full details, or if he had been called and examined as a witness, the slight presumption arising under the Act from the report of the Public Analyst of Rangpore would have been rebutted.

In this view of the matter I am of opinion, that, the petitioners ought to have been given the benefit of the doubt, and that the orders of conviction and sentence passed on them in both cases ought to be set aside. It further appears that at or about the time of taking the two samples in question, 457 tins of mustard oil were seized from the shop of the petitioners, and that the question of the disposal of those tins is still pending before the Magistrate. The petitioners applied to the Magistrate to have the tins returned to them, but the Magistrate ordered that they should be detained pending the disposal of these two cases. That order was in my opinion an incorrect order, inasmuch as the question of the proper manner of disposing of these 457 tins did not in any way depend upon the result of these two cases, and by the rules at present

under consideration the District Magistrate has been called on to show cause why those 457 tins of mustard oil should not be restored to the petitioners.

The actual seizure of the tins in question appears to have been made by an Assistant Sub-Inspector, (who admittedly had no powers under the Act), but the Sanitary Inspector took charge of the tins at a later stage under cover of an order from the Chairman of the Local Municipality. It is quite certain that the order of the Chairman authorizing the Sanitary Inspector to seize the tins was made without jurisdiction, at least so far as the provisions of the Bengal Food Adulteration Act are concerned, and, as has already been stated, there is nothing on the record to show that the Sanitary Inspector was empowered under Ss. 10 and 12 of the Act under the provisions of the new Rule 3, that is to say, he was not empowered to do anything under the Act within the limits of the Gaibandha Municipality. It appears therefore that the 457 tins in question were not taken possession of under any of the provisions of the Bengal Food Adulteration Act, and having regard to the subsequent course of events as disclosed by the evidence in the two cases we have just been considering, I am of opinion that these 457 tins should be at once released and restored to the petitioners. Both the rules are accordingly made absolute in the above terms. The fines, if paid, will be refunded.

Khundkar, J.—I agree.

G.B. *Rule made absolute.*

A. I. R. 1934 Calcutta 861

S. K. GHOSE, J.

Surendra Kumar Nandi—Petitioner.

v.

Bepin Chandra Guha and *others*—Opposite Parties.

Civil Rule No. 220 of 1934, Decided on 13th June 1934, from order of Munsif, Second Court, Chittagong, in Misc. Judicial Case No. 547 of 1933.

(a) Bengal Tenancy Act (1885), S. 26-J—Lower Court exercising jurisdiction under S. 26-J—High Court will not ordinarily interfere.

Where the lower Court has chosen to exercise jurisdiction under S. 26-J the matter is outside those subjects in which High Court would ordinarily interfere. [P 862 C 1]

(b) Deed — Construction — Lease — Patta called Daimi Kaimi providing "on payment of rent you enjoy in succession sons and grandsons downwards"—Liabilities to pay additional amount with rent on certain contingency—Permanent tenancy is created.

The patta showed that the land was let out at an annual rent of Rs. 3 including cess and there was nothing to indicate that it was intended that the rent should be varied. On the other hand, the concluding lines were as follows: "On payment of rent you enjoy and possess (the land) in succession of sons and grandsons downwards." It was further provided that if the demand by the superior landlord be ever increased the lessee would be liable to pay proportionate amount. The entry in the Record of Rights was that the holding was an occupancy one.

Held: that the patta should be preferred to the Record of Rights; that the recitals in the patta did lead to the conclusion that it was intended that the tenancy should be permanent. Liability to pay additional amount on certain contingency did not make the tenancy a non-permanent one: 1923 *Cal* 505; 1931 *Cal* 265 and 1932 *Cal* 73, *Rel on*. [P 862 C 2]

(c) Words—"Daimi Kaimi" may indicate permanent tenancy.

The words "Daimi Kaimi" can be relied on to hold that the permanency is indicated: 1928 *Cal* 531, *Rel on*. [P 862 C 2]

Chandra Sekhar Sen—for Petitioner.

Narendra Kumar Das — for Opposite Party.

Judgment.—The petitioner in this rule purchased in an auction sale in execution of a mortgage decree a tenure belonging to opposite party 2 and situated in the District of Chittagong. His case is that the rent was settled in Kaimi Mokarari right by a registered lease dated 15th August 1895. He paid the landlord's fee and served notices as required by the Bengal Tenancy Act.

Thereupon, the opposite party who is the landlord made an application under S. 26-J of the Act for enhanced landlord's fee and compensation alleging that the land comprised an occupancy holding. In the lower Court the purchaser of the tenancy relied on the aforesaid registered patta while the landlord relied on the Record of Rights in which the entry was to the effect that the holding was an occupancy one. The learned Munsif gave effect to the entry in the Record of Rights and decided in favour of the landlord. Hence this Rule.

A question has been raised as to whether in a matter like this the Court should at all interfere under S. 115, Civil P. C. The Rule having been obtained by the petitioner I do not propose to examine this matter in detail

and it would be sufficient to say that since the Munsif has chosen to exercise jurisdiction under S. 26-J it is difficult to resist the conclusion that the matter is outside those subjects in which this Court would ordinarily interfere.

On the merits, the main point raised is whether the Patta in question shows that the subject-matter of the lease was a permanent tenancy. If that is so, it must be accepted in place of the Record of Rights. It is pointed out that the learned Munsif did not decide the question as to whether the Patta related to a different taluk, but the petitioner was not to blame because the order complained against is made on the assumption that the Patta does relate to that land. The patta shows that the land was let out at an annual rent of Rs. 3 including cess and there is nothing to indicate that it was intended that the rent should be varied. On the other hand, the concluding lines are as follows:

"On payment of rent you enjoy and possess (the land) in succession of sons and grandsons down wards. In these terms I execute this Daimi Kaimi Patta dated 10th August 1895."

The learned Munsif has remarked that it cannot be said that because the words 'Daimi Kaimi' occur it is a Mokurari lease. But there are cases in which the Courts have relied on such terms as these in order to hold that permanency is indicated. See, for intance, the case of 1928 Cal. 531 (1), which was followed in Second Appeal No. 2445 of 1926. Stress is laid on the recital to the effect that if the demand by the superior landlord be ever increased the lessee would be liable to pay proportionate amount and it is contended that therefore the rent cannot be fixed. But taking all the recitals into consideration it would be difficult to hold that because of this condition or to a possible liability it was intended that the rent should not be fixed. There are many cases in which clauses occur making the tenant liable to pay an additional amount on the happening of a certain contingency. For instance see the cases of 1923 Cal. 505 (2), 1931 Cal. 265 (3) and 1932 Cal. 73 (4). It seems to me that the recitals in the patta do lead to the conclusion that it was intended that the tenancy should be permanent. That being so, the learned Munsiff was in error in giving effect to the record of rights. The rule must be made absolute with costs, hearing fee one gold mohur.

G.B. *Rule made absolute.*

1. Pyari Mohan v, Siddique Ahmed, 1928 Cal 531=117 I C 675.
2. Golam Rahaman v. Guru Das, 1923 Cal 505=76 I C 586.
3. Nabendra Kissore v. Choudhury Mian, 1931 Cal 265=131 I C 534.
4. Ambika Charan v. Basanta Kumar 1932 Cal 73=134 I C 1130=58 Cal 1046.

A. I. R. 1934 Calcutta 862

COSTELLO AND LORT WILLIAMS, JJ.

Corporation of Calcutta—Plaintiff—Appellant.

v.

Kumar Arun Chandra Singh and *others*—Defendants—Respondents.

Appeal No. 102 of 1933, Decided on 5th June 1934.

(a) Interpretation of Statutes — Express words.

Where the words of the statute and the intention of the legislature are clear and unambiguous, the Court must give effect to them in spite of the consequences. [P 863 C 2]

(b) Transfer of Property Act (1882), S. 67-A — Interpretation — Construction of S. 67-A must be strict.

Section 67-A restricts the rights of mortgagees and therefore must be construed strictly. [P 863 C 2]

(c) Transfer of Property Act (1882), S. 67-A—Scope.

Section 67-A is vide enough to include mortgages on different properties which are liable to sale. [P 863 C 2]

(d) Interpretation of Statutes—Preamble—Preamble can be referred to only where statute is ambiguous.

A preamble may afford useful light as to what a statute intends to reach, but where an enactment is itself clear and unambiguous, no preamble can qualify or cut down the enactment: 1928 *Lah* 35, *Citing Doe* v. *Brandling*, 7 *B and C* 643; *Fellows* v. *Clay*, 4 *Q B* 313, *Sussex Peerage Case*, 11 *Cl and Fin* 85; *Powell* v. *Kempton Park Race Course Co.* (1899) *A C* 143, *Ref.* [P 864 C 1]

(e) Transfer of Property Act (1882), S. 67-A—S. 67-A does not apply to charges under Cal. Municipal Act (1899), S. 205.

Section 67-A does not apply to statutory charges created under the provisions of S. 205 of the Calcutta Municipal Act: 34 *Cal* 223, *Ref.* [P 864 C 2]

A. K. Roy, *W. W. K. Page* and *N. C. Chatterjee*—for Appellant.

S. N. Banerjee and *S. C. Roy*—for Respondents.

Lort-Williams, J.—In this suit, the Corporation of Calcutta claimed Rupees 134-4-9 on account of consolidated rates payable in respect of premises No. 2

Payari Das Lane, Calcutta, which are part of a debutter property of which defendant 1 is the Shebait, defendant 2 a lessee, and defendant 3 a mortgagee of defendant 2. The defence of defendant 1, who alone contested the suit, was that the Corporation's claim arose by reason of a statutory charge created under the provisions of S. 205, Calcutta Municipal Act, that it had similar charges over other properties belonging to the same defendant, for the enforcement of which it had brought five other suits, four of which had been decreed by consent, and that by reason of the provisions of S. 67-A, T. P. Act, the Corporation must enforce all such charges in one suit. S. 205, Calcutta Municipal Act, provides:

"The consolidated rates due from any person in respect of any land or building shall, subject to the prior payment of the land revenue (if any) due to the Government thereupon, be a first charge upon the said land or building and upon the moveable property (if any) found within or upon such land or building and belonging to the said person."

Section 67-A, T. P. Act, provides:

"A mortgagee who holds two or more mortgages executed by the same mortgagor in respect of which he has the right to obtain the same kind of decree under S. 67 and who sues to obtain such decree on any one of the mortgages, shall, in the absence of a contract to the contrary, be bound to sue on all mortgages in respect of which the mortgage money has become due."

Section 100, T. P. Act, provides:

"Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge."

The learned Judge (McNair, J.) decided in favour of the defendants, except with regard to that part of the claim which referred to rates which became due prior to 1st April 1930 when S. 67-A came into force. As regards the rest of the claim he held that the suit was incompetent and dismissed it. The Corporation has appealed against this decision. In the first place, the Corporation draws attention to the serious inconvenience which would or might arise if the decision were correct. The Corporation before making any claim for rates, would have to make sure in every case whether the defendant or defendants had any other properties within the municipal area, which were subject to similar charges, and if they had, would have to ascertain further whether they were within the same jurisdiction, because the municipal area lies within the jurisdiction of more than one Court. The statutory charge applies to both moveables and immovables, and to both owners of moveables and immovables and occupiers and subtenants and purchasers (Ss. 199, 200, 205, Calcutta Municipal Act). The inclusion of such various and over-lapping rights and obligations in one suit would or might lead both to confusion and hardship. Nevertheless, these considerations would have little weight, if the words of the statute and the intention of the legislature were clear and unambiguous. The Court would be obliged to give effect to them inspite of the consequences. S. 67-A, T. P. Act, is one which restricts the rights of mortgagees and therefore must be construed strictly. (Maxwell's Interpretation of Statutes Edn. 7, p. 245). The section seems to have been thrust into the Act without due consideration of its effect upon other sections, for example S. 100. Presumably it was intended as a benefit to mortgagors. This may be so, when there is more than one mortgage on the same property and they are liable to foreclosure. But the section has been drawn wide enough to include mortgages on different properties which are liable only to sale, and it is difficult to appreciate how it can benefit a mortgagee to have to meet demands in respect of all such obligations at one and the same time.

Section 100, T. P. Act, purports to deal primarily with the incidence of the security, and not with the method of enforcing it, and declares that the provisions thereinbefore contained which apply to simple mortgages, shall apply to charges only "so far as may be." That all the provisions thereinbefore contained do not apply to charges and that S. 100 was not intended to apply to some statutory charges was decided in 15 Cal. 492 (1). It is not easy to understand why charges created by operation of law have been included within the provisions of S. 100. But for the fact that there are some other sections in the Act which refer to such charges, one would have thought that they had

1. Fatick Chunder v. Foley, (1888) 15 Cal 492.

been included by inadvertence because the Transfer of Property Act 1882 is "an act to amend the law relating to the transfer of property by act of parties." This is expressly stated also in the preamble, and where the enacting part of a statute is ambiguous, the preamble can be referred to, to explain and elucidate it: 1928 Lah 35 (2), 7 B. & C. 643 (3), 4 R. B. 313 (4) and 11 Cl. & Fen. 85(5). In 1899 A. C. 143 (6) Lord Halsbury said:

"Two propositions are quite clear: one, that a preamble may afford useful light as to what a statute intends to reach, and another that, if an enactment is itself clear and unambiguous, no preamble can qualify or cut down the enactment."

Careful examination of the terms of S. 67-A makes clear, in my opinion, that it was not intended to apply to securities created by operation of law, such as statutory charges, but only to consensual securities which are created by act of parties. Thus it applies to "mortgages executed by the same mortgagor," and provides that certain obligations shall arise "in the absence of a contract to the contrary." Both terms are inappropriate to a statutory charge. Ane even if it were arguable that the first refers only to mortgages, and may be ignored because S. 100 applies be the other provisions of the Act to charges only "so far as may be" yet the power, of contracting out is clearly an essential part of the section, and could not be given effect to, in a statutory charge, unless the particular statute so provided which is not so in the present case. Moreover, the language of the section is inappropriate in other respects to a statutory charge such as that created by S. 205, Calcutta Municipal Act. This comes into being for the first time when the rates become due, whereas S 67-A. clearly contemplates a security which is already in existence at the time when the "mortgage money has become due." It is true that the logical result of this construction of S. 67-A is that S. 67 also, which contains the same words "in the absence of a contract to the contrary," does not apply to securities created by operation of law, and thus the owners of such cannot avail themselves of the benefit of the provisions therein contained. But the Act was not intended to be exhaustive, and does not profess to be a complete Code, 34 Cal. 223 (7), and does not deal with the transfer of movables, or charges upon movables, such as are referred to in S. 205, Calcutta Municipal Act. In any case not covered by the Act, the Court is entitled to apply rules of English Law which are not inconsistent with the Act, 1926 Bom 31 (8), and the holder of a statutory charge is entitled to a decree for sale. For all these reasons, I entertain no doubt that Sections 67-A does not apply to statutory charges created under the provisions of S. 205. Calcutta Municipal Act.

The result is that the decree must be modified. There will be a decree instead for Rs. 134-4-9 against all the defendants with costs, a declaration that the corporation has a first charge on the premises No. 2 Peyari Das Lane, Calcutta, for this sum with interest at 6 per cent and a decree under O. 34, R. 4, Civil P. C., in Form No. 5-A in Appendix D to Sch. 1 thereto, as amended by Act 21 of 1929, and this appeal is allowed with costs.

Costello, J.—I agree.

Lort-Williams, J.—Appeal from original decree No. 103 of 1933.—For the reasons given in Appeal No. 102/33, the decree in this suit also must be modified. There will be a decree instead for Rupees 355-5-9 against all the defendants with costs, a declaration that the Corporation has a first charge on the premises No. 92 Upper Chitpore Road, Calcutta, for this sum with interest at 6 per cent, and a decree under O. 34, R. 4, Civil P. C., in Form No. 5-A in Appendix D to Sch. 1 thereto, as amended by Act 21 of 1929, and this appeal is allowed with costs.

Costello, J.—I agree.

G.A. *Order accordingly.*

2. Raj Mal v. Harnam Singh, 1923 Lah 35=104 I C 661=9 Lah 260.
3. Citing Doe v. Brandling, (1828) 7 B & C 643.
4. Fellows v. Clay, (1843) 4 R B 313.
5. Sussex Peerage case, (1844) 11 Ch & F 85.
6. Powell v. Kempton Park Race Course Co., (1899) A C 143.
7. Satyabadi v. Harabati, (1907) 34 Cal 223=5 C L J 192.
8. Maya Sankar v. Barjoryi, 1926 Bom 31=91 I C 973.